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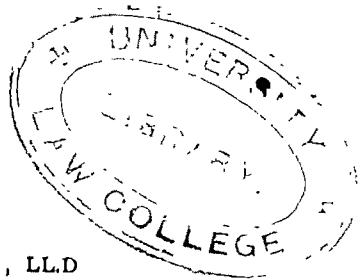
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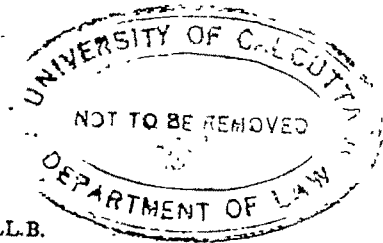
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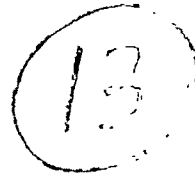
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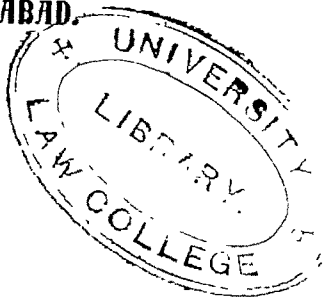
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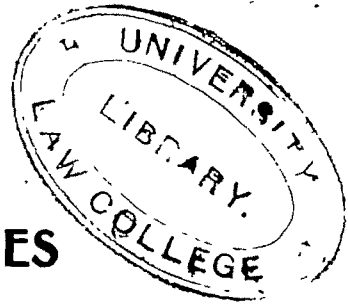


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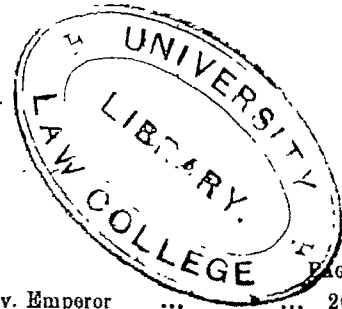
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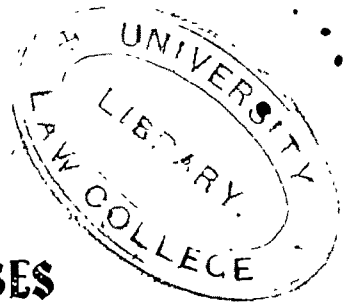


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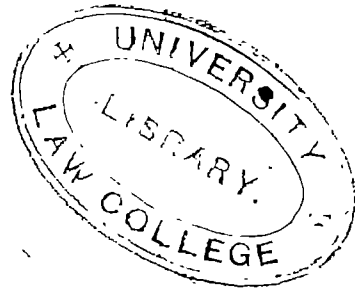
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REPORTS.

PRIVY COUNCIL.

GUNJESHWAR KUNWAR (*Plaintiff*)

versus

DURGA PRASHAD SINGH AND OTHERS (*Defendants*).

*Hindu Law—Inheritance—Exclusion from a share of the family property—
Permanent blindness after birth.*

Under Hindu Law blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance.

The rule laid down in Rajkumar Sarbadhikari's Hindu Law of Inheritance, p. 956, adopted.

Mohesh Chunder Roy v. Chunder Mohun Roy, [1874] 14 Bengal L. R., 273;
Murari Gokuldas v. Parvatibai, [1876] I. L. R., 1 Bom., 177, approved.

APPEAL from a decree of the High Court at Calcutta, reversing a decree of the Officiating Subordinate Judge of Bankipur, who decreed the plaintiff-appellant's suit in part.

The facts of the case are fully stated in their Lordships' judgment.

B. Dube, for the appellant.—The evidence establishes that Bishambhar was not born blind. He was therefore entitled to his share of the family property, and Durga had no honest and *bona fide* belief in his claim in the suit of 1904 in which the compromise in question was made. The court should not enforce that compromise but give the plaintiff the relief prayed for :

Dumage v. White, [1818] 1 S. R. C., p. 137.

He also relied on

Imrit Kunwar v. Roop Narain Singh, [1880] 6 Cal. L. R., 76.

[*De Gruyther, K. C.*, remarked that the Board did not approve of that case in

Khunni Lal v. Gobind Krishna Narain, (1911) 38 I. A., 38].

CIVIL

1917

July, 6.

LORD
DUNEDIN,
SIR JOHN
EDGE,
MR. AMEER
ALI,
SIR WALTER
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SINGH.

The *onus* is on the respondent, Durga, to show that the compromise was explained to the plaintiff's mother, who was a *purda-nashin* lady, and that she understood it. The respondent has not discharged that *onus*. Moreover, the plaintiff's mother had no independent advice. It is therefore submitted that the compromise is not binding on the plaintiff:

Asghar Ali v Delroos Banoo Begum, [1877] I. L. R., 3 Cal., 324;

Sudisht Lal v Musammatt Sheobarat Kumsar, [1881] 8 I. A., 39;

Bibee Rukhm v. Shaikh Ahmed Hossein, [1874] 22 W. R., 443.

As to the compromise of the partition suit of 1900 and the decree made in pursuance thereof, the court had all the materials before it, and consequently they are binding on the respondent:

Manohar Lal v. Jadu Nath Singh, [1906] 33 I. A., 128.

De Gruyther, K. C., and *J. M. Parikh*, for the respondents.—The evidence establishes that Bishambhar was born blind. He was therefore not entitled to inherit. The test to apply here is whether Durga had an honest and *bona fide* belief in his claim made in 1904. As to what is honest and *bona fide* belief reference was made to

Miles v. New Zealand Alfred Estate Company, [1882] 32 Ch. D., 266 at pp. 283 and 284.

Durga could have no personal knowledge of the fact whether his elder brother was or was not born blind, and the evidence shows that Durga had reasonable ground for an honest belief that his brother was born blind. There is nothing on record to suggest that Durga believed that his brother was not born blind. It is therefore submitted that the compromise is binding. They submitted on the evidence that the plaintiff's mother knew what she was doing.

Assuming that Bishambhar was not born blind, it is submitted that inasmuch as he became permanently and incurably blind long before 1900 he was not then entitled to partition the joint property: *Mitakshara*, Ch. 2, section 10, paras 1, 2, 3, 4, 5, 6, 7 and 9. There is no decided case on this point. The only point decided is that in order to exclude a co-parcener from inheritance he must have been born blind:

Kurarji Gokuldas v. Parvatibai, [1876] I. L. R., 1 Bom., 177.

As to the form of the decree where a compromise with a minor is set aside at the minor's instance, reference was made to

Manohar Lal v. Jadu Nath Singh, [1906] 33 I. A., 128, p. 132.

Reference was also made to

Lala Muddun Gopal v. Musammatt Khikhinda Koor, [1890] 18 I. A., 9.

B. Dube, replied.

The judgment of their Lordships was delivered by

Sir John
Edge.

SIR JOHN EDGE.—This is an appeal from a decree, dated the 7th May, 1912, of the High Court at Calcutta which reversed a decree, dated the 31st March, 1908, of the Officiating Subordinate

Judge of Bankipur and dismissed the suit. The plaintiff who is the appellant here is a minor and is suing by her next friend. The defendants are Durga Prashad Singh, an uncle of the plaintiff, Musammat Harbans Kunwar, her mother, and three assignees of the defendant Durga Prashad Singh.

The suit was brought on the 21st July, 1906, to obtain a declaration that a compromise which was entered into between Durga Prashad Singh, who is the first defendant in this suit, and Musammat Harbans Kunwar, and a decree dated the 30th August, 1904, which was made in pursuance of that compromise, are not binding upon the plaintiff; a declaration that the plaintiff's father, Bishambhar Prashad Singh, was at the time of his death separate from his brother, the defendant, Durga Prashad Singh; a declaration that the defendant, Musammat Harbans Kunwar, by reason of her conduct in entering into the said compromise, had ceased to be entitled to any rights in the estate of her deceased husband, Bishambhar Prashad Singh, and that the plaintiff was entitled to the present possession of that estate; a declaration of the plaintiff's reversionary right in case she should not be held entitled to the possession of the property in dispute during her mother's life-time; and for other relief. The Subordinate Judge gave the plaintiff a declaration that the compromise and the decree of the 30th August, 1904, which was made on the basis of that compromise, were not binding upon her and, on the ground that the plaintiff was not entitled to get possession of the property during the life-time of her mother, dismissed the suit so far as the claims for possession and mesne profits were concerned. The High Court in appeal by its decree dismissed the suit. From that decree of the High Court this appeal has been brought.

The plaintiff and the defendant Durga Prashad Singh are descended from Lal Behari Singh, who died on the 24th October, 1885, leaving him surviving two sons, then minors, Bishambhar Prashad Singh, the plaintiff's father, and the defendant, Durga Prashad Singh, his mother, Musammat Gulab Kunwar, and his widow, Musammat Mohun Kunwar. The family of Lal Behari Singh was a joint Hindu family, governed by the law of the *Mitakshara*. Bishambhar Prashad Singh died on the 2nd August, 1902, leaving surviving him only one child, the plaintiff, and Musammat Harbans Kunwar, his widow. The compromise referred to was made in a suit which Durga Prashad Singh had brought on the 7th May, 1904, against Musammat Harbans Kunwar, her daughter the plaintiff, then and still a minor, and other persons. In his plaint in that suit Durga Prashad Singh alleged that his brother Bishambhar Prashad Singh had been born blind and was excluded from inheritance to his father's estate by reason of his congenital blindness; that all the proceedings in a suit against Bishambhar Prashad Singh for partition which Durga Prashad Singh's father-in-law, Mahabir Prashad Singh,

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had, on the 25th January, 1900, brought, assuming to act as his guardian and next friend, were illegal; and that no partition had taken place.

If Bishambhar Prashad Singh was not disqualified from sharing in the family properties, he was entitled on separation to a moiety of the property of the joint Hindu family, and if in fact he did, in such circumstances, separate from his brother Durga Prashad Singh, Musammat Harbans Kunwar was on his death entitled to a Hindu widow's interest in his moiety, and on her death the plaintiff would inherit to her father. By the compromise which is in question in this suit Musammat Harbans Kunwar for herself and her daughter, the plaintiff, abandoned all claim to the property of Bishambhar Prashad Singh, admitted that Bishambhar Prashad Singh had been born blind, and was consequently excluded by Hindu Law from all right of inheritance; that he and his brother Durga Prashad Singh had not separated; and that Durga Prashad Singh was entitled to the whole family property by survivorship. By the compromise Durga Prashad Singh gave to Musammat Harbans Kunwar six villages, representing about one-fourth of the family property for her life, with remainder to the plaintiff, and undertook to pay certain debts.

It has been admitted on both sides that Bishambhar Prashad Singh was in fact blind at the time of his death. The Subordinate Judge found that Bishambhar Prashad Singh was not born blind. He also found that Musammat Harbans Kunwar, who is a *purdanashin* lady, was not given a sufficient opportunity of obtaining independent advice as to the terms of the compromise before entering into it. The High Court in the appeal did not expressly find that Bishambhar Prashad Singh had or had not been born blind, but came to the conclusion that Durga Prashad Singh had reasonable grounds for believing that there existed materials for a *bona fide* litigation and compromise, and that the question was not whether Durga Prashad Singh was right in his claim that Bishambhar Prashad Singh had been excluded from a right to share in the family property by reason of his having been born blind, but was whether Durga Prashad Singh honestly believed that Bishambhar Prashad Singh had been born blind.

The main questions upon the determination of which the decision of this appeal must, in their Lordships' opinion, depend are, firstly, is a man who is a member of a joint Hindu family, which is governed by the Law of the Mitakshara, and who becomes permanently blind after he is born, excluded by Hindu Law from sharing in the family property by reason of a permanent and incurable blindness which was not congenital; secondly, was Bishambhar Prashad Singh, who was the father of the plaintiff, born blind; and, thirdly, did Bishambhar Prashad Singh and his brother, the defendant, Durga Prashad Singh, separate and remain separate. The first of these

questions is a question of law, the second and third are questions of fact.

It will be convenient to deal at once with the first question, that of law. In his written statement the defendant, Durga Prashad Singh, alleged that Lal Bahari Singh died—

“Leaving him surviving two sons, namely, the plaintiff's father, Babu Bishambhar Prashad Singh, and this defendant, and Mohun Kunwar, widow and Gulab Kunwar, mother; but the plaintiff's father never succeeded him nor could he succeed him, according to law, as he was congenitally blind.”

The first ground of Durga Prashad Singh's memorandum of appeal to the High Court was:—

“1st. For that, upon the entire evidence on the record, the court below ought to have held that Bishambhar Prashad Singh was congenitally blind and he had no right to succeed to his paternal estate; the reasons assigned by the said court for holding otherwise are erroneous and unsound.”

The 17th ground of that memorandum of appeal was as follows:—

“For that even assuming, without admitting, that Bishambhar was not born blind, but became blind after birth, as alleged by the plaintiff, the court below ought to have held that, according to the Mitakshara law of the Benares school, he was excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition.”

It does not appear that the 17th ground of that memorandum of appeal was relied upon in the High Court, but as the point has been raised and pressed before this Board in this appeal, their Lordships will now deal with it.

The question as to whether blindness which is not congenital excludes by Hindu Law a member of a joint Hindu family from sharing in the family property does not appear to have been decided by this Board. The text of Manu on this subject, as translated, is as follows:—“Eunuchs and outcastes, persons born blind or deaf, madmen, idiots, the dumb, and such as have lost the use of a limb, are excluded from a share of the heritage”

In 1874 the High Court at Calcutta, in *Mohesh Chunder Roy and others v. Chunder Mohun Roy and others* (1), a case in which the law of the Dayabhaga applied, decided that the blindness which, under the Hindu Law as recognised in Bengal, excludes an afflicted person from inheritance, refers to congenital blindness, and not to loss of sight which supervened after birth. In that case the High Court Judges had before them the text of Manu which is above quoted.

In 1876 the High Court at Bombay in *Murarji Gokuldas and others v. Parvatibai* (2), decided that according to the Hindu Law, as prevailing in the Bombay Presidency, blindness, to cause exclusion from inheritance, must be congenital. In the latter case, SIR MICHAEL WESTROPP, C. J., in a learned and exhaustive judgment,

(1) [1874] 14 Bengal Law Reports, 273. (2) [1876] L. L. R., 1 Bom., 177.

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after considering the texts and authoritative commentaries bearing on the subject, including, the texts of Manu and the Mitakshara, said that :—

“Upon the best consideration we [he and SARGENT, J.] have been able to give to this question, we are of opinion that there is a considerable preponderance of authority in favour of the conclusion that blindness, to cause exclusion from inheritance, must be congenital.”

The Sanskrit word in the Mitakshara on this subject has been translated as “a blind man.” The description “a blind man,” if that be the correct translation, is somewhat indefinite, and their Lordships consider that, if that be the correct translation, it is not to be assumed that the author of the Mitakshara could have intended by the use of an ambiguous description to extend the prohibition of Manu and to exclude from a share in the heritage persons who become blind after they were born.

As was observed by JACKSON, J., in *Mohesh Chunder Roy v. Chunder Mohun Roy* (1), to which reference has been made above: “A rule of Hindu Law which is relied upon as preventing the natural course of inheritance, ought to be clear and unmistakable.” Rajkumar Sarvadhikari, in his “Hindu Law of Inheritance” page 956, says :—

“Blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness, if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance.”

The above is, their Lordships hold, the true rule.

The oral evidence on the question as to whether Bishambhar Prashad Singh was born blind is very conflicting, but on the whole their Lordships would be prepared to find on the oral evidence, if it stood alone, that Bishambhar Prashad Singh's blindness was not congenital. There are, however, facts proved by records and other documentary evidence which can lead to no other conclusion than that Bishambhar Prashad Singh was not blind when he was born, and was treated by the family and by others as a person entitled to share in the family property.

Lal Bahari Singh, who was the father of Bishambhar Prashad Singh and Durga Prashad Singh, died on the 24th October, 1885, when they were minors, Bishambhar Prashad Singh being then about 9 years old and Durga Prashad Singh being then about 1½ years of age. On the 7th December, 1885, their grand-mother, Musammat Gulab Kunwar, and their mother, Musammat Mohun Kunwar, presented a joint petition to the District Judge of Gaya in which they stated that Bishambhar Prashad Singh and Durga Prashad Singh, the minor sons of Lal Bahari Singh deceased, were “as heirs of their deceased father the owners in possession of all the properties, the approximate value of which is given below,” and they prayed that a certificate of guardianship under Act XL of 1858 might be granted

(1) [1874] 14 Bengal Law Reports, 273.

to them "for the protection of the person and the administration of the properties of the minors." On that petition the District Judge on the 12th February, 1886, appointed Gulab Kunwar and Mohun Kunwar to administer the estate of the minors during their minorities and they were appointed guardians. The names of the minors were entered in the land register as the names of owners, and Gulab Kunwar and Mohun Kunwar continued to manage the estate on behalf of and for the joint benefit of the minors until Mohun Kunwar died late in the year 1897.

After the death of Mohun Kunwar, Musammat Gulab Kunwar acted as sole guardian until Bishambhar Prashad Singh came of age.

On the 17th June, 1897, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated that he had attained the age of majority, and was willing to look after his own business without the guardianship of Gulab Kunwar and Mohun Kunwar. Notice was thereupon given by the District Judge to the guardians, to produce the certificate of guardianship, and to show what objection they might have. On the 4th September, 1897, they filed their objection, and in it stated that they had no objection to Bishambhar Prashad Singh being declared major, and that they had given up the management in respect of his share and he was looking after his affairs; but they objected that the management of the affairs of Durga Prashad Singh should remain with them as he was still a minor, and they stated that they "have and can have no objection to whatever proceedings may be taken by the court with regard to the share of Babu Bishambhar Prashad Singh." The District Judge declared Bishambhar Prashad Singh of age. On the 29th September, 1898, Bishambhar Prashad Singh presented a petition to the District Judge of Gaya, in which he stated:—

"1. That Musammats Gulab Kunwar and Mohun Kunwar were appointed guardians of your petitioner and his brother Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, by an order of the court, dated the 12th February, 1886.

2. That Musammat Mohun Kunwar died in Aasu 1305-1897.

3. That the two brothers are joint.

4. That your petitioner attained his age of 21st year in March, 1897, and that he was declared major by the order of this court.

5. That under the law no certificate of guardianship is necessary in a joint family, and the property or share of Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh not being defined, no guardian of his property should be appointed or retained, nor could the certificate of guardianship of the properties of the two brothers have any effect after the attainment of majority by any of them.

6. That consequently now as your petitioner represents the whole estate of your petitioner and his brother, there is no necessity of retaining the said Musammat Gulab Kunwar as the guardian of the minor Babu Durga Prashad Singh *alias* Beni Madho Prashad Singh, nor can she under the law continue to be his guardian.

7. Your petitioner therefore prays that under Section 29, Clause (1), Act VIII of 1890, your Honour will be graciously pleased to declare that the guardianship of Musammat Gulab Kunwar has terminated, and cancel the

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certificate of guardianship dated the 12th February, 1886, aforesaid, or pass such other order and grant such relief as may to your Honour seem just and fit."

In reference to that petition the District Judge made the following orders:—

"2nd December, 1898. Return of service of notice on Musammat Gulab Kunwar filed. House service made. Identifier not come. One week given."

"9th December, 1898. Affidavit of identifier filed."

"10th December, 1898. The grand-mother is the sole surviving guardian and she is said to be an old woman of about 80, and files no objection. They all live together, so there is no question of the personal benefit of the minor. The elder brother as *Karta* of the family has the inherent right to guardianship, and the previous order of guardianship to the grand-mother has become infructuous since he attained his majority. It will therefore be revoked."

After the order of guardianship had been revoked, Bishambhar Prashad Singh managed the family properties for himself and for his brother Durga Prashad Singh, and on their joint behalf brought suits and obtained decrees. He gave way to bad habits, became extravagant and contracted debts. On the 25th January, 1900, Mahabir Prashad Singh, who was the father-in-law of Durga Prashad Singh, then a minor, as the next friend of Durga Prashad Singh, brought a suit for partition against Bishambhar Prashad Singh, in the court of the Subordinate Judge of Gaya, and in the plaint stated—

"that according to the Mitakshara school of law, the plaintiff [Durga Prashad Singh] and the defendant [Bishambhar Prashad Singh] are the proprietors in equal shares of all the joint properties specified and detailed in Schedule No. 1 of this plaint."

It was also alleged in this plaint—

"that the defendant [Bishambhar Prashad Singh] is blind from birth and is wholly incapable of managing the joint properties, and owing to his being blind and an extravagant man the properties are being wholly ruined."

And it was further alleged in the plaint in that suit—

"that if the properties of the said joint family are allowed to remain in the hands of the defendant [Bishambhar Prashad Singh], he will ruin all the joint properties before your petitioner [Durga Prashad Singh] attains majority, and your petitioner will be put to difficulty and subjected to unnecessary expenses in seeking redress after his attaining majority. Hence the plaintiff [Durga Prashad Singh] has no other remedy than to get the properties partitioned. Therefore the plaintiff's necessity to bring this suit."

Mahabir Prasad Singh has not been called as a witness in this suit, nor has his absence been satisfactorily accounted for. On behalf of Durga Prashad Singh it has been suggested that his father-in-law, Mahabir Prashad Singh, was acting in collusion with and in the interests of Bishambhar Prashad Singh—an insinuation which appears to their Lordships to be wholly groundless.

The statement in the plaint that Bishambhar Prashad Singh was blind from birth was irrelevant, and, further, it was inconsistent with the claim that the family property should be partitioned between the brothers.

There was and could have been no defence to that suit for partition. Durga Prashad Singh, on whose behalf the suit was brought, was entitled to have his share partitioned off. The suit was compromised and by consent and with the sanction of the Subordinate Judge as to the compromise a decree for partition was made.

In accordance with that decree for partition the immovable property was partitioned, and the shares of the brothers were divided by metes and bounds the name of each brother was entered in the Land Register in respect of his separated share, and such of the movable property as was capable of being divided was divided between them, and complete separation between them was effected.

It has been said that Musammat Gulab Kunwar and Musammat Mohun Kunwar did not know that under the Hindu Law a person who was born blind was thereby disentitled to share in family property. It is inconceivable that ladies in their position could have been in ignorance of that well-known rule of the Hindu Law, and if the evidence which was given on behalf of Durga Prashad in this suit was true those ladies had several male relations and friends who were aware that Bishambhar Prashad Singh was born blind and who must have known what the state of Hindu Law was. It has also been said that the action of Gulab Kunwar and of Mohun Kunwar is explainable on the supposition that they did not wish to deprive Bishambhar Singh of a share in the family property. That is an explanation which their Lordships cannot accept.

If Bishambhar Prashad Singh had been in fact born blind his mother, Mohun Kunwar, and his grand-mother, Gulab Kunwar, must have known from the time of his birth that he suffered from congenital blindness. It must have been a fact of which neither of them, nor the plaintiff nor any near relation of the family could have been in ignorance; but the first time when it was alleged that Bishambhar Prashad Singh had no right to share in the family property was when Musammat Harbans Kunwar, after the death of Bishambhar Prashad Singh, applied to the District Judge of Patna for a certificate under Act VII of 1889.

To that application Musammat Gulab Kunwar, on behalf of Durga Prashad Singh, on the 10th December, 1902, filed an objection, in which she stated—

"3. That the aforesaid Bishambhar Prashad Singh was born blind and died as such. 4. That the aforesaid Bishambhar Prashad Singh had no right to any properties which were ancestral to the family under law, and that the petition is therefore liable to be rejected."

Their Lordships have without any doubt come to the conclusion that Bishambhar Prashad Singh was not born blind, and that Durga Prashad Singh could not possibly have been in ignorance or in doubt as to that fact, and had, when he induced Musammat Harbans Kunwar to enter into the compromise on behalf of the plaintiff which

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is in question in this suit, no honest and *bona fide* belief in the claim which he was making. That compromise, and the decree which was made in pursuance of it, could not be allowed to affect in any way the right of the minor, and she was entitled to the declaration which the Subordinate Judge made in her favour. In order to avoid any possible misconception arising as to the meaning of the decree of the Subordinate Judge, the following words—"whose action in connection therewith may be construed as one done for the transfer of the property left by her husband"—must be omitted from that decree. With that omission the decree of the Subordinate Judge should be affirmed, and the decree of the High Court in the respondents' appeal should be set aside with costs. As regards the appellant's appeal to the High Court with reference to the question of possession, the appeal against the High Court's decree was not argued before their Lordships, and under these circumstances the decree of the High Court will stand. The respondents Durga Prashad Singh, Ritu Singh, Lachmi Narayan Rajput and Tori Mahton must pay the costs of the appeal to His Majesty in Council and of their appeal to the High Court. Upon the appellant's cross-appeal to the High Court, the High Court made no order as regards the costs, and this decree stands.

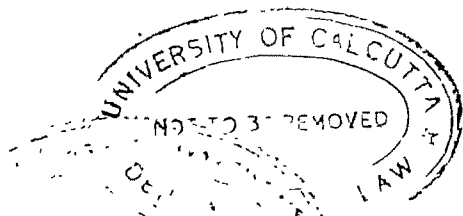
Their Lordships will humbly advise His Majesty accordingly.

Barrow Rogers & Nevill :—Solicitors for the appellant.

T. L. Wilson & Co :—Solicitors for the respondents.

A. P. P.

Appeal allowed.

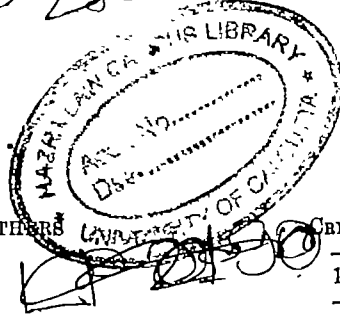


HIGH COURT.

CHANDAN SINGH AND OTHERS

- versus

EMPEROR *

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October, 1.

BANERJI, J.

*Penal Code (Act XLV of 1860), sections 304, 325—Common intention—**Several persons attacking one—Doubtful evidence as to who struck the fatal blow—Whether guilty of culpable homicide.*

Where several persons attack one, and the evidence is doubtful as to which of the assailants struck the blow which caused the death of the man attacked, the accused could not be guilty under section 304 of the Indian Penal Code, of culpable homicide but of having caused grievous hurt under section 324, because it was not the common intention of all of them to cause death.

Emperor v. Bhola Singh, [1907] I. L. B., 29 All., 282, followed.

CRIMINAL APPEAL from an order of W. F. KIRTON Esq., Sessions Judge of Aligarh.

Lalit Mohan Banerji, (Government Pleader) for the Crown.

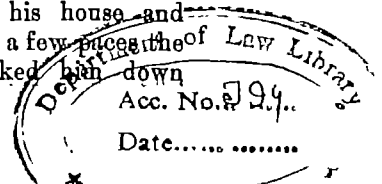
The following judgment was delivered by

BANERJI, J.—The appellants have been convicted of having caused the death of one Girdhar Singh and each of them has been sentenced under section 304, of the Indian Penal Code, to ten years' rigorous imprisonment.

Banerji, J.

It has been fully proved that there are various factions among the residents of the village of which the deceased was and the appellants are residents and that considerable enmity existed between the deceased and the appellants. A few days before the occurrence the deceased had given evidence against the appellants and on the day on which he was killed he was to have given evidence against them in the Tahsildar's Court in favour of one of his partizans. That morning, while he was seated at his *Chaupal*, the three accused came there, armed with *lathis* and challenged the deceased Girdhar Singh. There was an exchange of abuse and each side threatened to strike the other. Some of the persons who were there intervened and one of them asked Girdhar Singh to go into his house and pushed him towards the door. When he had moved a few paces the three accused attacked him with their *lathis*, knocked him down

* Cr. A. No. 668 of 1917.



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and inflicted injuries. The medical evidence shows that his skull was extensively fractured and this resulted in his death which took place the same evening. The above facts are fully proved by the witnesses for the prosecution who have been believed by the learned Sessions Judge and whom there is no reason to disbelieve. Their evidence, however, does not show which of the three accused struck the fatal blow which caused the fracture of the skull. With the exception of Hub Lal, who only says that Tola accused struck the deceased on the head, the others are unable to say anything on the point. Hub Lal is the brother of the deceased and it is probable that he was exaggerating. The evidence leaves it in doubt which of the assailants of Girdhar Singh struck the blow which proved fatal. Under these circumstances the appellants cannot be convicted under section 304. The common intention of the accused was not to cause death or such injury as was likely to cause death but only to cause grievous hurt. This case is similar to that of *Emperor v. Bhola Singh* (1), in which it was held, under circumstances which were exactly the same as those of the present case, that the accused were guilty under section 325 and not under section 304. I therefore alter the conviction to one under section 325 of the Indian Penal Code and reduce the sentence, in the case of each appellant, to one of five years' rigorous imprisonment.

Conviction altered.

(1) [1907] I. L. R., 29 All., 282.

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 Nov. 22.
 KNOX, J.

ASHBEY CLARKE HARRIS
versus
 EMPEROR.*

Penal Code (Act XLV of 1860), section 403—Criminal misappropriation—Property—Dishonest retention—Wrongful gain or wrongful loss.

A letter was addressed to A. It was received and read by him and then thrown on a table at which he and the accused were seated. The accused apparently picked up the letter and it was produced from his custody in court in a proceeding between A and his wife for judicial separation. The court refused to receive it and returned it to the accused. It was contended that the letter was 'property' of A which the accused had misappropriated:—*Held* that the essential ingredient for the offence of criminal misappropriation under section 403 of the Indian Penal Code being proof of dishonest misappropriation or conversion to the use of the accused, the offence was not made out.

Query,—Whether the letter the subject of the charge was, under the circumstances, 'property' at all.

CRIMINAL APPEAL from an order of T. SLOAN ESQ., City Magistrate of Lucknow.

Satyra Chandra Mukerji, for the appellant.

J. M. Banerji, (for *Lalit Mohan Banerji*, Government Pleader), for the Crown.

* Cr. A. No. 834 of 1917.

The following judgment was delivered by

KNOX, J.—Harris has been convicted under section 403 of the Indian Penal Code of criminal misappropriation of property. The judgment under which he has been convicted says that the property misappropriated is a letter which is on the record and which is marked Exhibit B. This is the only property regarding which any decision is to be arrived at in this appeal. Exhibit B is a letter which undoubtedly does no credit to the person who wrote it and would have been far better unwritten. But with that I am not concerned in the present appeal. I have only to decide the questions (1) whether the said letter is *property* within the meaning of the Indian Penal Code, (2) if it is property, whether it has been criminally misappropriated by Harris. The letter is admitted to be a letter addressed to Williamson, the complainant in the present case. It is also admitted that this letter first came into evidence so far as this case is concerned in a room occupied by Harris within the house in which for the time being Williamson was residing and Harris residing with Williamson as a guest. Harris was for the time being occupying the particular room. A postman is said to have brought the letter Exhibit B into this room. Williamson says that on receipt of the letter he placed it in a drawer of his writing table. The learned Magistrate has however thrown such doubt upon the evidence given by Williamson in the case that it is impossible to act upon it in a criminal case. The prosecution were therefore compelled to fall back upon the statement made by Harris himself regarding this matter and to contend that according to that statement the letter was Williamson's property, was handed over to Williamson, who threw it on a table at which he and Harris were standing or seated, and next appeared in a court at Bareilly, in the pocket of Harris. Harris attempted to have the letter filed in a case then pending between Mrs. Williamson and Williamson for judicial separation. The letter was handed by Harris to the Judge who however refused to receive it and returned it to Harris. This, it is argued, amounted to a retention of property, the property of Williamson, and that retention was done with the intention of causing wrongful gain or wrongful loss.

I have considerable doubts myself as to whether the letter under the circumstances stated by Harris in his statement was property within the meaning of the Indian Penal Code. It would be difficult to hold that an envelope thrown by the owner of the envelope into a waste paper basket and picked up or carried away by another person would be property within the meaning of that Code. To throw more light on this it is well to look to the actual terms used by Harris in this connection. If Harris is to be convicted on his own statement, that statement must be taken as a whole and with its natural meaning. Harris says that Williamson read the letter and placed it on Harris' table, that Williamson was drunk at the

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time and after an interval left the letter on the table and that Harris felt justified in his own interest as also in the interests of Mrs. Williamson to attach it to his (Harris') affidavit so as to strengthen her case and *improve his own position* whatever these last words may amount to. I have already said that I have considerable doubt as to whether a letter of this kind and under these circumstances comes within the meaning of "moveable property" as used in the Indian Penal Code. Assuming for the moment that it does, the next point which is to be considered is whether the evidence has established that Harris dishonestly misappropriated or converted to his own use this letter. Proof of dishonest misappropriation or conversion to the use of the accused is as essential an ingredient as any other ingredient for an offence under section 403 of the Indian Penal Code. I have heard Harris who conducted his own case and also the learned Government Pleader. I have also considered the evidence on the record. I have not to consider whether Harris converted the letter to the use of Mrs. Williamson. It must be a conversion to his own use, and the only evidence which bears on this rests upon the words used by Harris "I attached the letter to my affidavit so as to improve my own position." Had this been explained by Harris elsewhere in his statement, or had there been any evidence on the record explaining these words, the matter might have been different. I hold that these words standing by themselves are not sufficient to establish a conversion of the letter to the use of Harris.

It may be necessary to add something as regards dishonest misappropriation. With reference to this it is necessary to consider whether it has been established that wrongful gain or wrongful loss was intended to be caused. With regard to wrongful gain it appears to me from the definition given in section 23 of the Indian Penal Code that "gain by unlawful means" is gain to Harris and that we have not to consider gain to Mrs. Williamson or to any one else. I am unable to hold that when Harris picked up the letter, he had any intention to cause wrongful gain within the meaning of section 23 of the Indian Penal Code, and I think it would be stretching the definition of wrongful loss if I were to hold that Harris by picking up this letter and attaching it to his affidavit which according to him he was then preparing and by keeping it afterwards until he produced it in a court at Bareilly was causing wrongful loss within the meaning of section 23. I hold it to be no part of my judgment that I should go, as the court below did, into the moral aspect of this case. I have only to consider whether the offence of which Harris has been found guilty is established against him by the evidence. Holding that it is not, I set aside the conviction and sentence passed by the City Magistrate of Lucknow, and direct that the fine or any part thereof, if realized, be returned to Harris.

Conviction set aside.

AMTUL HABIB (*Decree-holder*)

versus

MUHAMMAD YUSUF (*Judgment-debtor*)*

Interest—Decretal amount paid in part—Judgment-debtor alleging it to be whole—Whether liability to pay interest on whole—Application of Civil Procedure Code (Act V of 1908), Order 24, rules 1, 2, 3.

A decree for dower for Rs. 5,000 with interest and costs was passed in favour of the widow of a deceased Mohammedan realisable from his estate in the hands of the heirs. The judgment-debtors in execution proceedings objected that the widow could get the decree executed for three-fourths of the amount only, the decree-holder being entitled to one-fourth of the estate as heir. The judgment-debtors deposited three-fourths of the amount with interest and costs while taking the objection. The objection was overruled up to the High Court. Upon the decree-holder claiming interest on the full amount until three months after the decision of the High Court, held that the amount deposited in court might have been immediately on deposit paid out to the decree-holder in part discharge of her claim and the judgment-debtors were relieved from paying interest on that amount.

EXECUTION SECOND APPEAL from a decree of J. H. CUMMING, Esq., District Judge of Saharanpur, confirming a decree of Babu Kalka Singh, Subordinate Judge.

M. L. Agarwala (with S. M. Yusuf Hasan), for the appellant.

Nihal Chand, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—This is an appeal arising out of execution proceedings. A decree was obtained for dower for a sum of Rs. 5,000 with interest and costs, to be recovered from the estate of her deceased husband in the hands of the heirs. The decree-holder sought to execute her decree and was met with an objection that she herself being one of the heirs and entitled to one-fourth of the estate, the decree could only be executed for three-fourths of the amount. When making this objection the judgment-debtors deposited three-fourths of the amount of the decree, principal, interest and costs. This objection was allowed in the court of first instance. There was an appeal to the District Judge, who held that the decree being for Rs. 5,000, it must be executed for that amount. The High Court upheld this ruling. The execution proceedings then continued; but the decree-holder claimed interest on the full amount of the decree up to the 14th of August, 1915, that is until three

* B. S. A. No. 1483 of 1916.

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months after the decision of the High Court. The judgment-debtors claimed that interest should not be charged save on the difference between the amount which they had deposited in court and the full amount of the decree, that is to say, that they should be relieved from paying interest on so much as they had deposited from the date of the deposit. This contention found favour with both the courts below. The decree-holder comes here in second appeal. The matter is not altogether free from difficulty. Order 24, rules (1), (2) and (3) provide that in the case of a suit the defendant may pay into court such sum of money as he considers as satisfaction in full of the claim. Notice of the deposit is given to the plaintiff who is entitled to draw the money out whether he takes it in full discharge or not and no interest is allowed to the plaintiff upon the amount of the deposit. There is no corresponding provision as to payment out of court and the cessation of interest in execution matters but there does not seem to be any reason why the same thing should not happen in execution proceedings as in the case of suits. In the present case the plaintiff had admittedly a decree which could be executed for at least the sum which had been deposited by the judgment-debtors. We think that there can be very little doubt that if the decree-holder had asked the court executing the decree, and in which the money had been deposited, to pay out this money, at the same time stating that the taking of the money out was without prejudice to the questions raised by the pending appeal, the court would have allowed the decree-holder to withdraw the money just as the court would have allowed a plaintiff in a suit to withdraw money deposited by the defendant although the plaintiff does not take it in full discharge. We are borne out in this view by a circumstance which happened in this very case. After the money had been deposited a third party who had a decree against the decree-holder attached portion of the money which had been deposited in court and the sum was paid out without objection. To hold that the court is not entitled to pay money out to a decree-holder in part discharge of his claim in a case like the present would mean that the money deposited should lie in court of no use to either party, while all the time interest would be running up against the judgment-debtor in the event of the court deciding that there was a greater liability on foot of the decree. Even the decree-holder would not profit because if the case was eventually decided against him, he would not have had the benefit of the money which had been deposited by the judgment-debtor. We think that in this case we ought to apply the analogy of the rules which relate to payment into court of money by the defendant in a suit, and that in this view the decisions of the courts below were correct and should be affirmed.

We accordingly dismiss the appeal with costs in all courts including in this Court fees on the higher scale.

Appeal dismissed.

PRIVY COUNCIL.

H. H. MIR ABDUL HUSSEIN KHAN (*Plaintiff*)*versus*MUSAMMAT BIBI SONA DERO AND ANOTHER (*Defendants*).

Custom, proof of—Burden of proof where custom set up—Alleged presumption in favour of custom—Bombay Regulation IV of 1827, section 26—Punjab Laws Act, (Act IV of 1872), section 5—Family customs—Recognised in India—Requisites to legal recognition of custom—Antiquity and certainty—Instances adduced in proof of custom—May be useful even though all the requisite conditions are not proved in every case.

When either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply.

No presumption in favour of custom as against the general or personal law is created by clauses such as section 26 of Bombay Regulation IV of 1827 or section 5 of the Punjab Laws Act: it is only when the custom is proved that it is made the rule of decision.

MR. JUSTICE ROBERTSON's judgment in *Daya Ram v. Soheli Singh*, (Punjab Record, 1906, 390, at p. 410), approved.

Custom binding inheritance in a particular family, although foreign to the spirit of English Law, is recognised in India: and if the custom is well established in one particular family, the fact that it might or might not apply to other families will not make it void for uncertainty.

Special usages modifying the ordinary law of succession must be ancient, invariable; established to be so by clear and unambiguous evidence.

Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.

The best evidence as to custom of inheritance is generally found in connection with the division of land, and Revenue Records may therefore be of great value.

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MR.
AMEER ALI
AND SIR
WALTER
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v.
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APPEAL from a decree of the Court of the Judicial Commissioner of Sind, dated January 9th, 1912, reversing a decree of the Judicial Commissioner (District Court jurisdiction).

The facts of the case are sufficiently stated in their Lordships' judgment. The suit was for the property of an intestate, and the only questions for determination were (1) whether deceased was a *Shia* or a *Sunni*; (2) whether there was a custom in his family excluding daughters and their issue in favour of male agnates. If such custom were established plaintiff would get the whole, whether deceased were *Shia* or *Sunni*: while if deceased were held to be a *Sunni* he would any how get half. Both courts held deceased was a *Shia*: but the first court held the custom proved, and therefore decreed the suit, while the appellate court found the custom not proved and dismissed the claim.

Hence this appeal.

P. O. Lawrence, K. C., (with him *Arthur Grey*) for the appellant.—The trial Judge held deceased was a *Shia*, and the appellate court confirmed this finding. We say this does not conclude the case, for we take the point that the question is not what sect deceased belonged to, but whether he adopted the *Shia* rule of succession. But we mainly rely on the custom, which was held to be proved by the local Judge after a trial extending over six months, during which he saw most of the witnesses.

The plaintiff was originally filed in the court of the District Judge of Hyderabad, who returned it for presentation to the proper court. A new plaintiff was then filed in the court of the First Class Subordinate Judge of Hyderabad, whence it was later on transferred to the District Court and tried by one of the Judicial Commissioners under his District Court jurisdiction. In this fresh plaintiff the suit was based upon "the custom regulating the inheritance by females in the family of the parties, and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable and has been acted upon from time immemorial." The words "and amongst the respectable Baluchis and Sardars" were inserted owing to

Pranjivan Dayaram v. Bai Reva, [1881] I. L. R., 5 Bom., 482.

They gave trouble in the appellate court, where the Judge held they made the custom pleaded too vague and declined to allow amendment.

[SIR W. PHILLIMORE.—Could you have pleaded alternatively?]

No: this family is not included among the Baluchis and Sardars. The custom is sufficiently exact. The phrase about respectable Baluchis and Sardars is surplusage. The real issue was whether the custom prevailed in the family. The fact that an indefinite class was added is irrelevant. If the only custom pleaded had been one prevailing

among respectable Baluchis and Sardars, I admit it would be too vague. If the amendment which was refused us had been applied for before trial it would have been granted as a matter of course.

[LORD BUCKMASTER.—What is the custom you allege? It is important, because the custom has to be *exact*. You cannot collect from a number of instances something which may help you.]

Our plaint states it thus :—“A woman is entitled to her proper dowry according to the rank and status of the family, and she has no other rights of inheritance to the property of her paternal relations.”

[LORD BUCKMASTER.—What is dowry here?]

Her portion.

[MR. AMEER ALI.—In Mohammedan Law it means what the husband gives.]

It has a different meaning here : it is what her own family give. The trial Judge found that “in the family of the Mirs descended from Mir Kaku Khan there is a well established custom having the force of law by which daughters and female paternal relations of the deceased are excluded from inheritance by any male agnate.”

[LORD BUCKMASTER.—What you allege is “no woman can inherit.” That is a very simple and plain custom.]

We have proved 58 instances in which the custom was upheld.

[SIR W. PHILLIMORE.—Are our rules about custom prevalent in India? There can be no Richard I there.]

If you prove the origin of a custom you go far to defeat yourself. In India the books are full of customs which would not be tolerated in England.

[SIR W. PHILLIMORE.—I can't think of any family custom in England.]

[LORD BUCKMASTER.—If you prove a custom based on violence and force, you invalidate it. You need not prove origin. Here your witnesses did attempt to prove it.]

The appellate court have gone into the question of origin, and have held that if the origin we suggested were the real one the custom is founded “not on legal reason but on violence and oppression and is therefore unreasonable.” “Not a single woman,” they say, “has been called in support of the custom and this coupled with the fact that the women affected are *purdah-nashin* women, raises a strong presumption that the practice if it exists is founded as said in

Tyson v. Smith, [1838] I. R. R., 539,

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“in wrong and usurpation and not on the voluntary consent of the people to whom it relates.” The defendants made no attempt to prove that the custom or the numerous instances of it proved were accounted for by violence or oppression: they could have called women if they had wanted to: not even the first defendant herself was examined. Violence and oppression should be proved, not merely suggested. If you proceed on theory only, all the customs in the Punjab excluding women might be said to be founded on oppression.

[SIR WALTER PHILLIMORE.—Or our Common Law.]

[MR. AMRER ALI.—The difference is that the personal law of Mohammedans gives women rights. Surely women could give evidence that they knew of the custom and therefore did not claim.]

The first defendant's own son has given evidence of two cases where she suffered by the custom. Neither side has called women, and no comment was made on their being left out either by the parties themselves or by the trial Judge. In

Tyson v. Smith, [1838] 9 Ad. and Ell., 406,

the custom was upheld. CHIEF JUSTICE TINDALL's judgment in that case (pp. 419, 422,) dealt with the English notion of custom, which is quite different from that in the Punjab and elsewhere in India.

There is no plea and no issue on this point whether the custom is reasonable or not. Even the appellate court here was not prepared to hold that a custom excluding females from paternal inheritance is in law unreasonable. I submit the custom here is reasonable in this sense, that it approximates to numberless other cases where women have been excluded.

[LORD BUCKMASTER.—The whole discussion arose out of your attempting to prove origin: it only shows how bad it may turn out to bring in things which are not relevant.]

Counsel then proceeded to deal at great length with the 58 instances adduced in proof of the custom.

[LORD BUCKMASTER.—These people seldom if ever follow the law: they settle amongst themselves as to the division of the property: one effect is that it is sons by males and never the women who inherit. But is that a custom?]

It is surely noteworthy that the sons take *equally* among themselves, and that the women get nothing at all.

Evidence showing the prevalence of a custom among families having a common origin has been admitted in support of a custom.

Mohesh Chunder Dhal v. Satrugan Dhal, [1902] 29 I. A., 62; I. L. R., 29 Calc., 343;

Pranjivan Dayaram v. Bai Reva, [1881] I. L. R., 5 Bom., 482, 489.

Arthur Grey, followed.—Once it is held that parties are governed by customary law, the presumption is in favour of custom as against any personal law, and it is only where custom fails that resort can be had to the personal law.

Daya Ram v. Sohail Singh, [1906] 41 Panj. Rec., 390, 393. (F. B.)

Rattigan—on custom.

The case cited is under the Punjab Laws Act, but the law applicable here (section 26 of Bombay Regulation IV of 1827 ; which has by notice been extended to Sind) is precisely similar.

[LORD BUCKMASTER.—In

Daya Ram v. Sohail Singh, [1906] 41 Panj. Rec., 390, 393, (F. B.), the custom was ascertained and admitted, the only point was whether it applied.]

I site it to show that in these parts the people are bound by customary law.

[SIR W. PHILLIMORE.—Is this a case of Customary Law against Common Law, or of one custom against another custom ?]

When a custom is proved it becomes the general or common law of the part to which the proved custom extends. These parties are Baluchis and their origin is doubtful. The presumption is that the custom was in force before their conversion to Islam, not that it has grown up since then. The Talpur Mirs have an extraordinary position and this is the only case in the history of the tribe in which the custom alleged has been disputed.

[LORD BUCKMASTER —When a custom is set up and is found not to extend to the case, the court, as in

Daya Ram v. Sohail Singh, [1906] 41 Panj. Rec., 390, 393, (F. B.), can do nothing except apply the personal law, and find out what is proved as to custom modifying it.]

Reference was also made to

Ramalakshmi Ammal v. Perumal, [1872] 14 M. I. A., 570 ;

Sundaralingasami v. Ramasami, [1899] 26 I. A., 55 ;

Mayne's.—Hindu Law, para 50.

De Gruyther, K. C., (with him *Sir W. Garth*) for the respondents.—The general law applicable to all Mohammedans in India is the Mahomedan Law 21 Geo. 3, c. 70, s. 17. To displace that personal law strong evidence is required. It is quite common to find instances where Mohammedan ladies do not claim their rights, but this is far from proving that they have not got such rights.

Mirabivi v. Vellayanna, [1885] I. L. R., 8 Mad. 464.

The history of this particular family is to be found in the Imperial Gazetteer of Sind, Vol. 22, pp. 397, *et seq.*

[SIR W. PHILLIMORE.—What is the authority of that as evidence ?]

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The court may refer to it under s. 57 of the Indian Evidence Act. As to the authorities to which reference can be made in such matters, see also

Read v. Bishop of Lincoln, [1892] A. C., 644.

Section 87 of the Indian Evidence Act enumerates the presumptions which may be made as to such books: presumably this Gazetteer was published under the authority of Government.

The Revenue Records are of great importance in the case. They show all the people who have held the various estates. There is nothing in the register produced to show that appellant's witnesses as members of the family ever owned what they claim here. The omission to produce records shows that there was no land owned by appellant's family.

[*Grey*.—The records give the names of members of the family as holding land. That was brought out in examination-in-chief and there was no cross-examination on the point, so it was taken that the evidence was unchallenged and not liable to be disputed.]

[*SIR W. PHILLIMORE*.—These persons were not claiming title. They were merely giving evidence of a custom.]

Counsel then went at length into the evidence and submitted that the custom was not established.

There is no force in the contention that the rule as to custom laid down by this Board in

Ramalakshmi Ammal v. Perumal, [1872] 14 M. I. A. 570, at p. 585, does not apply to the Punjab and Sind. It still remains law that whoever sets up a custom must prove it. This was clearly recognised in the Menon case

Mahomed Sidick v. Haji Ahmed, [1885] I. L. R., 10 Bom., 1, at p. 9.

Grey, replied.

Their Lordships' judgment was delivered by

Lord
Buckmaster

LORD BUCKMASTER.—On the 30th January, 1907, Mir Hussain Ali Khan of Talpur died intestate, leaving neither widow nor child. His nearest surviving relations were the plaintiff, Abdul Hussain, the son of his brother by the half-blood, one sister, the first defendant upon the record, and his sister's son, who is the second defendant. His estate, consisting exclusively of personal property, and largely of what we should call personal effects, is of great value, and doubtless also, from the character of many of the articles, of great personal interest to his relations. It is a dispute about the inheritance of this property that has given rise to the present appeal. The deceased was a member of the family of Talpur Mirs of Sind, who were a branch of the large Baluchi tribe. He was a Mohammedan, and, if Mohammedan Law governed the question, the rights of the

parties would vary accordingly whether the deceased was a member of the *Shia* or of the *Sunni* sect. If the former, the sister would inherit the whole estate ; if the latter, the plaintiff would be entitled to a half. The plaintiff alleges, however, that the rights of inheritance are not to be determined according to Mohammedan Law, but that they are regulated by a custom well-known and distinctly ascertained by which, notwithstanding the provisions of the Koran, women are excluded from any share in the inheritance of a paternal relation. He further alleges that, if this contention does not prevail the deceased was a *Sunni* and not a *Shia*, and that he is therefore entitled to the more limited rights to which reference has been made. Their Lordships think it is convenient to dispose of the latter contention first.

Although the holding of religious opinion is a matter of personal faith, and ordinarily it may not be easy to determine what the nature of that faith may be, yet in a case like the present, where the question lies between two sects so sharply divided in ritual and observances, performance of prayers, and public declarations of faith as the *Sunni* and the *Shia*, it is readily capable of being determined by definite evidence of action, conduct, and observance. For reasons which their Lordships consider as conclusive, both the Judicial Commissioner, before whom the case was first tried, sitting as District Judge, and the Court of the Judicial Commissioner of Sind before whom the appeal was heard, have decided that the deceased was of the *Shia* persuasion, and with this finding their Lordships see no reason to interfere.

There remains therefore for consideration only the question of custom, and upon this the court of first instance and the Court of Appeal have differed, the District Court holding that the custom was established, and the Court of the Judicial Commissioner of Sind deciding that it was not. It is from this latter decision that the present appeal proceeds.

Before proceeding to investigate the facts and circumstances that have influenced the two judgments already mentioned, it is desirable to make plain what is the position of a person like the plaintiff, who asserts that custom and not Mohammedan Law gives him the rights he claims. The appellant alleges that, by Section 26 of the Bombay Regulation of 1827, which has by notice been extended to the district of Sind, a presumption ought to be made in favour of the existence of a usage or custom where it is known that that usage or custom is prevalent. He bases this argument upon the words of the Regulation, which are as follows :—"The law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case ; in the absence of such Acts and Regulations, the usage of the country in which the suit arose ; if none such appears, the law of the defendant ; and in the absence of specific law and usage, justice, equity, and good conscience alone."

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Their Lordships cannot accept this view. In a case of *Daya Ram v. Soheli Singh* (1), which related to proof of a Hindu custom, the Chief Court of the Punjab had to consider a similar question on the terms of Section 5 of the Punjab Laws Act, the words of which are more strictly in favour of the appellant's contention than those of the Regulation that governs this dispute. This contention was dealt with by MR. JUSTICE ROBERTSON at p. 410 of the report in words which their Lordships think so aptly and expressly declare the true relation of the necessity of proof as between customary and established law that they may with advantage be reproduced. The learned Judge said:—

"In all cases it appears to me under this Act, it lies upon the person asserting that he is ruled in regard to a particular matter by custom, to prove that he is so governed, and not by personal law, and further, to prove what the particular custom is. There is no presumption created by the clause in favour of custom; on the contrary, it is only when the custom is established that it is to be the rule of decision. The Legislature did not show itself enamoured of custom rather than law nor does it show any tendency to extend the 'principles' of custom to any matter to which a rule of custom is not clearly proved to apply. It is not the spirit of Customary Law, nor any theory of custom or deductions from other customs which is to be a rule of decision, but only 'any custom applicable to the parties concerned which is not . . .'; and it therefore appears to me clear that when either party to a suit sets up 'custom' as a rule of decision, it lies upon him to prove the custom which he seeks to apply; if he fails to do so clause (b) of Section 5 of the Punjab Laws Act applies, and the rule of decision must be the personal law of the parties subject to the other provisions of the clause."

The principle that underlies this statement is, in their Lordships' opinion, correct, and is applicable to the construction of the Regulation that governs the present case. It is therefore incumbent upon the plaintiff to allege and prove the custom on which he relies, and it becomes important to consider the nature and extent of the proof required. Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a particular family has long been recognised in India (see *Soorendranath Roy v. Musammat Heeramonee Burmoneah* (2), although such a custom is unknown to the law of this country and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged

(1) [1906] Punjab Record, vol. xli, p. 390.

(2) [1870] 12 Moore, I. A., p. 91.

as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here, since, if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed.

Nor are their Lordships prepared to accept without qualification the statement of MR. JUSTICE CROUCH that it is necessary to reject as useless for proving the custom. "all those instances where we have no evidence that the deceased left any estate at all, or where there is no evidence to show its nature or value, or the amount of liabilities against it, *e. g.*, whether or not it consisted merely of a *Jagir*, or *Mafi* land, or of heirlooms, or of land heavily mortgaged, or of the family demesne; where there is no proof and no admission that the lady said to have been excluded had a legal claim to a share under the ordinary law; where, in case of a married lady, we have no evidence showing the actual amount of dowry received; where, in case of unmarried ladies, there is no proof that they knew of the custom and stood aside in obedience to it. And in all those cases where a witness states that he has himself excluded his own sisters, or nieces, our judgment as to the value of such statement as evidence of the custom having been enforced must be held in suspense until there is also evidence before us that the ladies had independent advice, and, with full and intelligent knowledge of the custom, voluntarily acquiesced in their exclusions." An example of each of the conditions there laid down ought certainly to be established by some witness, but it is not, in their Lordships' opinion, necessary that all should be proved in every case, as this might greatly weaken the evidence by tradition to which in a custom of the character under consideration great weight is due.

But, as pointed out by this Board in *Ramalakshmi Ammal v Sivanantha Perumal Sethurayar* (1) "It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

It is therefore necessary to define what is the custom, and then examine the evidence to see if it satisfies the conditions so laid down.

(1) [1872] 14 Moore, I. A., 585.

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It is urged against the appellant that he alleged the custom on which his case depends in three different forms: first, in the plaint filed on the 12th July, 1907, in which he asserted his rights as arising from current and immemorial custom of the dynasty of the parties; secondly, in an affidavit sworn by him on the 10th July, 1907, where he said that the custom was "that a woman after her marriage loses all interest and right of inheritance in the property left by her relations (on the father's side);" and finally in the plaint in the present proceedings, where the custom is asserted in these terms:—"But according to the custom regulating the inheritance by females in the family of the parties and amongst the respectable Baluchis and Sardars, which is ancient and which is invariable, and has been acted upon from time immemorial, and which has obtained amongst *Sunnis* or *Shias* alike, a woman is entitled to her proper dowry according to the rank or status of the family, and she has no other rights of inheritance to the property of her paternal relations."

There certainly is a marked difference between these different customs, but their Lordships are not prepared to give this fact such weight as to crush the appellant's case, and they will assume that the custom upon which he relies is a custom by which, in the event of intestacy, daughters of the deceased are excluded in favour of their brothers, and sisters in favour of male paternal collaterals and the question is, was such a custom proved?

A very large number of witnesses were called in its support, and a number of instances, amounting to sixty-one in all, were given as evidence of its operation. This evidence has been the subject of the most painstaking and careful analysis by both the courts, and has again been carefully considered by their Lordships with the assistance of the criticisms made, both in the District Court and in the Court of Appeal. Upon the whole their Lordships think that this evidence fails to satisfy the necessary standard of proof and that upon this point the judgment of the High Court must be accepted. Their Lordships do not propose to examine again in detail each one of the instances mentioned, for there are one or two general observations which are, in their opinion, sufficient.

The custom alleged, in its form most limited and best suited to the plaintiff's case, is a custom confined to the Talpur Mirs, the descendants of one Kaku Khan. These descendants are now represented by eight different families, *viz.*:—Sorabanis, Rustomanis, Bijranis, Shahdanis, Mahomedanis, Shahwanis, Jamanis, and Manikanis, of which the deceased belonged to the Shahdanis. Relevant and material instances are to be extracted from the descent of these families. The attempt to extend the custom to the "respectable Baluchis and Sardars" broke down, and it would in their Lordships' opinion, under any circumstance, have been unsafe to assume a custom applicable to a group of people so vaguely defined as those covered by the definition of "respectable Baluchis and Sardars."

Dealing, therefore, with the Talpur Mirs alone, their Lordships think the evidence is subject to the following comments:—

In the first place, many of the instances relate to descendants of a ruling family and depend upon the eldest son inheriting to the exclusion of his brothers and sisters. Although it is true that the sisters are excluded, yet it is plain that we have not in these cases reached the custom on which the plaintiff relies, because in a ruling family an over-riding custom has excluded all males as well as females in favour of the eldest male. Nine further cases relate to instances where the excluded daughters were unmarried and living with their brothers. These instances cannot be confidently relied upon. The position and relationship of the different members of the family must always be considered in determining whether claims are not met because the rights to which they relate do not exist or whether they are put on one side because, in the circumstances, there is no need that they should be asserted. This is pointed out in the case of *Mirabivi v. Vellayanna* (1), by CHIEF JUSTICE TURNER and MR. JUSTICE HUTCHINS. It is there stated at p 465:—

"It must be admitted that instances have been adduced in which the claims of daughters and sisters to a share have been ignored, or they have been allotted maintenance, though the cases mentioned by the Judge of a partition in the father's life-time are not inconsistent with Mohammedan Law. There are also cases in which married daughters have been treated as estranged from the family. But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mohammedan Law. Indeed, in many parts of the country it is unusual for Mohammedan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves, and when they are married the marriage expenses and presents are often, by express or implied agreement, taken as equivalent to the share which they could claim. Moreover, Mohammedan females are so much under the influence of their male relations that the mere partition of the property among the males without reference to them cannot count for much."

And with this statement their Lordships are in entire agreement.

In certain other instances, and notably in 24, 35, and 45, there is no substantial evidence of property to be divided, and in the most recent cases of all, 52-60, there is only one witness who speaks in their support, although it is plain that there must have been others who could have spoken upon the matter. It ought not, of course, to be assumed that a custom fails because certain of the instances brought forward in its support may be referable to other causes than the custom relied upon; nor again, because in certain respects some of the witnesses may be found untrustworthy.

(1) [1884] I. L. R., 8 Mad., p. 464,

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But there is one outstanding circumstance in the present case which their Lordships think demands attention. Mir Rustom Khan is the admitted head of the Rustomanis. He is a man of position and authority, and he says in plain terms that "there is no such custom amongst our families by which daughters and sisters are excluded from inheritance. They get their share of inheritance according to Mohammedan Law."

He is supported by other witnesses, of whom the learned trial Judge says that they are all witnesses of high position, and that there seems no special reason why they should combine to give false evidence on behalf of the defendants, although he adds that Mir Rustom Khan was not on good terms with the plaintiff, and inclined to exaggerate his evidence. But the learned Judge declines to accept the view that these important witnesses are committing perjury, and the statement which he thinks shows a tendency to bias in favour of the defence is a statement which may well have been misunderstood. Mir Rustom Khan was speaking of the religion of the deceased, and stated that whenever a *Sunni* entered his house he had it washed three times. As the servants were *Sunnis* the learned Judge thinks that this is a clear improbability. It appears to their Lordships quite possible that Mir Rustom Khan was only referring to people of a similar social standing to the deceased, who, it is not unreasonable to assume, would not pay the same attention to the religion of his servants that he might to the religion of his friends. But however this may be, Rustom Khan can have been under no misapprehension upon the question of this custom. If he did not know of it, it may be safe to say that it did not exist. If he did know of it he could not have denied the knowledge without deliberate untruth, which there is no reason to impute to his evidence.

There is, however, one instance in connection with his testimony which does need some further consideration. Mir Validad Khan, who was the paternal uncle of Rustom Khan, died leaving three sons and six daughters. Mir Rustom Khan was asked to determine how the estate should be divided among the three sons, and he made an award, effecting this division. It is suggested that if no such custom as that alleged existed he must have known that he was making an improper division of the property. Their Lordships do not think this is the only and necessary inference. He was never asked to determine the rights as between the brothers and the sisters, but merely how to divide the property among the brothers themselves, and it may well be that he assumed that arrangements had been made with the sisters which rendered it unnecessary for him to consider anything more than the actual point that he was called upon to determine. He also speaks to a matter, to which constant reference is made by the witnesses, and that is that the question of inheritance is decided in each family, either by a family

council or by the head of the family. This is an extremely probable explanation of many of the instances in the present case, and if it be accepted it destroys the custom, because the division made according to the wishes of the members of a family council is certainly not the custom on which the plaintiff relies.

In every case of this kind the burden of proof lies heavily upon the plaintiff, and though his evidence may consist of a number of striking instances in support of his case, it receives a severe blow when prominent members of the families concerned deny that the custom exists.

There is also another piece of evidence which is of considerable value: this is to be found in the Revenue Records which relate to the descent of the property of Mir Ghulam Ali Khan, who died leaving three widows, one sister, two daughters, and a brother; one of these Records, dated October, 1903, shows a clear division according to the Mohammedan Law, and not according to any such custom as is alleged. There are no other Revenue Records produced, and it is said that the reason of their non-production is that they do not assist the defendants' case. But their Lordships think the omission is serious. The best evidence associated with any such custom as that alleged would be found in connection with the division of land, and these records would at least have established the fact that land was left, its extent and character, and would, were it the fact, make clear the point which the evidence leaves uncertain, that in the division of this property, the women were excluded.

The argument put forward by the defendant that in many of the cited instances, the women said to have been excluded have been provided with dowries either in the life-time of the owner of the estate, on the division of which they received no benefit, or after his death by a male relation, and that this was equivalent to and must be taken as a recognition of their right to share, is one to which their Lordships are unable to accede. It is quite possible that the husband of a wife who had been suitably dowered would not desire to claim rights of inheritance against those by whose generosity or at whose expense the dower had been provided, but this would not involve the conclusion that the right to share existed and had been satisfied by the dower.

Again, such an argument, though it might affect inheritance as between father and daughter, would not cover the present case, for, if a daughter had been dowered by her father, and this were treated as equivalent to an advancement of her share in his estate, this would not affect a claim like the present put forward by a woman to a share in her brother's estate by whom she had never been dowered at all.

The ground upon which their Lordships base their judgment does not include any such considerations; it is their opinion that,

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although there is much reason in history for the custom alleged, and some evidence by which it receives support, yet on the whole the evidence has fallen short of the standard to which it must attain in order to succeed in altering the devolution of property according to Mohammedan Law to a devolution determined by a family custom, and they will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

E. Dalgado :—Solicitor for the appellant.

Wilson & Sons :—Solicitors for the respondents.

A. P. P.

HIGH COURT.

CRIMINAL
 1917

Dec. 13.
 BANERJI, J.

LIAQAT HUSAIN AND OTHERS

versus

EMPEROR.*

Code of Criminal Procedure (Act V of 1898), sections 203, 437—Complaint summarily dismissed—Further enquiry—Notice to accused not necessary.

Where an accused person was not called upon to appear in the first instance and where an order was only made under section 203 of the Code of Criminal Procedure the issue of a notice is unnecessary when the order is set aside.

CRIMINAL REVISION from an order of W. F. KIRTON, Esq., Sessions Judge of Aligarh.

C. Dillon and C. Ross Alston, for the applicants

G. P. Boys, G. W. Dillon and J. M. Banerji, for the opposite-party.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicants in this case were charged under sections 342, 323 and 454 of the Indian Penal Code by one Ganga Sahai who filed a petition of complaint in the court of a Magistrate of the first class. The Magistrate apparently after examining the complainant ordered an enquiry under section 202 of the Criminal Procedure Code by a Magistrate of the third class. A report was made by that Magistrate and as a result of that report the complaint was dismissed under section 203

without issuing any notice to the persons against whom the complaint was made. Upon application made to the learned Sessions Judge, he set aside the order of dismissal and directed that the case should be tried by another Magistrate. Before making his order he did not issue notice to the accused persons to show cause why the order of dismissal should not be set aside. On the strength of this omission the present application for revision has been made and the only contention put forward on behalf of the applicants is that the court ought to have issued notice to them and for not having done so, its order ought to be set aside. It is conceded that the order of the learned Sessions Judge is not illegal by reason of his omission to issue notice, but it is urged that as the order was to the prejudice of the applicants, notice ought to have been issued. No doubt it has been held in this Court that when an order is made to the prejudice of an accused person, it is desirable that he should be afforded an opportunity of showing cause against the making of the order, but this rule has been held to have certain limitations. Where the accused person was not called upon to appear in the court below in the first instance and where an order was only made under section 203, the issue of a notice was unnecessary. This was held by MR. JUSTICE TUDBALL in *Angan v. Ram Pirbhan* (1). The learned Judge observed:—"In my opinion a notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order in a proceeding to which he was actually no party," and he held that the cases in which a notice was necessary before an order could be made to the prejudice of an accused person, were cases in which after an accused person was tried and discharged a further enquiry was ordered behind his back and without notice to him. A similar view was held in the Calcutta High Court by certain of the Judges who decided the case of *Hari Dass Sanyal v. Saritulla* (2). In the course of his judgment MR. JUSTICE PRINSEP, observed:—"A notice certainly would not be necessary before an order to set aside an order of dismissal under section 203 could be passed, since that order was not passed with a notice to the accused person or in his presence and therefore is probably unknown to him." The learned CHIEF JUSTICE made remarks to the same effect at page 617. In view of these authorities, from which I see no reason to differ, I do not think that this application is sustainable and that notice was necessary. I accordingly reject the application and discharge the order staying proceedings.

Application rejected.

(1) [1918] I. L. R., 35 All., 78. (2) [1887] I. L. R., 15 Cal., 608.

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GOBIND DAS AND ANOTHER (*Decree-holders*).

versus

KARAN SINGH AND OTHERS (*Objectors*).

*Provincial Insolvency Act (III of 1907), section 23—Attachment of property—
Judgment-debtor subsequently adjudicated insolvent—Attachment inopera-
tive—Property vests in Receiver—Locus standi to maintain appeal.*

After an adjudication in insolvency, an attachment of property though made before the adjudication, ceases to have any effect, and the property of the insolvent vests in the Receiver who is the person to maintain all proceedings.

Where no Receiver is actually appointed the court is the Receiver under section 23 of the Provincial Insolvency Act.

FIRST APPEAL from an order of H. J. BELL Esq., District Judge of Jhansi.

Girdharilal Agarwala, for the appellants.

Peary Lal Banerji, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—A preliminary objection is taken to the hearing of this appeal that the appellants have no *locus standi*. The dispute is about the property of certain buffaloes. The appellants alleged that these buffaloes belonged to the insolvent. It appears that the appellants were decree-holders and had attached the buffaloes just before the adjudication in insolvency. Upon the adjudication in insolvency the attachment ceased to have any effect. All the property of the insolvent vested in the Receiver. In this particular case there was no actual receiver appointed, but the court itself in such cases is the Receiver (See section 23). In our opinion the preliminary objection has force and must prevail. We dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

THAKUR SRI SRI RADHA KRISHNA

CHANDERJI (Defendant)

versus

RAM BAHADUR AND OTHERS (Plaintiffs)

Hindu Law—Debts—Joint family property—Liability for father's debts—Waiver of creditor's claim to proceed against such property—Symbolical possession—Sufficient to interrupt adverse possession.

The general rule of Hindu Law is that ancestral property in a joint family may be made liable for the father's debts, unless those debts are shown to have been for an illegal or immoral consideration: but this rule is not always applicable, *e.g.*, the creditor's conduct may evidence his intention not to resort to any such right.

Where therefore it appeared that the interest of the father had been taken in execution, but it was sought in the Privy Council to extend that interest beyond his life on the ground that his sons were liable under the aforesaid rule.

Held, that such an argument was no longer open to the attaching creditor, as there might have been an answer to it if it had been raised in the courts below.

• Symbolical possession is sufficient to interrupt adverse possession, if the adverse possessors are parties to the proceedings in which, it is given.

Juggobandhu Mukerji v. Ram Chandra Bysack, [1880] I. L. R., 5 Calc., 584 (F. B.), followed.

APPEAL against a decree of the Calcutta High Court, dated June 24, 1913, reversing a decree of the Additional Subordinate Judge of Monghyr.

The facts of the case sufficiently appear from their Lordships' judgment. The trial Judge held that the 150 bighas therein mentioned, claimed by the defendant as purchaser of the interest of Sheo Perkash Misr, were the absolute property of the said Sheo Perkash, and that plaintiffs-respondents acquired no title thereto from his sons. He also held that plaintiffs' suit was barred by limitation. On both these points his decision was reversed by the

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LORD SHAW,

LORD

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SIR JOHN

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High Court who held that all that Sheo Perakash reserved to himself and all that the defendant bought was a life interest, and that on Sheo Perakash's death the 150 bighas reverted to the joint family. On the point of limitation they held that symbolical possession was given to plaintiffs in the execution proceedings, and that as defendant had been made a party to those proceedings this was sufficient to interrupt the 12 years' adverse possession on which defendant relied. They accordingly gave plaintiffs a decree for the 150 bighas. Hence this appeal.

Abdul Majid, who appeared for the appellant (the respondents being unrepresented) submitted that the 150 bighas were expressly excluded from the sale at which plaintiffs bought but that anyhow the sale to defendant was of the right, title and interest of the father, and that by purchasing under his decree the defendant got a good title not only against the father, but against the sons. It is not absolutely necessary they should be made parties: their interest is liable for their father's debts.

Mayne, Hindu Law, para. 321.

Muddun Thakoor v. Kantoo Lal, [1874] 1 I. A., 321.

[The Board intimated that this point had never been taken before in the case and that they must decline to go into it.]

There remains the point of limitation. If any symbolical possession was given at all, it did not cover this 150 bighas: but anyhow symbolical possession would not interrupt our adverse possession: to do that, actual dispossession was necessary.

[MR. AMEER ALI.—Referred to

Juggobundhu Mitter v. Purna Nund Gossami, [1889] I. L. R., 16 Cal., 530].

The two rulings on which the Calcutta High Court rely refer to lands in the occupation of tenants, as to which symbolical possession was the only possession possible; this is not so here.

[LORD SUMNER, asked if the point had been taken before?]

[MR. AMEER ALI, pointed out that one of the grounds of appeal in the application for a certificate seemed to cover it]

It is a question of law.

[LORD SUMNER.—It is a question of procedure in execution. You say symbolical possession was the wrong thing to do: that they ought to have taken actual possession.]

The two cases cited against me do not apply. It has been held in Bombay by a Full Bench that symbolical possession is not equivalent to real possession under the Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect.

Mahadeo Sakharam Parkar v. Janu Namji Hatle, [1912] I. L. R., 36 Bom., 373.

[LORD DUNEDIN.—That was the case of a judgment-debtor.]

Their Lordships' judgment was delivered by.

LORD SUMNER—This was a suit to recover possession of 150 bighas of land in mouzah Nagdah, in the pergunnah of the same name and the district of Monghyr. The plaintiffs had acquired *inter alia* such right in that land as could be sold under a decree in favour of mortgagees against two members of a joint Hindu family, named Rudra Parkash Misser and his younger brother, Dharam Parkash Misser, and they alleged this right to be the full title to the land. The principal defendant, an idol by his shebait, who were in actual possession by their tenants, claimed in right of a judgment-creditor of the father of Rudra and Dharam, who had bought the land at an execution sale under his decree in 1883, and they alleged that the title thus derived from the father was better than any title that could be derived from his sons. They also relied on adverse possession. They proved that they had held the land by their tenants for many years before the suit, but the plaintiffs in reply alleged effective interruption of their possession within twelve years before the suit. The Subordinate Judge decided for and the High Court against the defendant; hence this appeal. The respondents did not appear at their Lordships' bar. There were other parties to the suit, but in substance none were interested except those above mentioned.

Pandit Babu Sheo Parkash Misser, who lived at Mirzapur Gobardhan, in the district of Monghyr, was the head of a joint Hindu family of zamindars governed by the Mitakshara law, which was entitled to considerable property in Behar. In 1873 he executed what has been called, somewhat loosely, a deed of gift in favour of his only son, Pandit Babu Rudra Parkash Misser, then a child. There were other members of the family beside Sheo and Rudra. By this deed he recited that among other family properties there was an 8-anna share in mouzah Nagdah and he conveyed by gift to his son all his rights and interests in that and other properties, and then declared that—

"400 rupees per month shall continue to be paid to me for defraying the expenses of the maintenance of me, the declarant, and for meeting my personal expenses, and, over and above that, 150 bighas of land by measurement, situate in mouzah Phulwaria or in any other mouzah, shall remain in my possession and occupancy as *sirat* land, and the measurement and the demarcation of the boundaries thereof shall be made as soon as possible, and the said land shall be held by me in my possession as *sirat* without paying any rent therefor."

There were other provisions, but it does not seem material to consider them on the present appeal.

No doubt so unusual a transaction might be called in question on various grounds. The appellant did, indeed, suggest that its

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object was to defeat and delay creditors, but, as such a point ought to have been made at the trial, so that the facts might have been investigated, their Lordships declined to entertain it.

The appellant in the proceedings below made this deed the basis of his claim of title, and as the respondents accepted it as valid in the courts below, the only question which arises upon it for their Lordships is one of construction, namely what was the interest in the 150 bighas which Sheo Parkash reserved to himself? It is not necessary to examine what precise right Sheo Parkash may have had, as head of a joint family, to make such an arrangement, although no separation of the family took place nor were its properties divided, or to create a new *zirat* land out of that which had been theretofore merely part of the zamindari land of his family. In the view which their Lordships take it is sufficient to answer this one question. That interest continued no longer than his life, and determined when he died in 1893, leaving his two sons Rudra Parkash and Dharam Parkash, him surviving. Subsequent events made the words "as *zirat* land" of some importance. Their Lordships think that on the true construction of these words, as used in this connection, they merely mean "for the personal use and maintenance of the declarant himself, without paying any rent therefor." As between ryot and zamindar, and sometimes as between the zamindar and the revenue authorities, questions as to *zirat* or *zarait* lands involve very different considerations. The present case, however, is not one which touches a ryot's claim to be protected against dispossession so long as his rent is paid, or a zamindar's claim to an abatement of *jumma* in respect of lands held by him for his maintenance as *zirat*. In this case the word is used merely to describe the kind of interest reserved to the grantor under this particular deed, and its interpretation does not affect the general law or custom as to *zirat* lands. The land was never in fact cultivated by Sheo Parkash nor had it ever been recognised by village usage as his private land. The deed reserves a certain area, to be thereafter particularly set out, for the declarant's occupation, rent-free, as part provision for his personal maintenance, his sons and other dependants being otherwise provided for under the general disposition of the family properties made by the deed. So used, the term "*zirat*" ceased to be a description truly applicable to these lands after the death of the declarant, nor could third parties, who were entitled to his rights alone, found upon this word any claim to rights in the land, which he could never have enjoyed. With the determination of his interest this land would again form part of the general zamindari property of the undivided family. During the life-time of Sheo Parkash the interest of his son, Rudra, in the 150 bighas would be a vested zamindari interest in reversion. On the father's death the suspension of his right as zamindar to collect rents from the tenants of it would terminate, and, as manager and head of the

joint family, he would possess and enjoy this parcel in like manner as the rest of the family property. Such upon the argument presented to their Lordships appears to be the true effect of this deed.

That the interest of Sheo Parkash, *tale quale*, was validly assignable has not been contested, and their Lordships will assume it to be so for present purposes. Some years after he executed his deed Sheo Parkash was sued for debt by the predecessors-in-title of the present appellant. For what the debt was contracted or when does not appear. A decree was obtained, and in execution proceedings his right to the 150 bighas was sold in 1883 to the decree-holders. They then claimed to have this area delimited and obtained an order in 1886, which was duly executed in 1888, that a sufficient area of land fit for *khud-kasht* should be set out. To these proceedings Rudra Parkash and Dharam Parkash were made defendants. Evidently Sheo Parkash had not asserted his right to have this land set apart for his use, and probably, as was stated below but not proved, he had received money payments, which had made any demarcation unnecessary. Clearly there was no partition by the family. The decree-holders in 1886 got possession of the 150 bighas as if they had been in the occupation of Sheo Parkash and for his interest therein, whatever it might be. Doubtless they supposed that interest to have been absolute, and the family may have thought so too, but the point does not seem to have been raised. Subject to the question of dispossession in 1898, they have enjoyed the rents of it ever since. A series of *zarpehgi pattahs*, *mustajiri pattahs*, and *kabuliyats* was produced, and sufficiently established the case.

Before their Lordships the appellant took this new point. Even if the interest of Sheo Parkash in the land, which was sold in execution, determined with his life, it was said that the interest of his sons must be deemed to have been sold too, for the ancestral property in a joint Hindu family may be made liable for the father's debts, unless they can be shown to have been for an illegal or immoral consideration. Such rules, however, do not always apply. The creditor's conduct, for example, may evidence his intention not to resort to such a right, whereby, after all, one man's property is taken to pay another man's debt. This is peculiarly so where the form of his proceedings points to an election to seek execution against his own debtor's interest, and no further. In the present case there is strong evidence of such an intention. The certificate of sale, moreover, dated the 10th January, 1884, recites that the decree-holder, Krishna Mohan Ghatak, has bought "the right and interest of the judgment-debtor, Sheo Parkash Misser, to be allotted by division, namely, by a separate allotment of 150 bighas of land . . . for the purpose of cultivation." It does not appear that he claimed execution at any time against the family property generally. The whole of the facts should have been investigated at the trial. Certainly their Lordships ought not to decide upon a general claim of

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right, now first raised, when there appears to be, to say the least of it, a *prima facie* answer, which might have been completely made out if the appellant had raised the contention in the courts below. They are of opinion that such an argument is no longer open to him.

In 1889, while Sheo Parkash was still alive, his two sons mortgaged the family estate, including their share in mouzah Nagdah, to the predecessors-in-title of the present plaintiffs. After his death the mortgagees took proceedings to enforce the mortgage, and, among others, made the predecessors of the present defendants parties to them. In due course a decree was obtained, and upon the application for a sale in execution, it was asked that the order should apply to the mortgaged properties "with the *zarait* land" (*mai arazi zirat*). On a formal objection being taken to the addition of these words by the predecessors of the present appellant, it was held that the court was bound to sell the mortgaged property as described in the mortgage bond without addition. The order thereupon made must be construed as if it applied only to "Nagdah, original with dependency, all the zamindar's rights, together with the *tolas* known by district names or otherwise," following the language of the mortgage. The sale accordingly took place, and the mortgagees were the purchasers. They received a sale certificate that they were entitled to "all the zamindari rights in 8 annas *pucca* of mouzah Nagdah," and, the land being in occupation by cultivating tenants under an apparently *bona fide* title, they received formal possession as usual after due proclamation by beat of drum in 1898.

This interruption, if such it was, of the defendants' actual possession was not of long duration. Hence the necessity for the present suit. Hence also the defence of adverse possession for more than twelve years before the suit began. The Subordinate Judge held that in fact the symbolical possession, given under the circumstances mentioned, did not apply to the 150 bighas. He construed the order as if it had expressly excluded them, because of the deletion from the proposed order of the words "*mai arazi zirat*." Their Lordships think that this cannot be sustained. The true construction of the decree depends on what the court actually ordered, not on what it refused to order. The order for possession applied to the 150 bighas because, following the description of the mortgaged lands, it extended to the lands in which the mortgagors, as zamindars and members of the undivided family, had a reversionary zamindari right, *albeit* subject to the interest which Sheo Parkash retained for his life.

In the High Court and before their Lordships it was further argued that symbolical possession would not avail against the defendants, but that only actual dispossession would interrupt their adverse possession. The High Court, following a decision of the full Bench in *Juggobundhu Mukerji v. Ram Chandra Bysack*(1),

(1) [1877] I. L. R., 5 Cal., 584.

held that symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given. This decision is one of long standing, and has been followed for many years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered. In the result the appeal fails, and their Lordships will humbly advise His Majesty that it ought to be dismissed with such costs as have been incurred by the respondents in entering their appearance.

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Truefitt and Franin:—Solicitors for the appellant.

T. L. Wilson & Co.:—Solicitors for the respondents.

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Appeal dismissed.

HIGH COURT.

LALJI AND OTHERS

versus

EMPEROR (GENDAN LAL)*

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Dec. 14.
—
KNOX, J.

Criminal Procedure Code (Act V of 1898), section 125—Security to keep the peace—Power of District Magistrate—Jurisdiction of High Court.

A Magistrate of the first class ordered certain persons to execute a bond to keep the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over. He made a reference to the High Court with a recommendation that the order should be set aside:—*Held* that where the order was passed by a Magistrate subordinate to the District Magistrate, the record should, under section 125 of the Code of Criminal Procedure, be laid before the District Magistrate to deal with the matter.

Where a Code gives a particular court jurisdiction to act in certain matters, it is that court which should be applied to and not the High Court.

CRIMINAL REFERENCE made by H. E. HOLME ESQ., Sessions Judge of Bareilly.

The parties were not represented.

* Cr. Ref. No. 1014 of 1917.

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Knox, J.

The following judgment was delivered by

KNOX, J.—A Magistrate of the first class in Bareilly, ordered three persons to execute a bond for keeping the peace. The persons so bound applied to the Sessions Judge for a revision of this order. The learned Sessions Judge went into the reasons set out by the Magistrate for passing his order and came to the conclusion that the applicants should not have been bound over, and that the order binding them over should be set aside. He considered that under the ruling *Banarsi Das v. Partab Singh*(1), this could only be done by reference to this Court. He has accordingly sent the case up with a recommendation that the order be set aside. The case before me however differs from the case of *Banarsi Das v. Partab Singh*(1). In this last case the District Magistrate had treated it as though it were an appeal and cancelled the order of the lower court. It was held that the order of the District Magistrate was void as an order passed without jurisdiction. There is no sign however that the case before me is a case of an appeal from an order of the Magistrate of the first class. It appears to me that the District Magistrate has power at any time for sufficient reasons to be recorded in writing to cancel any bond for keeping the peace provided that the bond be one given in obedience to an order of a court in his district not superior to his court. In the present case the Magistrate who passed the order was a Magistrate subordinate to the District Magistrate, and I agree entirely with what was said in the concluding sentence of this Court's judgment in *Banarsi Das v. Partab Singh*(1), thus far namely, "the matter is one concerning the peace of the district, and I think it advisable in the circumstances of the case that the record should be placed before the present District Magistrate so that he may examine it himself and see whether or not it is any longer necessary to keep the opposite party under his bond." I see nothing in the words contained in section 125 of the Code of Criminal Procedure to prevent the District Magistrate from cancelling the bond for reasons other than that the persons bound over can be released without hazard to the community or any other person. Where a Code gives a particular court jurisdiction to act, it has been held by this Court on several occasions that it is that court which should be applied to and not this Court. I decline to interfere but direct that the record be laid before the District Magistrate in order that he may, if he thinks fit, deal with it under section 125 of the Code of Criminal Procedure.

Order upheld.

(1) [1912] I. L. R., 35 All., 130.

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October, 5.

BANERJI, J.
WALSH, J.

Code of Criminal Procedure (Act V of 1898), sections 289, 537—Calling upon the accused to enter on his defence—Omission by the Judge to do so—Mere irregularity.

The omission by the Sessions Judge to call upon the accused to enter on his defence is a mere irregularity and is covered by section 537 of the Code of Criminal Procedure, unless it is shown that the accused has been prejudiced thereby.

The facts material for the purposes of this report may be stated as follows.—At a trial for murder before a Sessions Court, after the conclusion of the examination of the prosecution witnesses and of the accused, it was stated on behalf of the accused that he would not adduce any evidence. Thereupon the pleader for the Crown addressed the court and assessors and summed up his case. There was no entry or note on the record to show whether the court had, on the conclusion of the prosecutor's address, "called on the accused to enter on his defence." After the pleader for the Crown had finished his address the pleader for the accused addressed the court and assessors. The opinion of the assessors was then taken and judgment was given and sentence passed. The accused appealed.

Satya Narain, for the appellant.—The trial was vitiated inasmuch as the procedure laid down by the law was not observed. Under section 289 of the Code of Criminal Procedure it is the clear duty of the court, at the stage when the examination of the witnesses for the prosecution and of the accused are concluded and the accused has stated that he does not mean to adduce evidence and the prosecutor has summed up his case, to consider whether in its opinion there is evidence that the accused committed the offence. If the court is of opinion that there is not, then under cl. (2) of section 289 it may at once record a finding of not guilty; if the court considers that there is such evidence then it is imperative for the court under cl. (4) to call on the accused to enter on his defence. The words employed in cl. (4) are, "the court *shall* call on the accused" etc. It should be observed that this calling on the accused to enter on his defence is quite distinct from, and happens at a later stage than the mere asking of the accused under cl. (1) whether he means to adduce evidence. There is nothing on the record to show that the court did at all call on the accused to enter on his defence. This is a vital and indispensable part of the procedure and

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not a mere formality. It has been held that its omission occasions a failure of justice and is not cured by section 537 of the Code.

Queen-Empress v. Imam Ali Khan, [1895] I. L. R., 23 Cal., 252.

But the common practice in these Provinces seems to be to overlook it. What is generally done is that the prosecution evidence and the statement of the accused are recorded, and if the accused says he will not adduce evidence the prosecutor addresses the court, then follows the address on behalf of the accused, then the court sums up the evidence and the assessors give their opinion or the jury their verdict as the case may be. It is submitted that this course of procedure overrides the law and vitiates the trial.

Unless and until the accused is called upon to enter on his defence he may think that the court considers that no case has been made out against him; till then he or his pleader may not feel himself called upon to put forward the whole of his defence and to say whatever could be said on his case.

[The appeal was then argued on the merits.]

W. K. Porter, (for the Government Advocate), for the Crown.—There is no affidavit on behalf of the accused in support of the suggestion that the court did not call on him to enter upon his defence. Even if there was such an omission, there is no affidavit to show that the accused was, in fact, thereby prejudiced in his defence in any way. Section 537 of the Code of Criminal Procedure cures the defect, if there was any, unless it is shown that failure of justice was occasioned thereby. [The merits of the case were then discussed.]

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—Premgir a boy whose age is between 14 and 15 years, has been convicted of having murdered another boy named Parshotam aged about 12 years. He has been sentenced to death and the record has been submitted for confirmation of the capital sentence. He has appealed from Jail. The case for the prosecution is that the accused and the deceased were gambling with *cotories* in a jungle. There was some quarrel between them. The deceased struck the accused a *lathi* blow and thereupon the latter who had a small axe in his hand struck him with it and killed him, and subsequently cut off his hands and appropriated the silver bangles which the deceased was wearing as also his gold ear-rings. The evidence proves that the deceased boy was missing. His relatives searched for him but without success. A woman of the name of Budhni told Sat Narayan, the uncle of the deceased, that if he went to the jungle he might find something. He did go there and discovered the dead body of the boy. The matter was mentioned to Hira Lal, the headman of the village, who sent for the accused. Hira Lal swears that the accused admitted having killed the boy, Parshotam. Hira Lal says that the accused told him that the winnings of the

deceased went up to twelve annas and the deceased pressed him for payment. The accused promised to pay by instalments but the deceased apparently did not agree and hit him with his stick on the shoulder. He (the accused) had an axe in his hand and with it he cut him down and covered him with leaves under a Sal tree. According to Hira Lal the accused brought the axe from his house and handed it over to Hira Lal. Its handle had been changed. This according to Hira Lal was before the arrival of the Sub-Inspector. The accused in his statement before the committing Magistrate admitted that he had made the confession deposed to by Hira Lal, but he said that he had done so at the desire of the Darogha. As we have already said, according to the evidence of Hira Lal, the Darogha had not arrived when the confession was made. Hira Lal also proves that when the Sub-Inspector came at night the accused took him to the spot where the murder had been committed and then to a tree where the body was lying. The hands of the deceased boy had been cut off and his throat was cut, there being marks of 5 or 6 blows on the head. The bamboo handle of the axe and also the stick which was said to have been Parshotam's stick was found near the spot. Subsequently the accused produced the bangles and earrings in the presence of a number of witnesses from the thatch of his house and handed them over to the police. There can be no doubt that the accused murdered the boy, Parshotam. The learned Vakil for the appellant has asked us to set aside the conviction because he contends that the provisions of section 289 of the Code of Criminal Procedure have not been complied with. He urges that under clause 4 of that section the court should have called upon the accused to enter on his defence and this was not done in the present case. In the first place we may observe that there is nothing to show that the court did not call upon the accused to enter on his defence. On being asked he had told the learned Judge that he would not call any witness. He was being defended by a pleader and there is no affidavit before us or anything else to show that the court had not called upon the accused or his pleader to enter on his defence. In the next place if there was any omission it would in our opinion be covered by the provisions of section 537 of the Code of Criminal Procedure as it is manifest that the accused was not in any way prejudiced by it. We agree with the learned Sessions Judge that the accused is guilty of murder, but in consideration of his youth and the fact that he is a mere boy we think the extreme penalty of the law is not called for in this case. We accordingly alter the sentence to one of transportation for life. We allow the appeal so far that we set aside the sentence of death and in lieu thereof sentence the accused Premgir to transportation for life with effect from the 13th of August, 1917.

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Nov 2

PIGGOTT, J.
WALSH, J.ANT RAM (*Plaintiff*)

versus

MITHAN LAL AND ANOTHER (*Defendants*)

Provincial Small Cause Courts Act (IX of 1887), Art. 41—Decree for maintenance against three persons—One of them made liable—Liability of the other two in the event of the former's default—Suit to recover the amount paid by the former—Amount below Rs. 500—Suit cognizable by Small Cause Court—Contribution.

A decree for maintenance was passed in favour of a certain lady against three brothers. Under some arrangement one of the brothers alone was made liable for the payment of the amount, and neither the property on which the maintenance was charged nor the other two brothers were made liable unless the first man made default in complying with the decree. The first brother having paid the maintenance brought a suit against his other two brothers to recover a sum below Rs. 500 :—*Held* that the suit was not under the peculiar circumstances, one for contribution and it was cognizable by a Court of Small Causes ; hence no second appeal lay.

SECOND APPEAL from a decree of B. C. FORBES, Esq., Subordinate Judge of Muttra, modifying a decree of Babu Gauri Prasad, Munsif of Mahaban.

Narain Prasad Asthana, for the appellant.

M. L. Agarwala, for the respondent.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This is a second appeal by a plaintiff whose suit to recover from the two defendants, his own brothers, a sum amounting to Rs. 340, after having been decreed by the court of first instance, has been decreed in part only by the lower appellate court. The sum covered by this appeal is Rs. 190. On behalf of the defendants respondents a preliminary objection was raised to the effect that the cognizance of this appeal is barred by section 102 of the Code of Civil Procedure. We have to determine whether the suit brought by the plaintiff, Ant Ram, was or was not one of a nature cognizable by a Court of Small Causes. It was a simple claim for money to an amount falling short of Rs. 500, and therefore fell within the cognizance of a Court of Small Causes, unless excluded by some Article in the second Schedule of the Provincial Small Cause Courts Act (No. IX of 1887). There is really one Article alone (Article

41) about which there can be any substantial argument. Something has been said about Articles 38 and 42, but they are so clearly inapplicable that we need not mention them further. On behalf of the appellant it is contended that the suit in question was a suit for contribution and that it was brought by himself, either as a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or in the alternative made by him as a manager of joint property on account of the said property. As a matter of fact the question raised by this preliminary objection is one which we should have to consider in one form or another at the hearing of the appeal itself, because the only question decided against the plaintiff has been one of limitation, and in order to determine the question of limitation it would be necessary to determine the nature of the suit as brought. We have come to the conclusion that the preliminary objection must prevail, as the suit in question is not a suit for contribution at all within the meaning of Article 41 aforesaid and cannot be held to be concerned with joint property within the meaning of that Article. The somewhat peculiar circumstances out of which the litigation arises need not be gone into at length. The essential point is that a decree was passed on the 15th of February, 1910, against all the three brothers who were parties to the present suit, in favour of Musammatt Basanti, the widow of a previously deceased brother. The object of that decree was to secure to this lady maintenance at the rate of Rs. 10 per mensem chargeable on the whole of the property which had belonged to the father of the three defendants. In consequence however of certain antecedent circumstances which need not be gone into, the court thought fit to include in its decree an express direction that the present plaintiff, Ant Ram, should alone be liable for the payment of the money. The consequence of this is that the liability of the property, and therefore the liability of the remaining defendants, could not come into existence except in the event of failure on the part of Ant Ram to comply with the terms of the decree. We do not think there is any getting away from the fact that, at the time when he made the payments which formed the basis of his cause of action, Ant Ram alone was liable to make them under the terms of the decree. No doubt, under the peculiar circumstances, the fact of his making these payments gave rise to an equity in his favour as against his two brothers, and this equity has been recognised by the decree passed in the courts below. The fact remains nevertheless that the suit as brought cannot be treated as one for contribution and therefore was not excluded from the cognizance of a Court of Small Causes. For authorities on this point it is sufficient to refer to two judgments of the Madras High Court, *Mavula Ammal v. Mavula Maracoir*(¹), and *Ramaswamy Pantulu v. Narayanamoorthy Pantulu*(²). We were referred in argument on the other side to a case of this

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(1) [1903] I. L. R., 80 Mad., 212. (2) [1903] 14 M. L. J., 480.

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Court. *Fatima Bibi v. Hamida Bibi*(1); but that case is fully reconcilable with the Madras authorities and indeed proceeds on the same principles of law. What the learned Judge of this Court who decided that case laid stress upon was that the liability which the plaintiff had satisfied was a joint liability as between himself and the defendants at the moment when the payment was made, and, moreover, a liability attaching to a joint tenancy and therefore attaching to property jointly held by the parties to the suit. It was therefore a suit for contribution in the full sense of the word. We hold accordingly that no second appeal lies in this case and we dismiss this petition of appeal accordingly with costs.

Walsh, J.

WALSH, J.—I entirely agree. One thing is quite clear that it is only suits for contribution of a peculiar and special character which are included in this exemption. If what is ordinarily known as a suit for contribution was intended to be exempted nothing would have been easier than to say so. I think it must be taken that a litigant who wants to bring himself within article 41 must clearly establish that his suit in every respect complies with the very precise definition.

Appeal dismissed.

(1) [1915] 13 A. L. J. R., 452.

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 C. J.
 BANERJI, J.

THE GANGES FLOUR MILLS COMPANY LD.

(*Judgment-debtors*)

versus

SHADI RAM (AUCTION-PURCHASER) AND BANK OF BENGAL

(*Decree-holders*)*

Civil Procedure Code (Act V of 1908), Order XXI, rule 90—Sale in execution—Order for stay obtained by fraud on court—Effect of such order—Whether sale taking place on date fixed a nullity.

An *ex-parte* order for stay of an auction sale was obtained by fraud, and it was subsequently discharged by the Judge who had passed it. Before the *ex parte* order was set aside the sale was held and the property sold. *Held* that the sale was not void

FIRST APPEAL from an order of Babu MUARI LAL, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore.

Application under Order 21, rule 90 to set aside a sale held in execution of a decree.

* F. A. F. O. No. 124 of 1917.

The Bank of Bengal held a mortgage decree against the Ganges Flour Mills Company in execution of which the mortgaged property was advertised for sale. After two adjournments the sale was fixed for 10th April, 1917. On the 5th April, 1917, the judgment-debtor Company applied *ex parte* to the High Court for a stay of the sale fixed for the 10th and WALSH, J., passed the following order. "Let notice go. Stay absolutely for 14 days." If the judgment-debtor deposits Rs. 50,000 within two weeks, stay until the disposal of this application". The days intervening, 6th to 9th April, both days inclusive, were holidays and the order of the High Court was brought to the notice of the Subordinate Judge between 12 and 12-30 on the 10th, who directed it to be communicated to the auctioneer who was conducting the sale, but before the order reached the auctioneer, the sale had been completed and the property sold to Lala Shadi Ram for Rs 300,000.

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On the 13th April, the decree-holder Bank appeared before the High Court and alleged that the *ex parte* order of the 5th was obtained by suppression of facts and by fraud: WALSH, J., after considering the whole matter cancelled his order of 5th April and held that it was obtained by misleading the Court and that if the true facts had been placed before him he would never have passed the order.

The judgment-debtor applied to the court below under Order 21, rule 90 to have the sale set aside on the ground that it was a nullity and also on the ground that there was material irregularity in conducting the sale which resulted in loss. The court below overruled the objections, dismissed the application and confirmed the sale.

The judgment-debtor appealed.

W. Wallach (with whom *Pearylal Banerji*), for the appellant.—

On the date on which the sale was held the order of WALSH, J. was in full force and consequently the sale was a nullity. It is true that WALSH, J. set aside his former order on the 13th, but that would not validate a sale held on the 10th. It would only allow a sale after the 13th. The order of WALSH, J. of the 5th was not a nullity, but being *ex parte*, the decree-holder had a right to have it re-considered and on re-consideration the learned Judge could confirm or discharge his order and in the event of his discharging the order, it would become inoperative from the date of its being discharged, but it would be a valid and subsisting order until so discharged and the sale held in contravention was void, even though the court below was not informed in time.

He relied on and discussed

Ram Dial v. Mahtab Singh, [1881] I. L. R., 3 All. 701;

Sant Lal v. Umrao-ur-nissa, [1889] I. L. R., 12 All., 96;

Hukum Chand v. Kamalanand Singh, [1905] I. L. R., 33 Cal., 927, 934.

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B. E. O'Connor (with whom *Motilal Nehru*), for the respondents —

The order of WALSH, J. of the 5th April was obtained by fraud and the learned Judge in his order of the 13th says that he would never have made it if the proper facts had been placed before him. An order so obtained could not be utilised by the party guilty of fraud to nullify a proper proceeding of a court. The effect of the order being discharged and cancelled was that the order must be deemed as if it was never made.

He relied on

Ex-parte White, [1853] H. L., 4.

Kerr on Fraud, 4th edition, p. 325.

W. Wallach, heard in reply.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—In this case an order had been obtained from the High Court *ex-parte*, staying an execution sale which was to take place on the 10th of April, 1917, for a period of fourteen days. The order was obtained from this Court on the 5th of April, 1917. The sale in fact took place on the 10th of April, the day fixed for the sale. It was conducted by an auctioneer who admittedly was justified in proceeding with the sale so far as he was concerned. He had got no proper intimation that this Court had postponed the sale. Even the Judge himself, under whose order the sale was held, did not know of the order of this Court until after the time advertised for the sale. When the copy of the order of this Court was filed in the court of the Subordinate Judge the sale was actually taking place. The order, which was obtained from this Court on the 5th of April, was subsequently set aside by the same learned Judge who made the order on the ground that the order had been obtained from him by fraud, misrepresentation and suppression of material facts. It seems to us therefore that the only question we have to decide is whether or not the sale was absolutely void because it was made while the order of this Court was still in existence. In our opinion the sale was not void. Once the order obtained in this Court was set aside as having been obtained by fraud it was as if the order had never been made. If this order had never been made it is clear that the sale was a perfectly valid sale and could not be set aside on any ground of irregularity. This being so, we think the appeal must be dismissed with costs. Both sets of respondents were vitally interested in the appeal and there must be two sets of costs.

P. L. B.

Appeal dismissed.

FULL BENCH.

IN THE MATTER OF KHUB CHAND AND OTHERS.*

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- *Stamp Act (II of 1880), section 57—Certificate by Collector that document duly stamped—Reference by Board of Revenue to High Court—Jurisdiction of High Court to decide the question.*

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August, 6.

Where the Collector finding a sale deed insufficiently stamped, under section 40 (1) B, of the Stamp Act, levied the deficit together with the penalty provided by law, (which fact was endorsed on the document) and the Board of Revenue then referred the question as to the stamp duty, if any, payable on the document to the High Court, under section 57 of the Act, *held* that the High Court had no jurisdiction to decide the question.

KNOX,
A. C. J.
RAFIQ, J.
PIGGOTT, J.

Reference under Stamp Act, section 57, I. L. R., 25 Mad., 752, followed.

STAMP REFERENCE made by the Junior Secretary to the Board of Revenue, United Provinces to this Hon'ble High Court.

Stamp Reference.

The facts appear fully from the following reference made by the Board of Revenue for the United Provinces to the High Court:—

(1) "I am directed to refer the following case under section 57 (1) of the Stamp Act for the decision of the Hon'ble High Court. The case came to the notice of the Board while scrutinising the monthly statement of cases of the infringement of the stamp law in Agra submitted by the Collector under Rule 204 of the Stamp Manual.

(2) On 13th January, 1914, one Khub Chand and his sons executed a mortgage deed in favour of one Shankar Lal for Rs. 20,500 on a stamp of Rs. 205 mortgaging their proprietary rights in land together with their mortgagee rights in certain other immoveable property secured by a mortgage deed, dated 1st May, 1909, executed in their favour for Rs. 16,000 by one Ganga Prasad.

(3) On 15th February, 1916, Khub Chand and others sold a portion of the mortgaged property to the mortgagee, Shankar Lal, for Rs. 17,000 out of the mortgage debt of Rs. 20,500, the remaining property being left hypothecated with the mortgagee for the balance of the mortgage money, namely, Rs. 3,500 and the interest on that sum This deed was executed on a stamp paper of Re. 1 only.

(4) On 2nd April, 1916, another sale deed ...being virtually in lieu of the former, "was executed by the said vendors in favour

*Stamp Reference Miscellaneous No. 180 of 1917.

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of the same vendee in respect of the same property which had been sold by means of the sale deed, dated 15th February, 1916, for the same amount of consideration, viz., Rs. 17,000 and on the same terms, the only difference being that the sale of a house worth about Rs. 300, which house was mentioned only casually at the end of the body of the previous sale deed, was in the new sale deed effected by means of express provisions made in the body of the deed itself. This second sale deed was also executed on a stamp of Re 1 only. It was impounded by the Sub-Registrar of Agra and sent to the Collector of the district under section 38 (2), of the Stamp Act.

Duty on Rs. 17,000 plus Rs. 300 on account of the house, or Rs. 17,300 under Art. 23, Schedule I	Rs.	175	The Collector held that the sale deed was not sufficiently stamped and that the deficient stamp duty payable amounted to Rs. 4 as noted on the margin. He levied this deficient duty and penalty of Rs. 5 under section 40 (1) (b) of the Act.
Minus			
Duty on Rs. 17,000 representing the proportionate amount of the mortgage money in respect of the whole of which stamp duty has already been paid under Art. 23, Schedule I read with Section 24 of the Act	Rs.	170	
Net duty	...	5	
Duty paid	...	1	
Balance due	...	4	

tion 40 (1) (b) of the Act.

(5) In the first place no additional duty would appear to be due on account of the house worth Rs. 300 as its value is clearly included in the sale price of Rs. 17,000. The main question, however, is whether the Collector was right in holding that because the property sold (except the house) formed a part of the property previously mortgaged by the vendor to the vendee and on which duty had been paid already, the mortgagee was entitled to deduct from the duty payable on the sale deed the amount of duty paid in respect of the mortgage under section 24 of the Stamp Act. It will be observed that only a portion and not the whole of the property mortgaged under the deed of 13th January, 1914, was transferred to the mortgagee and it would appear therefore that the full duty of Rs. 170 in respect of Rs. 17,000 was payable on the sale deed. (*In re Nirabai*, Indian Law Reports 29 Bombay, 203). If this view is correct the Board are doubtful whether the realization of the additional duty can be ordered by them now.

(6) The case is complicated and the decision of the Hon'ble High Court is solicited on the following two points:

(i) Whether the second instrument of sale is correctly stamped with a duty of Rs. 5 as assessed by the Collector or whether it should be assessed to a duty of Rs. 170 following the Bombay ruling.

(ii) Whether the chief controlling revenue authority has any powers of revision under section 56 (1) of the Act over the action

of the Collector under section 40(1) (a) and (2) or over his action under section 40 (1) (b) either *before* or *after* he has given a certificate under section 42 (1).

(7) As regards the latter point attention is invited to Indian Law Reports, 25 Madras, 752. It was held in that case that the chief controlling revenue authority has no such powers though the learned Judges of the High Court constituting the Bench which disposed of the reference held divergent views in the matter."

W. Wallach, (Officiating Government Advocate), for the Crown.—The first point is, what is the amount of the stamp duty payable on the sale deed of 2nd April, 1916? But for the Proviso to the Explanation to section 24 of the Stamp Act there could be no room for doubt that the amount of duty payable would be 1 per cent on the sale consideration. That Proviso and Illustration (3) contemplate cases in which the property sold is identical with that mortgaged. They are inapplicable where only a portion of the mortgaged property is sold.

In re Nirabai, [1904] I. L. R., 29 Bom., 203.

Here, there is the further complication that another item of property which was never mortgaged has also been included in the sale.

The second point that arises is whether the Board of Revenue has any power to refer the matter after the Collector has decided it and taken action under section 40 (1) (b) of the Stamp Act. That section occurs in Chapter IV of the Act; and under section 56 (1) the powers exercised by a Collector under Chapter IV shall in all cases be subject to the control of the Board. The words used are "in all cases." If in any case coming before him under section 40 the Collector feels doubt as to what the correct decision should be he may refer the case to the Board under section 56 (2). If he does not feel any such doubt he decides the matter himself and takes what he thinks to be the proper action. To hold that in the latter event the Board cannot, when the case comes to its notice, revise the action of the Collector would be to nullify the control conferred on the Board by section 56 (1).

Under section 57 (1) the Board is entitled to refer to the High Court any case which has either been referred to the Board under section 56 (2) or has "otherwise," i. e., in any way, come to its notice.

Further, section 40 (2) interposes no difficulty in this case; sub-section (2) refers only to certificates endorsed under cl. (a) of sub-section (1) of section 40. Here the action was taken under cl. (b) of that sub-section and the certificate could only be under section 42 (1). Certificates endorsed under the last mentioned section are not mentioned in s. 40 (2). The case of

Reference under Stamp Act, [1901] I. L. R., 25 Mad., 752,

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was one under section 40 (1) (a), and it was pointed out that in the case of a certificate under section 42 (1) the Board has the power to revise; *vide* p. 766.

It is for this Court to express an opinion as to what would be the correct stamp duty; it would then be for the Board to take any action in the matter that it might think fit. The question whether the Board can now take any steps to overrule the Collector's decision and levy any additional duty does not call for a determination by this Court.

Narayan Prasad Asthana, for Khub Chand.—The present reference by the Board is incompetent. There is no case pending before the Collector or the Board. The word "case" in section 57 is to be interpreted as meaning a pending case and not a case which has been decided by the Collector and in which a certificate has been endorsed by him. I rely on the cases of

Reference under Stamp Act, [1901] I. L. R., 25 Mad., 752.

Reference under Stamp Act, [1901] I. L. R., 25 Mad., 751.

BHASHYAM AYYANGAR, J., at pp. 758, *et seq.* of the report has, after an exhaustive treatment of the subject, shown that the Legislature did not intend to empower the Board of Revenue to revise the action of a Collector who has made the certificate under section 40 (1) (a) or section 42 (1), and that the right construction to be placed upon section 56 is that the Board can control the powers of the Collector exerciseable under those provisions only before such powers have been actually exercised. Once they are actually exercised, the matter becomes final and there is no longer any "case" which may be referred under section 57. The power conferred on the Board by section 56 is that of "control" which implies a thing being done or to be done and not that which has already been done. The meaning of the word "control" given in

Stroud: Judicial Dictionary, 2nd Edition, p. 397, and the cases cited therein show that the application of the word is confined to proceedings so long as they are actually going on. The word signifies administrative control rather than judicial control.

Section 59 (2) also shows that the reference under section 57 contemplates that there is a case to be disposed of, *i. e.*, a *pending* case. Section 42 (2) shows that the action of the Collector under sub-section (1) *finally* disposes of the matter.

In cases under the Stamp Act the Collector acts as the agent of the Government for the purpose of deciding upon and levying the correct amount of duty. He holds an exactly analogous position under the Land Acquisition Act. Under the latter Act the Government cannot question the correctness of an award made by the Collector, although a private party can do so. Similarly, under the Stamp Act there is no provision under which the decision of a Collector can be questioned if the Government thinks he has levied

insufficient duty, although a private party can, under section 45, question such decisions.

The decision of the High Court on this reference as to the correct amount of duty payable would be a mere *brutum fulmen*, for the Stamp Act provides no machinery under which the Board can now levy any additional duty or direct the Collector to do so, nor has the Collector any power under the Act to revise or review his own decision and levy more duty.

On the question of what is the correct amount of stamp payable on the sale deed it is submitted that by the sale deed "property subject to a mortgage has been transferred to the mortgagee" and the case therefore comes within the proviso to section 24. The ruling in I. L. R., 29 Bom., 203, becomes unintelligible where the mortgagor sells a part of the mortgaged property in satisfaction of the whole mortgage money or for an amount larger than the mortgage money. The case of

Reference under the Stamp Act, [1902] 4 Bom. L. R., 430,

held that the inclusion in the sale deed of some property which was not included in the mortgage was no bar to the operation of the provision to section 24.

W. Wallach, in reply.—The interpretation put upon the word "control" in the two cases cited in Stroud's Judicial Dictionary is no guide to the interpretation to be put upon the word as it occurs in section 56 of the Stamp Act. Those cases were decided with special reference to the context in which the word was used in the particular and special Acts.

"Stating a case," in section 57, means no more than stating a proposition which has arisen out of something which is already in existence. "In all cases", in section 56, does not mean something like "in all suits," but 'in every instance.'

Sections 56 and 57 are independent of the subsequent sections and are not to be interpreted in the light of any expression contained in section 59.

In the case in 4 Bom. L. R., 430, the whole and not a part of the mortgaged property was sold.

The following judgments were delivered.

Knox, A. C. J.—This is a reference made to this Court by the chief controlling revenue authority. It is said to be made under the provisions of section 57, sub-section (1) of the Indian Stamp Act, 1889. It is not a case that was referred to the Chief Controlling Revenue authority under section 56, sub-section (2). Therefore if it falls at all under section 57, sub-section (1), it must be deemed to be a case otherwise coming to the notice of the Chief Controlling Revenue authority. In its order of reference the Chief Controlling

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Revenue authority states it as a case coming to the notice of the Board while scrutinising the monthly statement of cases of the infringement of the Stamp Law of Agra submitted by the Controller under Rule 204 of the Stamp Manual.

The point arises whether the record before us is the record of a case within the meaning of section 57, sub-section (1). The questions involved, so far as stamp duty is concerned, have been before the Collector of Agra under section 38 (2) of the Stamp Act. The Collector has held that the sale-deed in question was not sufficiently stamped, that the deficit stamp duty payable amounted to Rs. 4. This deficit duty he had levied together with a penalty of Rs. 5, under section 40, sub-section (1), clause B of the Act. We understand that the deficit duty and the penalty have both been paid. This is in accordance with the statement made by the Chief Controlling Revenue authority. Presumably therefore the Collector has certified by endorsement upon the deed that it is now duly stamped. Under section 40, sub-section (2), this certificate is for the purposes of the Indian Stamp Act conclusive evidence of the matter stated therein. The case before the Collector has been fully decided and there appears to be no room for any further disposal in accordance with section 59, sub-section (2) of the Indian Stamp Act. The very same point that is before us came before the Madras High Court. (See *Reference under Stamp Act section 57*, reported in I L R., 25 Mad., 752). The learned Judges before whom the reference came were divided in their opinion. Two of the learned Judges arrived at the opinion that section 57 of the Indian Stamp Act, did not give the High Court jurisdiction as there was nothing regarding which the High Court could be asked to pronounce judgment. The learned Chief Justice took a contrary view. After the hearing of arguments addressed both by the learned vakil for Khub Chand and the Government Advocate, I am of opinion that the view taken by the Madras High Court was the correct view and that this is not a case within the meaning of section 57. No definition of the word "case" has been cited in the argument on either side and I know of no definition by the Indian Courts upon the meaning of this word. I find on referring to Wharton's Law Lexicon, 11th Edition, page 147, that the word "case" is defined as (1) a trial, (2) a trial involving some point of law so important as to be published in the Law Reports as a precedent.

This confirms me in the view I have taken and I would return this reference to the Chief Controlling Revenue authority with the opinion that the matters referred are, under the circumstances, not within the jurisdiction of this High Court.

RAFIQ, J.—I agree.

PIGGOTT, J.—I agree.

B. K. M.

Reference answered accordingly.

• DRIG PAL SINGH (*Plaintiff*)

versus

KUNJAL, (*Defendant*).*

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RAFIQ, J.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 31—Suit for mesne profits for wrongful dispossession from a grove—Jurisdiction of Small Cause Court.

A suit for recovery of mesne profits of a grove from which the plaintiff had been wrongfully dispossessed is not a suit of Small Cause Court nature and the Small Cause Court cannot take cognizance of such a suit. *Parsadi Lal v. Imdad Husain*, [1898] A. W. N., p. 10, distinguished. *Sheo Bodh v. Surjan*, [1913] 11 A. L. J. R., 238, followed.

CIVIL REVISION from an order of PANDIT GAURI SHANKER TEWARI, Judge of the Court of Small Causes, Fatehpur.

Plaintiff instituted in the Court of Small Causes a suit for the recovery of Rs. 60 on account of the wrongful use of his land by the defendant who had wrongfully taken possession of it and cultivated it. The Judge returned the plaint for presentation to the proper court holding that the case fell within art. 31 of the second schedule of the Provincial Small Cause Courts Act.

Plaintiff applied to the High Court in revision.

Purusottam Das Tandon, for the applicant, contended that the suit was cognizable by the Small Cause Court.

The case is on all fours with another case in which it was set out in the plaint that the defendant had dispossessed the plaintiff and it was against the defendant in possession that mesne profits were claimed.

Kunjo Behary v. Madhub Chandra, [1896] I. L. R., 23 Cal., 884, F. B.

This case has been consistently followed by later Calcutta cases.

[RAFIQ, J.—The Madras and the Bombay High Courts are against you

Antone v. Mahadev, [1901] I. L. R., 25 Bom., 85.]

A suit to recover damages on account of the wrongful eviction of the plaintiff from immoveable property is not a suit falling within cl. 31 of the second schedule of Act IX of 1887 though the profits of the property may be the measure of the damages claimed.

Prasadi Lal v. Imdad Husain, [1898] 18 A. W. N., 10.

This is a Division Bench ruling of our Court and follows the 23 Calcutta Full Bench.

[RAFIQ, J.—That is a very old case].

* Civ. Rev. No. 194 of 1917.

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A later ruling of our Court is certainly against my contention but in that case it does not appear that either of the two cases cited above were cited. Moreover it is a single Judge case.

Sheo Bodh v. Surjan, [1913] 11 A. L. J. R., 238.

Mangal Prasad Bhargava, for the respondent, relied upon.

The following judgment was delivered by

Rafiq, J.

RAFIQ, J.—This is an application in revision from the order of the Small Cause Court at Fatehpur returning the plaint to be presented to the proper court. It appears that the plaintiff applicant sued to recover mesne profits of a grove from which he said he had been wrongfully kept out of possession for three years by the opposite party. The learned Judge considered that the claim of the applicant fell under Article 31, Schedule II of the Small Cause Courts Act and was not therefore cognizable by him. He accordingly returned the plaint for presentation to the proper court. He is supported in the view of the law he has taken by a case of this Court *i. e.*, *Sheo Bodh v. Surjan* (1), as also by several cases of the Bombay and the Madras High Courts. For the applicant reliance is placed on the Full Bench Ruling of *Kunjo Behari Singh v. Madhub Chandra Ghose* (2). The view taken by the Calcutta High Court seems to have been adopted by this Court about eighteen years ago in the case of *Prasadi Lal v. Imdad Husain* (3). The facts of that case are not quite the same as those of the present case. In the case of *Prasadi Lal* (3), the plaintiff had sued for damages for wrongful eviction. In the present case the plaintiff is suing for the mesne profits of the property from which he was kept out of possession for three years. The case of *Prasadi Lal* does not apply to the present case. The application fails and is dismissed with costs. Let the original plaint be returned.

S. N. M.

Application rejected.

(1) [1913] 11 A. L. J. R., 238.

(2) [1896] I. L. R., 23 Cal., 884.

(3) [1898] A. W. N., p. 10.

PRIVY COUNCIL.

KRISHNASAMI PANIKONDAR (*Defendant*)

versus.

S. R. M. A. R. RAMASAMI CHETTY & OTHERS (*Plaintiffs*)

Limitation Act (Act IX of 1908), section 5—Admission of appeal after period of limitation without notice to respondent—Practice of Indian Courts—Stage at which question of limitation should be finally decided.

The admission of an appeal after the period of limitation deprives the respondent of a valuable right, for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made *ex-parte*, it is open to re-consideration at the respondent's instance.

The question of limitation should not however be left open till the hearing of the appeal, although this may have hitherto been the usage in India. The courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal.

APPEAL from an order of the Madras High Court, dated November 4th, 1908, dismissing an appeal against a decree of the Subordinate Judge of Tanjore.

The facts of the case are sufficiently stated in their Lordships' judgment. The main question was whether the High Court at the hearing of the appeal had power to go behind an *ex-parte* order admitting it.

Sir Erle Richards, K. C., (Kenworthy Brown with him) for the appellant.—The order admitting the appeal was made on July 31st, 1905. Although notice of the admission was given to respondent, he only applied to set it aside on September 28th, 1908. I submit that his application was barred by limitation and should have been dismissed.

There is no inherent power in a court to reverse a decision: it depends upon the Civil Procedure Code: practice is not enough.

The admission order was made under Rule 1 (b) of the Madras High Court Rules, which came into force in January, 1905. Under these rules the Judges, may hear *and determine* an application to admit an appeal beyond time. A single Judge has power to admit.

The respondent's only remedy against the admission was by applying for review under s. 623 of the Civil Procedure Code, and

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to do this he was bound by time. The practice in Madras since the case of

Venkatrayadu v. Nagadu, [1886] I L. R., 9 Mad., 450,

has been against me, but such practice cannot override the Civil Procedure Code. The application for review should have been made to the same tribunal. The two Judges who heard the appeal had no power to set aside Mr. JUSTICE SANKARAN NAIR's decision: it was not an order, for it was a determination of the point.

In 1867 this question came before the Calcutta High Court, and it was held by the majority that when an appeal had been admitted and notice given to the respondent the appellate court had no power at the hearing to reject the appeal as out of time.

Bharat Chunder Roy v. Issur Chunder Sircar, 8 W. R., 141.

I rely on the judgment of SIR BARNES FRACOCK in that case. A different view was taken by a majority of the Allahabad High Court in

Dube Sahai v. Ganeshi Lal, [1878] I. L. R., 1 All., 35 (F. B.),

but there is a later case in my favour,

Jhotes Sahoo v. Omesh Chunder Sircar, [1879] I. L. R. 5 Calc., 1,

while

Bhismadso v. Sitanatha, [1912] 17 Cal. W. N., 42,

is suggested against me.

Counsel then proceeded to deal with the merits as to the delay, when

De Gruyther, K. C., (with him *O'Garman*), objected that no other ground than that already argued had been urged in applying for special leave. He referred to

Corporation of St. John's v. Central Vermont Railway Co., [1889] 14 A. C., 590,

but said he would not press the objection.

Kenworthy Brown, followed.—Even though SANKARAN NAIR, J. may have been wrong in not adding to his order the words "subject to objection at the hearing" still he has made an order and he had jurisdiction to make it and his order stands good.

Respondent's counsel were not called on.

Their Lordships' judgment was delivered by

Sir
Lawrence
Jenkins.

SIR LAWRENCE JENKINS.—On the 4th November, 1908, the High Court of Madras dismissed an appeal from an original decree on the ground that it was barred by limitation. From this order of dismissal the present appeal has been preferred, and in its support it has been contended, first, that the order was without jurisdiction and, secondly, that it was erroneous on the merits.

The original decree was passed on the 8th February, 1905, in the Court of the Additional Subordinate Judge at Tanjore in the plaintiff's favour.

Against it the first defendant, Krishnasami Panikondar, preferred an appeal to the Madras High Court. The last day for its presentation was the 10th July, when the court re-opened after vacation; but it was not presented until the 12th July, 1905.

It was then returned to the appellant as out of time. It thus became necessary for the appellant to satisfy the court that he had sufficient cause for not presenting his appeal within the prescribed period.

He accordingly again presented his appeal on the 26th July, supported this time by affidavits purporting to explain the delay. The application for admission came before SANKARAN NAIR, J., sitting as a single Judge, and on the 31st July he made an order in these terms: "Delay excused in the circumstances and appeal admitted."

When notice of this appeal was served on the respondents does not appear, but in the following November affidavits were filed controverting the material allegations in those on which delay had been excused. Further affidavits were subsequently filed on both sides.

The appeal thus admitted came on for hearing before a Division Bench of the court on the 7th October, 1908, and at the outset it was objected that the appeal was out of time, and so not competent. The court after an examination of the several affidavits, accepted this view and dismissed the appeal, as provided by section 4 of the Indian Limitation Act. A subsequent application for review failed.

It has been argued that the admission of the appeal by SANKARAN NAIR, J., was final, and that the Division Bench had no jurisdiction at the hearing of the appeal to re-consider the question whether the delay was excusable. But this order of admission was made not only in the absence of Ramasami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour, so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to re-consideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the courts in India.

But there remains the contention that, at any rate, the court exceeded its jurisdiction in permitting the question of limitation to be re-opened at so late a stage as the hearing of the appeal. This objection, however, has all the appearance of an after-thought. It was not urged at the hearing, though the appellant was represented by so experienced an advocate as Sir Bhashyam Aiyangar; nor was

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it even mentioned in the original review petition. It was no doubt advanced at a later stage as an additional ground for review, but it met with no success, for the High Court held that the procedure adopted in this case was in accordance with the usual practice of the court. The authorities, moreover, show that this practice is not peculiar to Madras, and in the circumstances their Lordships hold that the Division Bench had jurisdiction to re-consider the sufficiency of the cause shown, and to do this at the hearing of the appeal.

But while this procedure may have the sanction of usage, it is manifestly open to grave objection. It may, as in this case, lead to a needless expenditure of money and an unprofitable waste of time, and thus create elements of considerable embarrassment when the court comes to decide on the question of delay. Their Lordships therefore desire to impress on the courts in India the urgent expediency of adopting in place of this practice a procedure which will secure at the stage of admission the final determination (after due notice to all parties), of any question of limitation affecting the competence of the appeal.

On the merits little need be said. It is the duty of a litigant to know the last day on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the court to exercise in his favour the power contained in Section 5 of the Indian Limitation Act, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies. It was with the claim of such a litigant that the Division Bench had to deal, and after a careful and critical examination and appreciation of the evidence, the learned Judges distrusted his explanation and held that sufficient cause had not been shown. The court therefore declined to exercise in his favour the power to excuse delay. It has not been shown that in this the court fell into any error, and their Lordships consequently decline to interfere with its decision. They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Douglas Grant :—Solicitor for the appellant.

Chapman-Walker and Shephard :—Solicitors for the respondents.

A. P. P

Appeal dismissed.

SAUDAGAR SINGH (*Defendant*)

versus

PARDIP NARAYAN SINGH AND OTHERS (*Plaintiffs*).

Hindu Law—Alienation by widow—Presumptive heir—Declaratory decrees—Declaration to protect his interests, whether permissible—Specific Relief Act, (Act I of 1877), section 42, illustration (c).

When a deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. *Janaki Ammal v. Narayanasami Aiyar*, [1916] 43 I. A., 207, distinguished.

APPEAL against a decree of the Calcutta High Court, dated January 29th, 1914, reversing a decree of the Subordinate Judge of Patna.

The parties to the litigation were governed by the *Mitakshara*. Deo Narayan Singh, who had separated from the joint family into which he was born, died leaving a widow Jaibasi Koer (defendant No. 1) and a childless widowed daughter Sakhalbuti Koer (defendant No. 2). After Deo Narayan Singh's death these two ladies by a *Tamliknama* or deed of assignment, which was voluntary, purported to convey the whole estate of Deo Narayan absolutely to the defendant-appellant Saudagar Singh, who was son of one of Deo Narayan's uncles. The *Tamliknama* recited that appellant was the sole next reversioner. Appellant took possession thereunder. Thereafter respondents, who were the three sons of another uncle of Deo Narayan, sued the parties to the deed for a declaration that the ladies had no right to execute the *Tamliknama* and that the assignee acquired no title thereunder and that the deed was ineffective and inoperative as against the plaintiffs. They also claimed possession and other reliefs, but abandoned these claims before the High Court.

Defendants contended *inter alia* that Saudagar Singh was the only next reversioner, as plaintiffs' father was only the half brother of Deo Narain. The trial Judge found in plaintiffs' favour on this issue, holding that their father was of the whole blood and that they were in the same degree of kinship as Saudagar: but he dismissed the suit as non-maintainable on the ground that while the ladies lived plaintiffs had no cause of action.

On appeal the Calcutta High Court (STEPHEN and MULLICK, JJ.) gave plaintiffs the declaration prayed for. They held that the mere

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fact that such declaration must be founded on reasons which would support a declaration that plaintiffs were heirs to Deo Narayan (which declaration, it was conceded, was not allowable) could not shut plaintiffs out of their right to a declaration as to the validity of the deed.

Hence this appeal.

Sir Erle Richards, K. C., and *Dunne, K. C.*, for the appellant.—submitted that the suit was brought to recover immediate possession on the ground that the execution of the *Tamluknama* by the widows was an act of waste. But the effect of the deed was anyhow to give appellant the ladies' interest, and the Sub-Judge rightly dismissed the suit on the ground that so long as the ladies lived there was no cause of action. The High Court have given plaintiffs a declaration the effect of which is to declare that they are the next reversioners. The reversioners are not entitled to such a declaration. *Mayne, Hindu Law*, (8th. Edition) paragraphs 647, 648, 649, and 651.

[*LORD PARKER*, referred to the Specific Relief Act, 1877, section 42, illustration (e)].

Where a suit for possession fails, the court should not give plaintiffs a declaration to the effect that they are the next reversioners :

Janaki Ammal v. Narayanasami Aiyar, [1916] 43 I. A., 207.

De Gruyther K. C., and *Pa.*, for the respondents, were not called on.

Their Lordships' judgment was delivered by

*Lord
Parker.*

LORD PARKER.—Their Lordships do not consider it necessary to call upon counsel for the respondents in this appeal.

The question is a very short one. It appears that the High Court from which the appeal has been brought has made a certain declaration. There is absolutely no ground for saying that that declaration is in any way erroneous, nor has counsel for the appellant suggested any error. The point is simply whether, under the practice prevalent in India, such a declaration ought to have been made. In order to show that no declaration ought to have been made, reference has been made to various cases, and in particular to the case of *Janaki Ammal v. Narayanasami Aiyar* (1). The point of that case is this:—There was a Hindu widow entitled to an estate, and a suit was brought by a person, presumptively entitled as heir after her death, to prevent waste. It was held that there was no waste at all, and the question arose whether, under those circumstances, it was proper to give the persons presumptively entitled a declaration of their title as presumptive, or as sometimes called reversionary, heirs, and it was held

(1) [1916] 43 I. A., p. 207.

by this Board that no such declaration ought to be made. It is said that this case is analogous to that, and that no declaration ought to have been made. On the other hand, if section 42 of the Specific Relief Act, 1877, is referred to, it will be seen that one of the illustrations given is this:—"The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her, may, in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's life-time."

It appears to their Lordships to be clear on this section that where any deed is executed, the result of which may be to prejudice the interests of the reversionary heirs, those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed. The declaration here is simply confined to that. It is a declaration that a certain deed which was executed by the Hindu widow in possession, and purporting to confer the absolute estate in the property on one of the reversionary heirs, is not binding on the other reversionary heirs. It was intended that this deed should operate to confer the whole interest on the grantee, on the footing that the other reversionary heirs, being of the half blood only, could not come in in competition with the grantee, and the real question in the suit, as far as their Lordships can make out, was simply whether the claimants were claimants of the half blood or of the whole blood, and it was decided by both courts that they were not of the half blood, but of the whole blood.

Under these circumstances, it appears to their Lordships that this is an exact illustration of that which section 42 of the Specific Relief Act was meant to provide for. It is quite true that it involves a finding that the appellant in this case is a reversionary heir, but that must always be the case where a declaration is made following the illustration (e) of the section, because it is only in virtue of the persons claiming the declaration being reversionary heirs, and therefore presumptively entitled, that the declaration is made.

Under these circumstances, their Lordships can see no possible ground for interfering with the decree of the High Court, and the appeal therefore should be dismissed with costs. Their Lordships will tender their humble advice to His Majesty accordingly.

T. L. Wilson and Co :—Solicitors for the appellant.

E. Dalgado :—Solicitor for the respondents.

A. P. P.

Appeal dismissed.

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BISHESHAR NATH (*Applicant*)*versus*EMPEROR (*Opposite-party*).*

Civil Procedure Code (Act V of 1908), Order VI, rule 14—Signature of plaintiff authorised by a man in Jail—Validity of signature—Jail Regulations, breach of—Whether cause of action destroyed—Practice—Professional misconduct—Mixing up of questions of—Decision of case.

Jail Regulations and Manuals have the force of law but they cannot override or alter the general law. A plaint signed or a suit authorised by a man in Jail is just as good as any other plaint or suit, however many Jail Regulations are broken. The breach of Jail Regulations by the prisoner, his pleader or friends cannot destroy a cause of action and the court should not enter into the question whether permission of Jail authorities had been given or not.

A person in Jail who is unable to sign a plaint may authorise some other person under Order VI, rule 14, to sign it for him and the plaint so signed will be a valid plaint. *Basdeo Singh v. Smidt*, I. L. R., 22 All., 55, referred to.

The object of courts is to decide the right of parties and not to punish them for mistakes which they make in the conduct of their case by deciding otherwise than in accordance with their rights.

If a court thinks that there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, it should decide the merits and reserve such question for further consideration after the disposal of the suit.

CIVIL REVISION from an order of Babu KASHI PRASAD, Munsif of Ghaziabad.

Motilal Nehru, Tej Bahadur Sapru, Satya Chandra Mukerji, and Gulzari Lal, for the applicant.

A. E. Ryves, for the opposite-party.

The following judgment was delivered by

Walsh, J.

WALSH, J.—These are two applications by Bisheshar Nath, High Court Vakil, practising at Ghaziabad against an order of the

Civ. Rev. No. 178 of 1917.

Munsif of Ghaziabad, which was really a judgment in a civil suit, (a) directing him to show cause why he should not be committed to the criminal court under section 476 of the Criminal Procedure Code, and also (b) directing him to show cause why proceedings should not be taken against him under section 14 of the Legal Practitioners' Act.

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The circumstances of the case are unusual. A suit was brought in the court of the Munsif by one Chajju Mal against Jasram upon a promissory note alleged to have been given by the defendant on the 31st of December, 1913, for Rs. 150, with interest at Rs. 1-4 per cent per mensem. The claim was for Rs. 216-14, only. The plaint was filed about the 22nd December, 1916, and the claim would therefore have been barred in a few days.

Para. 2 of the written statement alleged that the plaintiff was in jail, that the suit had not been presented on his behalf, and that the permission of the jail authorities had not been given to the plaintiff's signature. The following issue was framed :—1. Whether the suit was properly and duly filed on behalf of the plaintiff and is maintainable or not. The Munsif describes it as the most important issue in the case.

Bakhtawar Singh, brother-in-law of the plaintiff was called and swore that he was asked by the plaintiff's wife, in consequence of a letter written by the plaintiff from jail, to file the suit; and he accordingly instructed the applicant, Bishesbar Nath. Hardwari Lal the plaintiff's Munim, called by the defendant, attempted to identify the plaintiff's signature but he was not certain about it. A jailor was called by the defendants who contradicted the statement of Bakhtawar Singh that the plaint was signed by the plaintiff in the presence of the jail authorities, though he stated that, about the date in question, two or three people called to see Chajju Ram who was at work outside the jail, and the signature might have been obtained in the jailor's absence.

These witnesses whose evidence was recorded on the 14th February and the 13th April, are the only relevant ones upon the point as to the manner in which the plaintiff's signature was obtained.

On the 19th April, the plaintiff himself was put into the box and was asked the question "Who signed the plaint in this case?" After a highly technical discussion about the *onus* of proof which I confess is beyond my comprehension, the question was disallowed. So that issue No. 1 was decided after the deliberate refusal to hear the evidence of the principal person concerned who was in a position to speak to it. To talk of forgery under such circumstances is of course out of the question.

I will assume that the plaintiff's signature was appended so as to constitute a breach of the jail regulations. I will assume further, though it is by no means proved, that he did not write it himself,

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although he had authorised the suit, and that although he might have authorised some one to sign his own name, he was prepared, or badly advised, under a mistaken fear of the consequences of telling the truth, to commit perjury by swearing that a signature written by some one for him was written by himself. There is not, so far as I can see, in the absence of a repudiation of his signature by the plaintiff himself, a scrap of evidence of forgery, and not a shadow of a suggestion in the evidence that the present applicant knew it was forged.

The learned Munsif appears to have felt the difficulty himself. He says the signatures of the plaintiff to the plaint and *vakalatnama* were "most probably forged." He further concludes that the applicant was guilty of gross negligence in not concluding that there had been a breach of the Jail Regulations. It is impossible to reconcile this finding with the ultimate conclusion that the applicant produced two documents in court which he either knew or had reason to believe were forged. Without considering whether the Munsif had jurisdiction to deal with any disciplinary question under the Legal Practitioners' Act, or whether the occasion was one in which, in any event, he ought to have exercised the power given by section 476 of the Criminal Procedure Code, I hold that on the evidence before him the course which the Munsif took with the *vakil*, the present applicant, had no foundation in fact and was an unwarrantable abuse of his power, and an irregular exercise of jurisdiction.

As however, the judgment in this case raises several points of practical importance and the whole proceedings evidence a lamentable waste of judicial time, and a fruitless expenditure of costs, all of which apparently will fall upon one or another of these two unfortunate litigants I think it desirable to deal with the other points raised.

The Munsif has entered into a learned and exhaustive examination of the Jail Manual and Regulations. These are wholly irrelevant. He says they have the force of law. This does not mean that they alter the general law. A plaint signed or a suit authorised, by a man in Jail, is just as good as any other plaint or suit, however many Jail Regulations are broken. The breach of Regulations whether by the prisoner, his friends or pleader are matters for the Jail authorities, or the Local Government, or whoever has the duty of enforcing them or punishing their breach. They no doubt have the force of law but they cannot destroy a cause of action, or invalidate a plaint. The second part of the second plea in the written statement which raised this point ought to have been struck out and no issue should have been framed thereon.

Order VI, rule 14, which requires a pleading to be signed by a party is merely a matter of procedure. It is the business of the

court to see that this provision is carried out. It is also the business of the court to see that a suit is authorised by the plaintiff. Of course if it is not, the suit ought to be dismissed, and the persons responsible for it made to answer for their conduct. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorised, the proper signing of the plaint is a matter of practice only, and if a mistake or omission has been made it may be amended at any time. Sections 151 and 153, which the courts below seem too often to ignore, were plainly intended for such cases. And the latter part of Order VI, rule 14, enabling a person duly authorised by the party when the party is unable to sign the pleading himself to sign for him makes this clear. In the present case I see no reason why Bakhtawar Singh could not have signed for the plaintiff. I delivered a judgment recently myself upon this very point where I endeavoured to make it clear. But there is abundant authority if any were required for such an obvious proposition. *Basdeo v. John Smidt* (1), decided it in this Court many years ago.

But the most unfortunate incident of the whole case is the proceeding of the 19th April when the plaintiff presented himself in the box, and the Munsif disallowed a most obvious, necessary and proper question. Why the Munsif did not then realise the position, and put an end to further waste of time and invite the plaintiff to sign the plaint and *vakalatnama* then and there, I am at a loss to understand. The fact that a fresh suit would probably be barred by limitation would seem an additional reason for doing so.

I have not thought it necessary to discuss the high technicalities about the attestation of the *vakalatnama*. All defects might and ought to have been cured by the exercise of a little common sense, and may, in my opinion, still be cured if the suit is remanded or the court which hears the suit in appeal does what the Munsif might and ought to have done. *Vide Ranjit Ram v. Kalesar Nath* (2).

It cannot be impressed too often upon the inferior courts what BOWEN, L. J., said in *Cropper v. Smith* (3).

"The object of courts is to decide the rights of parties, and not to punish them for mistakes which they make in the conduct of their cases, by deciding otherwise than in accordance with their rights. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy."

Of course where it is sought to abuse the process of the court, or to over-reach the other party by some fraud, it is another matter.

It is to be observed that although according to the Munsif's judgment the defendant admitted his signature to the note so that the

(1) [1900] I. L. R., 22 All., 55. (2) [1896] I. L. R., 18 All., p. 396.

(3) [1884] 26 Ch. D., 700, 710.

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onus was upon him, and the plaintiff gave evidence and the defendant did not, but relied upon a discharged servant of the plaintiff, the Munsif dismissed the suit on the merits. If he was right in so doing there was the less reason for this elaborate expenditure of time and money over a trivial matter of Rs. 200. The defendant and his representatives are partly to blame for this unfortunate miscarriage by having raised the question in their plea, apparently because the plaintiff, who was a former employer of the defendant, had been sent to jail. If there was a good defence to the suit, it was superfluous. If there was no defence, it was irrelevant to any question, unless the suit had not been authorised by the plaintiff. This, which is the sole question of importance, has not been decided at all.

I will merely add that it would in my opinion be better, as a general rule, where the court has reason to think that there has been any breach of professional etiquette or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, to decide the merits, and reserve any such question for further consideration after the disposal of the suit. If there were no other reason for this course, and there are several in my judgment, it is in any case not a matter which concerns the parties, or one in respect of which, they ought to be penalised either by prolonging the suit or increasing the costs. This case seems to have occupied the time of the court on six days, including the framing of the issues and the delivery of judgment, and lasted for more than six months. I direct the order of the Munsif so far as it affects the applicant to be cancelled.

Order set aside.

CRIMINAL
 1917

RAM SAHAI
versus
 EMPEROR.*

Dec. 15.
 TUDBALL, J.

Code of Criminal Procedure (Act V of 1893), section 439—Revenue appeal pending before Collector—Collector decides receipt filed in the case not genuine—No steps taken as Collector—Order for prosecution passed as District Magistrate—Illegal.

The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in this connexion as Collector but acting as District Magistrate committed the case to a Subordinate Magistrate for trial:—*Held* that the High Court had jurisdiction to interfere in revision, the order passed by the District Magistrate being *ultra vires*.

* Cr. Rev. No. 888 of 1917.

CRIMINAL REVISION from an order of C. L. ALEXANDAR ESQ.,
District Magistrate of Farrukhabad.

Satya Chandra Mukerji, for the applicant.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

TUDBALL, J.—The facts of this case have one peculiarity about them. Briefly stated they are as follows:—There was a *lambardari* case pending in appeal in the court of the Collector of Farrukhabad. The present applicant Ram Sahai had been appointed by a Subordinate Court as *lambardar* and the opposite party had appealed against the order. The opposite party pleaded that Ram Sahai was in debt: that his estate was burdened, and that he should not be appointed. He pleaded that he had paid up a considerable part of the debt and in order to establish it he produced a receipt for Rs. 450, dated the 20th of December, 1911, and bearing on it a one anna postage stamp which bore the effigy of King George V. The Collector came to the conclusion that this receipt was not genuine on the ground that the stamp which was affixed to it was not obtainable in the district on the 20th of December, 1911. Ram Sahai explained that the stamp had been affixed to the receipt a year after the execution of the document itself. The Collector came to the conclusion that Ram Sahai should not be appointed and he passed orders accordingly on the 5th of September, 1917. Under his order deciding the appeal he wrote the following order.—“I propose to make further enquiry into the matter of the receipt as District Magistrate. I order that Kashi Ram, Inderjit and Jaisukh be summoned to my court on September 25th and direct that Ram Sahai execute a bond in Rs. 100, for his appearance on that date.” A separate record was commenced in the forefront of which there is a vernacular translation of this order in which it is distinctly set out that Mr. Alexandar in his capacity as District Magistrate, was taking up this matter. He passed orders on the 11th of October, as follows:—“Ram Sahai appears to be guilty of an offence under section 471 of the Indian Penal Code and I send this record to Mr. Mahadeo Prasad for necessary action together with Ram Sahai.” It is against this order that the present application in revision has been filed. Now it is quite clear under section 195, clause 1(c) of the Criminal Procedure Code that no court could take cognizance of the offence under section 471 of the Penal Code except with the previous sanction or on complaint of the Collector of Farrukhabad. The District Magistrate of Farrukhabad *qua* District Magistrate had no jurisdiction to take cognizance of the offence, because the offence had been committed by a party to a proceeding in the Revenue Court of the Collector in respect of the document which was given in evidence in the course of the appeal. Mr. Alexandar in his capacity as Collector and Presiding Officer of the Revenue Court of

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appeal has made no complaint and has given no sanction. Therefore no criminal court could take cognizance of the offence in the present case. The order of the District Magistrate in the present case is *ultra vires* and must be set aside. I would point out that if the Collector of the district had taken action under section 476 of the Criminal Procedure Code and had made a complaint, then this Court would have had no jurisdiction to interfere with his order. At first I was under the impression that Mr. Alexandar had acted in his capacity as the Presiding Officer of a Revenue Court of appeal, but I am faced with the clear statement in his order that he is acting in his capacity as a District Magistrate and not as a Collector. I therefore allow this application. I set aside the order of the District Magistrate. It will be open to the Collector of the district to take any action which he may deem necessary in the matter according to law.

Application allowed.

CIVIL

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Dec. 20.

RICHARDS,
C. J.
BANERJI, J.

THE PEOPLE'S INDUSTRIAL BANK LD., *In Liquidation*
(Objector)

versus

HAR KISHEN LAL (Applicant).*

Companies Act (VI of 1882), section 169—Appeal—Order in winding up proceedings under that Act—Order passed after new Act came in force—Order directing preferential payment.

An order directing a preferential payment to be made to a creditor is one which relates to and is an incident of the winding up, and the right of appeal is an incident of the winding.

When the liquidation of a company began under the Act of 1882 but the order complained of was passed after the Act of 1913 was passed, *held* notwithstanding that section 169 of the Act of 1882 would govern the right of appeal and consequently no appeal lay.

FIRST APPEAL from an order of F. D. SIMPSON Esq., District Judge of Allahabad.

Sham Nath Mushran, for the appellant.

Kailas Nath Katju, for the respondent.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—A preliminary objection is raised to the hearing of this appeal. The liquidation in the present case of the Bank

F. A. F. O. No. 55 of 1917.

began in January, 1914, or at the very latest February, 1914. The order of the court below, which it is sought to appeal from, was made on the 4th of April, 1917. The appeal was filed on the 3rd of May, 1917, and notice of the appeal was given to the respondent on the 31st of May, 1917. The objection is that under the provisions of section 169 of Act No. VI of 1882, notice of the appeal ought to have been given within three weeks of the date of the order complained of. There is no doubt that section 169 does contain such a provision. Section 284 of Act No. VII of 1913, provides that the provisions of that Act shall not apply to any Company the winding up of which has commenced before the commencement of the Act but that every Company the winding up of which has commenced before the new Act came into operation shall be wound up in the same manner and with the same incidents as if the new Act had never passed. In the present case it is quite clear that the winding up of the People's Industrial Bank, Limited began in January, or February, 1914, that is before the new Act came into operation. It is contended that the order in the present case had nothing to do with the "winding" up of the Bank. We cannot accede to this contention. The order was an order directing a preferential payment to be made to a creditor and clearly related to and was an incident of the winding up and the right of appeal also is clearly an incident of the winding up. We accordingly must allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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Richards,
C. J.

JURAWAN AND OTHERS (*Judgment-debtors*)

versus

MAHABIR DUBE AND ANOTHER (*Decree-holders*)*

Civil Procedure Code (Act V of 1908), section 48—Subsequent order—Meaning of—Order giving time for payment by executing court—Limitation Act (IX of 1908), section 15—Exclusion of time.

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C. J.

The expression "subsequent order" in section 48 (b) of the Code of Civil Procedure means a subsequent order made by the court which made the decree and acting as that court and not as a court executing the decree. Where therefore a court executing the decree, allows a judgment-debtor two months' time to pay up the decree, the order allowing time is not a subsequent order within the meaning of section 48 and does not give a fresh period to the decree-holder to execute his decree.

The order giving time is not an order staying execution or an injunction and in computing time that period cannot be excluded.

* E. S. A. No. 596 of 1917.

CIVIL
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JURAWAN
v.
MAHABIR
DUBE.

EXECUTION SECOND APPEAL from a decree of E. BENNETT, Esq., Additional District Judge of Gorakhpore, reversing the order of Babu Girish Prasad, Munsiff, Bansi.

Application to execute a decree.

The decree was passed by the Munsiff of Bansi on 28th July, 1904, and after certain applications for execution, an application was presented on 31st March, 1915, asking for the attachment and sale of certain property. On 23rd September, 1915, the judgment-debtors paid a sum towards the decree and asked for 2 months' time within which to pay up the decretal amount. The court executing the decree passed an order granting 2 months' time and struck off the application for execution of 23rd September, 1915. The present application for execution was filed on 6th September, 1916, and the relief claimed was arrest of the judgment-debtors. The judgment-debtors objected that as the application was presented more than 12 years after the decree, no order for execution could be made. The Munsiff allowed the objection and dismissed the application. On appeal the Additional District Judge held that the application was not barred as a fresh period would be calculated from the part payment on 23rd September, 1915, and that it was also within time under section 179 (4), Limitation Act of 1877.

The judgment-debtors appealed.

The appeal came on for hearing before TUDBALL, J., who referred it to a Bench of two Judges.

Peary Lal Benerji, for the appellant.—The present application was a fresh application and could not be treated as a continuation of the application of 23rd September, 1915, as the reliefs asked for in the two applications were entirely separate.

Mewa Lal v. Ahmad Ali [1911] 9 A. L. J. R., 17.

The application may be within time as prescribed by art. 182 (5), Limitation Act of 1908, corresponding to section 179 of the Act of 1897, but those articles are controlled by section 48 of the Civil Procedure Code.

Balaram Vithalchand v. Maruti, [1914] I. L. R., 39 Bom., 256.

Radha Kant Malaviya, for the respondent.—The decision of the learned Judge is not right, but the application is within time having regard to Section 48 (b) of the Code and section 15 of the Limitation Act.

In the present case although the decree was dated 28th July, 1904, there was a "subsequent order" on 23rd September, 1915, which directed payment of money after 2 months from the date, consequently 12 years would run from the expiry of those 2 months on 23rd November, 1915.

[BANERJI J.—Before a subsequent order modifying the decree could be passed under Order 20, rule 11, the consent of the decree-holder was required.]

The decree-holder never objected in this case, he accepted the money and the judgment-debtors having enjoyed the benefit of the adjournment cannot now plead that the order was bad as made without the consent of the decree-holder

The order of 23rd September, 1915, had the effect of modifying the decree.

He relied on and discussed

Tota v. Ram Chandra, [1883] I. L. R., 7 Mad., 152 ;

Perumal Naickar v. Shekh Daod Rowther, [1916] 34 I. C., 392

Again under section 15 of the Limitation Act, in computing the period of 12 years, the period of 2 months during which the execution was stayed should be excluded.

[RICHARDS, C. J.—Is not section 15 confined to periods of limitation prescribed by the Limitation Act.]

The section does not say so and it is wide enough to affect any period of limitation prescribed in any enactment. This section did not contain the words used in section 6 which had been held not to affect section 48, Civil Procedure Code, because of the words “prescribed in the third column of the first schedule.”

He cited and discussed

Premnath Tewari v. Chatarpal Man, [1915] I. L. R., 37 All., 638.

Peary Lal Banerji, in reply.—There is no subsequent order in this case directing payment of the money. Order 20, rule 11 gives power to the court which passed the decree to modify its decree. It does not refer to the executing court at all. In the present case, the application for time was made to the executing court and the order of 23rd September, 1915, was not one under Order 20, rule 11. An order passed in the case of execution granting time to the judgment-debtor was not a subsequent order within the meaning of section 48 (b) of the case.

He discussed

Bal Chand v. Raghunath Das, [1881] I. L. R., 4 All., 165 ;

Jagubundho Das v. Hari Rawat, [1888] I. L. R., 16 Cal., 16 ;

Raghunath Prasad v. Kushi Prasad, [1912] 13 I. C., 88.

The provisions of the Limitation Act dealing with the mode of computation of periods of limitation cannot apply to section 48, Civil Procedure Code. This section does not enact a rule of limitation at all, but merely lays down a period after which any application for execution, though not barred by limitation will not be granted,

[1889] Punjab Record No. 109.

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Richards,
C. J.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of execution proceedings. The decree was dated as far back as the 28th of June, 1904. In March, 1915, an application was made for execution by attachment of certain property of the judgment-debtors. On that application (the 23rd of September, 1915), two months' time was granted to the judgment-debtor to pay the balance of the decretal amount he having paid Rs. 22 on account. No further step appears to have been taken on this application and it was struck off. On the 6th of September, 1916, the present application was made. It sought execution in a different way. The application of the 31st of March, 1915, was for execution by attachment of property. In the application of the 6th of September, 1916, execution was sought by the arrest of the judgment-debtor. The judgment-debtor raised an objection that having regard to the provisions of section 48 of the Code of Civil Procedure the decree being now more than twelve years' old an order for execution could not be made. The first court allowed the objection. The learned District Judge upon appeal held, first that the application was within time holding that the twelve years mentioned in section 48 ran from 1915 and secondly that the application was within time, under article 179, clause 4, of the Limitation Act. The judgment-debtor has appealed. The learned vakil, for the decree-holder, admits that article 179, clause 4, of the Limitation Act does not apply but he contends that the order of the 23rd of September, 1915, when the judgment-debtor was allowed two months to pay the decree was a "subsequent order" within the meaning of that expression in section 48, clause (b), of the Code of Civil Procedure, and secondly, that in calculating the period of twelve years mentioned in section 48 of the Code of Civil Procedure the two months which were given to the judgment-debtor by the order of the 23rd of September, 1915, should be excluded having regard to the provisions of section 15 of the Limitation Act. Amongst the authorities cited by each side were *Prem Nath Tewari v. Chatarpal Man Tercari* (1), *Jagubandhoo Das v. Hori Rawoot* (2), *Balchand v. Raghunath Das* (3), *Raghunath Prasad v. Kashi Prasad* (4), *B. Sata Charlu v. Kenadala Ramachandra* (5), *Perumal Naickar v. Sheikh Dawood Rowther* (6).

Section 48, of the Civil Procedure Code, is as follows:—"Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (a) the date of the decree sought to be executed, or (b) where the decree or any subsequent order directs

(1) [1915] I. L. R., 37 All. 638.

(2) [1889] I. L. R., 16 Cal., 16.

(3) [1881] I. L. R., 4 All., 155.

(4) [1912] 13 I. C., 88.

(5) [1883] I. L. R., 7 Mad., 152.

(6) [1916] 34 I. C., 393.

any payment of money or the delivery of any property to be made at a certain date or at recurring periods the date of the default in making the payment or delivery in respect of which the applicant seek to execute the decree."

As already mentioned it is contended that the order of the 23rd of September, 1915, giving the judgment-debtor two months' time is a subsequent order directing the payment of the balance of the money. It must be remembered that this order was made by the court *executing the decree*. It may perhaps have so happened in this case that it was the same court which granted the decree of the 28th of June, 1904, that was executing the decree. But if the argument put forward by the decree-holder is good it would equally apply to a case where the decree had been merely transferred to another court for execution. It would almost seem to follow that even an adjournment of an application for execution would give a fresh period of twelve years from the expiry of the period of adjournment. After consideration we have come to the conclusion that a subsequent order directing payment of money in section 48, clause (b), means a subsequent order made by the court which made the decree and acting as that court and not to an order of a court executing a decree. In all probability the section contemplates orders made under Order 20, rule 11. We may say in passing that the order of the 23rd of September, 1915 was not made under Order 20, rule 11. As to the argument put forward grounded on the provisions of section 15 of the Limitation Act, this section runs as follows:—"In computing the period of limitation prescribed for any suit or application for the execution of a decree the institution or execution of which has been stayed by injunction or order, the time or continuance of the injunction or order the date on which it was issued or made and the day on which it was withdrawn shall be excluded."

In the first place the order of the 23rd of September, was not strictly an order staying the execution of the decree. Furthermore the Limitation Act itself prescribes periods of limitation for bringing suits and periods of limitation for the execution of decrees, and it seems pretty clear that the word "prescribed" in this section refers to periods prescribed by the Limitation Act. Section 48 of the Code of Civil Procedure does not in a strict sense provide a "period" of limitation. It is an enactment which forbids an order for execution upon a decree which is more than twelve years old. We must allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts.

P. L. B.

Order set aside.

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Dec. 22.

WALSH, J.

KALKA PRASAD (*Applicant*)*versus*EMPEROR (*Opposite party*)*

Legal Practitioners' Act (XVIII of 1879), section 36—Touts—List of—Person seen canvassing and introducing litigants to members of the Bar—Inference from—Removal of previous list—Effect of—Order declaring a person as a tout—Revision.

It is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession he is not rendering gratuitous service such as a casual friend and an acquaintance may do.

An order of a Judge declaring that the applicants are touts and putting up their names in list of touts is an order against which revision can be entertained. Mere removal of the list of touts exhibited in one Court or failure to exhibit them in one of the District has not the effect of cancelling the list altogether.

CIVIL REVISION from an order of L. JOHNSTON ESQs., District Judge of Meerut.

A. P. Dube and Satya Chandra Mukerji, for the applicant.

A. E. Ryves, for the Crown.

The following judgment was delivered by

Walsh, J.

WALSH, J.—These are four applications in revision made by six persons, Abdur Rabim, Iftikhar Husain, Nisar Ahmad, Rup Chand, Abdul Karim and Kalka Prasad against one order made by the District and Sessions Judge of Meerut on the 4th of May, 1917, ordering the names of these persons with others to be posted and put on a list of touts under section 36 of the Legal Practitioners' Act. Although the cases of the various applicants are not precisely similar, I propose to deal with all of them in one judgment.

The proceedings were undertaken by the District Judge at the instance of the Bar Association of Meerut which had sat and considered the matter with great thoroughness and which supported the complaint which they made against the system of touting by a large number of persons with a considerable body of evidence.

The hearing of the case was spread over a considerable period and the learned Judge devoted great pains to the performance of

* Civ. Rev. No. 170 of 1917.

this difficult but important task. I have to consider in the case of each applicant to this Court how far he is entitled to complain of the order made against him. Before doing so however it is necessary to make one or two general observations. While exercising due care to see that each case is fairly made out by the evidence called, and is established in a hearing according to law, it is desirable to emphasize the great importance of this legislation both to the general public and to the legal profession. The Judge has used language, none too strong, about the pests who perennially infest the courts. It is common knowledge that systematic touting is inseparable from a great deal of deception and imposition practised upon poor and ignorant litigants, whose interests are subordinated to those of the needy persons who prey upon their credulity. It is also inseparable from unprofessional conduct on the part of those who employ them. It is only by the vigilant efforts of bodies like the Meerut Bar Association, and by strict enforcement of statutory safeguards, that the poorer members of the public and the respectable members of the profession can obtain protection.

The nature of the evidence which may legitimately be tendered in such a case does not really admit of much controversy. The learned Judge has held that the recognised principles applicable in cases under section 110 of the Code of Criminal Procedure or the "evil livelihood" section, are applicable here. This is clearly right. Indeed it was admitted at the Bar by both sides in this case which was well and temperately presented. The statute says "by general reputation or otherwise." The former of those provisions clearly includes hearsay evidence which may be tested, when admissible, by cross-examination just as other evidence may be tested and challenged. The latter provision "or otherwise" is clearly intended to include all the ordinary modes of proof known to the law which might otherwise be said to have been impliedly excluded, such as personal observation, evidence of conduct, admissions in conversation and the like, proved by first hand testimony. In this case almost every possible kind of evidence was given. I note that none of the alleged touts themselves gave evidence on oath, though I can find nothing in the statute or in the general law to prevent their doing so if they chose. The Code of Criminal Procedure is not applicable and there seems no reason in good sense or in the general law to disentitle them to be heard on oath. It is not to be supposed that direct evidence of a specific case of consideration passing between tout and employer can be forthcoming, except in the rarest cases. The case quoted to me from the Punjab Record is not in point. The only evidence in that case was a letter of introduction which did not suggest remuneration, and might have been perfectly harmless. But it is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession he

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is not rendering gratuitous service such as a casual friend or acquaintance may do.

In my opinion revision may be entertained in such a case as this. It is "a case in which no appeal lies." I am aware that the contrary view has been expressed by some Judges of this Court. In *In re Madho Ram* (1), the point taken was that the finding was against the weight of evidence. That is not a ground for revision and therefore it was not necessary for the court to decide more. I do not think that it is necessary to invoke the aid of the superintendence section in the Government of India Act, 1915, though it seems to have been held in *in re Kedar Nath* (2), that this was one way of questioning orders in this Court. There is no decision binding upon me and I prefer the view taken in *Basen Sahib v. The District Judge of Madura* (3), where the High Court interfered in revision in a similar case. The matter has been very fully discussed in *Hari Charan Sircar v The District Judge of Dacca* where it was held that the revisional jurisdiction could only be entertained in the furtherance of Justice.

These being the general considerations applicable I now come to the particular case of each applicant before me. In the cases of Rup Chand, Ittikhar Husain, and Abdul Karim there was ample evidence to justify the order. They were constantly seen to be taking clients about, one of them had taken away one case from one of the witnesses; they had been seen to stop clients, hold them in conversation and apparently take charge of them. The evidence as to their general reputation was very strong. It was urged on behalf of Rup Chand, and I think one of the others, that the Judge had erred in refusing to send for files of cases which would have shown that they were legitimately engaged in litigation in which they or members of their family were interested. This might be so but it would not negative or prove anything inconsistent with the other evidence called against them. The learned Judge was no doubt pressed for time to conclude enquiry before going on leave. He took the right view in assuming that these files would prove what they were alleged to show and that it was superfluous to prove them strictly because they would not alter his view. I see no reason to interfere with the decision in the case of these three applicants and I therefore dismiss their applications.

The cases of Nisar Ahmad and Abdur Rahim stand upon a somewhat different footing. I have felt some doubt as to whether I ought to interfere even in their cases. I am not prepared to overrule the findings of the learned Judge on a question of fact of this kind even if I had the power to do so, and it may be that I am stretching the power of this Court in revision somewhat by interfering at all. I only do so because the evidence as recorded in the

(1) [1899] I. L. R., 21 All., 281. (2) [1909] I. L. R., 31 All., 59.

(3) [1903] I. L. R., 26 Mad., 596.

Judge's note in these two cases is not very strong, and the Judge being admittedly pressed for time and having given reasons in their cases which are not entirely satisfactory, it is just possible that they may have suffered injustice by being, so to speak, swept away in the general current against their co-defendants. Abdur Rahim had been in the employment for one year of Mr. Abdul Bari, a Barrister, against whom the complainants made no suggestion, but who had been temporarily absent from Meerut. Those who mentioned Abdur Rahim said very little about him. Muhammad Husain in cross-examination (see page 58 of the Judge's English notes) really spoke in his favour and mentioned that he had returned to Mr. Abul Bari's employment. Gauri Prasad said little or nothing about him. Ghasi Ram (see page 21 of the English notes) mistook him altogether for another.

As to Nisar Ahmad two Pleaders were called for the defence. One, with over three years experience, spoke of him as being regularly in the employment, and constantly seen in the company of Mr. Zamirulislam his employer. Mr. Abdullah Shah had nothing to suggest against the latter (see page 6). Bahal Singh and Ghasi Ram certainly gave positive evidence about his holding clients. Ramji Lal (pages 36-37) on the whole spoke in his favour. In these two cases the learned Judge's reason namely, that the evidence did not warrant him in rejecting the considered complaint of the Bar Association is not quite satisfactory. He must form an independent view of his own though no doubt the opinion of the Bar-Association on a matter of general reputation is entitled to very great weight. I am not deciding that his conclusion was wrong. It is a question of fact of which he is a better judge than I. I merely hold that these two applicants have made out a case for further consideration and I remit their cases to the learned Judge for consideration and for such final order thereon as he, on hearing any further evidence on either side or of the men themselves, sees fit to make. He can of course take into account the evidence already given. And in the exercise of my discretion I leave it to the learned Judge to decide whether in the cases of these men he will suspend the operation of the list until he is able to take up the further enquiry. Further than this I decline to interfere.

The last case is the case of Kalka Prasad. This case has caused me some difficulty. The applicant was put upon a list in 1908 by the then District Judge of Meerut, the list which gave rise to the decision in *I. L. R.* 31 All. 59. The District Judge reports that he has repeatedly applied to have his name removed as it was impeding his chances of obtaining work in Delhi, but the District Judge of course had no material on which to act. The applicant undoubtedly wrote to the court on the 9th of February of this year and received what I may accept as an official reply that no list of touts was then affixed. According to the learned Judge it was also

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not affixed from the long vacation of 1916 and afterwards. It is clear that the list ought to be exhibited. I think subsection 3 means that the exhibition of the copy list, there referred to, is necessary to constitute a man a proclaimed tout, though it is not necessary for me to decide that point in this case. But upon further consideration I have come to the conclusion that the mere removal or failure to keep the list exhibited in the court of the District Judge of Meerut had the effect of cancelling the list altogether, inasmuch as it was by the order to be exhibited in all courts subordinate to the District Court, and its mere removal in one court out of many would not *per se* cancel the original order of 1908. The form however adopted by the learned Judge in this particular case has caused some embarrassment. He might have made a further list supplementary to the existing list of 1908 and merely ordered his official to restore the list of 1908 to the place from which it should not have been removed. In that event the applicant would have had no grievance. As it is he has the grievance, technical though it may be that his name has been included in a new list consisting of the old list and the new names added together by the order of the 4th of May, and before that was done he was given no opportunity of showing cause. In this case again I decline in my discretion to interfere. Though the applicant's name would not be properly upon the new list and ought to be removed it is not improperly upon the old list. The section gives the Judge the power, from time to time, to alter and amend the list and under the circumstances inasmuch as the present applicant is desirous of being heard and may be able to satisfy the learned Judge that if he had been given an opportunity of showing cause, his name would not have been included in the list of the 4th of May, I think the learned Judge might well allow an application by Kalka Prasad, if he sees fit to make it, to have the list altered or amended by the removal of his name on the ground that whatever may have been the case in 1908 he is no longer a tout. The result is, though feeling some doubt in the matter, that I dismiss the application of Kalka Prasad.

Order modified.

MOTI BEGAM (*Defendant*)*versus*HAR PRASAD AND ANOTHER (*Plaintiffs*).*

CIVIL

1912

June, 26.

TUDBALL, J.

Court-Fees Act (VII of 1870), section 7, cl. iv. (c)—Ad valorem fee—Suit for sale on mortgage—Defendant sets up prior charge—Court disallows defendant's claim—Appeal by defendant—Court-Fees payable on memorandum of appeal.

A suit for sale was brought upon foot of a mortgage. One of the defendants pleaded that she held a decree for dower against the mortgagor for the payment of which the property had been made a security. The plaintiff paid *ad valorem* court-fees on the amount of his claim. The court decided that the plaintiff's mortgage was prior in date. The defendant appealed and in her appeal sought that her security should have priority. She paid the same court-fees on her memorandum of appeal as the plaintiff had paid on his plaint:—*Held* that the defendant must pay *ad valorem* court-fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief.

The facts are fully set out in the office report.

The suit out of which this appeal has arisen was brought by the plaintiff for recovery of Rs. 2,500 on account of principal and interest on foot of a mortgage dated 4th May, 1893, by enforcement of hypothecation lien.

Musammât Moti Begam one of the defendants, defended the suit on the allegation that the property sought to be sold was conveyed to her as security for her dower debt under a prior bond executed by her deceased husband, Sayed Hasan, on 9th February, 1892, which bond was subsequently renewed by the heirs of her deceased husband on 5th August, 1910. The said defendant contended that the property could not be sold until payment of the money due to her on account of her dower debt secured by the deed of mortgage which she put up as a shield.

The suit was valued at Rs. 2,500, and a court-fee of Rs. 150, was paid thereon.

At the trial of the suit the court held that the plaintiffs' mortgage was prior and decreed the plaintiffs' suit. A decree was accordingly passed for sale of the mortgaged property under Order 34, rule 4.

* Stamp Reference in S. A. No. 872 of 1912,

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Musammat Moti Begam appealed to the lower appellate court setting up *inter alia* a plea of priority and genuineness of the mortgage held by her. The lower appellate court modified the decree of the court of first instance by extending the time for payment of the decretal amount, and in other respects the appeal was dismissed.

The appeal was valued at Rs. 2,500, and a court-fee of Rs. 150, was paid thereon. The proper valuation of the appeal was Rs. 2,519, inclusive of interest from date of suit to date fixed for payment of the decretal amount awarded in the decree appealed from and a court-fee of Rs. 155, was payable upon that valuation. Rs. 150, having been paid, there is therefore a deficiency of Rs. 5 to be made good by the defendant-appellant for the lower appellate court.

Musammat Moti Begam has preferred this second appeal and the relief sought by the appeal is that the Honourable Court will be pleased to allow the appeal and declare that the appellant has a prior charge for the amount of her dower debt and the property can be sold only subject to her charge. The appeal is valued at Rs. 2,500, and a fixed fee of Rs. 10, has been paid, apparently on the ground that a mere declaration is sought by this appeal.

I think a court-fee of Rs. 10 paid in this Court is quite inadequate. The defendant-appellant seeks by this appeal to go behind the decrees of the court below decreeing the plaintiffs' claim for sale of the mortgaged property and declining to accept the plea set up by the defendant in the courts below and repeated in this Court in a somewhat different form.

The suit was a suit for sale on a mortgage on the basis of which the courts below have passed a decree in plaintiffs' favour. The defendant comes to this Honourable Court in second appeal, and by making a prayer in the form of a declaration wants to get rid of those decrees. Assuming that the defendant-appellant does not state in distinct words that the decrees below should be set aside, but one should see what will be the consequence, if the declaration prayed, be granted. Leaving out the question that the appellant is avoiding the decree passed against her, it is evident that the property will be subjected to a double charge created by the mortgages held by the parties and out of sale proceeds the plaintiff may not get anything after meeting the prior charge of the defendant.

I am quite certain that the appellant is seeking for a declaration with a consequential relief, and, as such, she must pay *ad valorem* court-fee of Rs. 175, on the amount of her mortgage i. e., Rs. 3,000. Rs. 10 having been paid there is therefore a deficiency of Rs. 165 due from defendant-appellant for this Court.

Total deficiency due from defendant-appellant for this Court and lower appellate court is Rs. 170.

Abdul Raoof, for the appellant raised the following objection to the report of the stamp reporter.

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1. The object of the appeal is not to get rid of the decrees of the courts below nor does the appellant seek "by this appeal to go behind the decrees of the courts below decreeing the plaintiff's claim for sale of the mortgaged property" as remarked by the stamp reporter.

2. The appellant is desirous that the decree for the sale of the property may be allowed to remain intact but it may be declared that her dower debt is a prior charge. Almost a similar question arose in a case *Rup Chand v Fateh Chand*, [1911] 8 A. L. J. R., page 821, and it was decided that a court-fee of Rs. 10 on the memorandum of appeal was sufficient.

3. Having regard to the above circumstances the court-fee of Rs. 10 paid by the appellant on the memorandum of appeal is sufficient.

4. The court-fee in the court below was paid on the amount of the mortgage money under section 7 of the Court-Fees Act and was sufficient and the stamp reporter is not justified in demanding any court-fee on the amount of interest on the memorandum of appeal either in this Hon'ble Court or in the court below.

The stamp reporter replied as follows:—

In submitting the papers to you under section 5 of the Court-Fees Act, I beg to add that the ruling relied upon by the learned counsel has no application at all to this case, and that according to the long standing practice of this Court *ad valorem* court-fee is always charged on *pendente lite* interest.

I cite two cases *viz.*—(1) A. W. N. 1905, page 40; (2) A. L. J. R., Vol VI, page 155.

These are converse cases. In these cases the appellants sought to get rid of the liability imposed by the decrees appealed against while in the present case the appellant is seeking to impose a further liability on the property in suit. In the second ground of appeal the appellant distinctly assails the concurrent findings of the courts below that the right of the appellant under the deed was barred by time and extinguished for all purposes under the law. The relief sought by the appeal may be read thus.

It may be declared that the appellant has a prior charge for the amount of her dower debt and that the property can be sold only subject to her charge by reversing the concurrent findings of the courts below in so far as they effect her deed on the ground set forth in the memorandum of appeal. I most respectfully submit that a very substantial consequential relief is involved in the case and under section 7, clause IV (c), read with clause 1 of the Court-Fees Act,

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the appellant must pay *ad valorem* court-fee on the amount of her own deed amounting to Rs. 3,000.

If the appeal prevails and the Honourable Court holds that the appellant has a prior charge and directs the property to be sold subject to her prior charge the appellant may apply for sale of the property under Order 34, rule 12, and the court acting under Order 34, rule 13, may first satisfy the prior charge out of the sale proceeds and then give the balance to the plaintiff-respondent. If the law allows such a procedure the appellant will get her mortgage money on payment of Rs. 10 without bringing a fresh suit.

In any case I most humbly submit that it is manifestly a case in which the appellant is not only trying to get rid of the liability imposed upon her by the decree but to impose a further liability on the property and as such the appellant must pay *ad valorem* court-fee on the further charge thus imposed.

The Taxing officer referred the matter to the Taxing Judge with the following note :—

I have heard the learned counsel and am not convinced by his arguments. In the appeal to the District Judge, Saharanpur, full court-fee was paid. In this appeal the whole of the decree is attacked by the second ground. I agree with the stamp reporter that the full court-fee should be paid on this appeal but Mr. A. Raoof maintains that he seeks merely a declaration and that the case is one of general importance in view of the Full Bench ruling, I. L. R., 29 All., page 385. At his request I submit the question for the decision of the Hon'ble Taxing Judge.

The stamp reporter should quote the rulings on which he relies.

The following judgment was delivered by

Tudball, J.

TUDBALL, J.—The amendment has been made, court-fee must be paid on the amount of the prior charge. I allow two days to make good the deficiency.

NIZAMUDDIN SHAH (*Defendant*)

versus

BOHRA BHIM SEN (*Plaintiff*).^{*}

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January, 5.

RICHARDS,
C. J.
BANERJI, J.

Limitation Act (IX of 1908) section 6, article 181—Civil Procedure Code, (Act V. of 1908), Order XXXIV, rules 4 and 5—Suit on mortgage—Decree passed by High Court in appeal—Application for decree absolute—Limitation

An application for a decree absolute under Order 34, rule 4 of the Civil Procedure Code is beyond time when it is made more than three years after the date of the decree in appeal passed by the High Court and section 6 of the Limitation Act does not save limitation inasmuch as an application for a final decree in a mortgage suit is not an application in execution.

FIRST APPEAL from a decree of MAULVI KHWAJA ABDUL ALI, Subordinate Judge of Agra.

The facts briefly are these. A suit for sale on a mortgage was instituted in 1911, and the High Court in appeal made a decree on June 17th, 1912. On March 16th, 1916, the decree-holder made an application for a decree absolute under Order 34, rule 5 of the Civil Procedure Code against the heir of the original judgment-debtor. He objected that the property was *wagf* and the application was time-barred. The court below disallowed the objections.

Hence the appeal by the objector, defendant.

B. E. O'Connor (S. A. Raoof with him), for the appellant.

M. L. Sandal, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts connected with this appeal are as follows:—A suit was instituted in the year 1911 on foot of a mortgage. Two persons were made defendants to this suit, namely one Musammat Kadri Begam and Nizam-ud-din Shah. The usual preliminary decree was granted by the court of first instance. Two appeals were filed in the High Court which dismissed the suit against Nizam-ud-din Shah but gave a decree against Musammat Kadri Begam. The High Courts decree was dated the 17th of June, 1912. The court does not appear to have been asked to extend the time and did not do so. The present application was one made on the 16th of March, 1916. The application stated that Musammat Kadri Begam, the sole defendant, had died and that Nizam-ud-din Shah was her heir. The application was one for the

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preparation of a final decree under Order 34, rule 5. Several objections were taken by Nizam-ud-din Shah. He tried to set up that the property was *waqf*. He also objected that the application for the decree was beyond time and that Musammat Kadri Begam had died more than six months before the application was made. The court below held, and we think rightly held, that Nizam-ud-din Shah could not set up the plea that the property was *waqf*. He could only make such objections to the execution of the decree as Musammat Kadri Begam whose heir he was, could have made and she could not have raised the objection that the property was *waqf*. The learned Subordinate Judge overruled the other two objections based on limitation. This Court has held in a case like the present that the High Court's decree is the decree in respect of which an application for a final decree is to be made. It has also held that article 181, schedule I of the Limitation Act is the proper article and that time begins to run from the period for payment fixed by the High Court's decree see *Gajadhar Singh v. Kishen Jivan Lal* (1). Applying this authority to the present case time began to run from the 17th of June, 1912. The application was accordingly clearly beyond time. Section 6 of the Limitation Act will not help the plaintiff because that section only applies to the time for the institution of suits or the time for an application for the execution of the decrees. An application for a final decree in a mortgage suit is not an application for execution of a decree. It is clear therefore that the application was beyond time. It is admitted that Musammat Kadri Begam died more than six months before the application was made. Order 22, rule 4 provides that where a sole defendant dies and the right to sue survives the court on an application made in that behalf shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit. Sub-section (3) further provides that where within the time limited by law no application is made under sub-rule (1) the suit shall abate as against the deceased defendant. In the case of *Muhammad Masih-ullah Khan v. Jarao Bai* (2), it was held that a suit for redemption is still a "pending" suit after a preliminary decree has been made. It would therefore appear in the present case that there ought to have been an application to bring the heir of Musammat Kadri Begam on to the record within six months from the date of her death. Otherwise the suit would have abated. It is not however necessary for the decision of the present case that we should decide this last mentioned point.

We allow the appeal, set aside the order of the court below and dismiss the application of the respondent. The appellant will have his costs in both courts.

Appeal allowed.

(1) [1917] 15 A. L. J. R., p. 734. (2) [1915] I. L. R., 37 All., p. 22.

RAGHUNANDAN LAL AND OTHERS (*Decree-holders*)

versus

BADAN SINGH AND ANOTHER (*Judgment-debtors*)*

CIVIL

1918

January, 7.

RICHARDS,
C. J.
BANERJI, J.

*Limitation Act (IX of 1908), Sch. I, Article 182—In accordance with law—
Application complying with Civil Procedure Code (Act V of 1908), Order 21,
rule 11—Subsequent order for filing decree—Non compliance with.*

An application for execution of a decree was made on 1st March, 1916, but copy of the decree was not filed along with it. It however fulfilled all the requirements of Order XXI, rule 11 of the Code of Civil Procedure. Time was given by the court for filing the copy of the decree but it was not filed whereupon the application was struck off. Another application was filed within three years of the application of 1916 but beyond three years of the previous application. *Held* that the application when filed having complied with all the requirements of Order 21, rule 11, was an application in accordance with law and saved limitation.

EXECUTION FIRST APPEAL from a decree of MAULVI SHAMS-UD-DIN KHAN, First Additional Subordinate Judge of Aligarh.

Application for execution of a decree.

The court of first instance allowed the plea of limitation.

Decree-holders appealed.

Panna Lal, for the appellants.

A. H. C. Hamilton, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of an application for execution of a mortgage decree. An application was made on the 1st of March, 1916, and it is admitted that if this application was an application for execution “in accordance with law” the present application is within time. The application was in writing and seems to have complied with all the provisions of Order 21, rule 11. It being an application for the sale of immovable property under a mortgage decree, the provisions of Rules 12, 13 and 14 do not apply. The application however was unaccompanied by an affidavit a receipt of inspection of the registration office and copies of the *khewat* and decree. The court granted time to the applicant to file these documents and all the documents were subsequently filed except a copy of the decree. This not being done the application

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* E. F. A. No. 807 of 1917.

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was struck off on the 30th of March, 1916. The court below held that under these circumstances the application could not be deemed an application "in accordance with law," and so time would run from the previous application for execution and the present application in such case was admittedly beyond time. It seems to us that the view taken by the court below was not correct. No doubt under the provisions of Order 21, rule 11 (clause 3) the court is entitled to require the applicant to produce a certified copy of the decree, and if the applicant does not do so the court is entitled to reject the application; but the application in the present case when made fulfilled all the requirements of Rule 11, necessary to an application for sale of property mortgaged in execution of the mortgage decree. It was only after the application had been presented that the court made its order that the applicant should produce a certified copy of the decree. This being so it seems to us that the application was "in accordance with law" and saved limitation. We allow the appeal, set aside the order of the court below and remand the case to that court with directions to re-admit the application and to proceed to hear and determine the application according to law. As we think that the decree-holder ought to have had the necessary documents before the court and that the present appeal is due to his carelessness, we direct the parties to pay their own costs of this appeal.

Appeal allowed.

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NARSINGH DASS (*Objector*)
versus
DEBI PRASAD (*Decree-holder*)*

January, 10.

RICHARDS,
C. J.
BANERJI, J.

Mortgage—Suit for redemption—Mesne profits directed to be ascertained in the execution department—Time begins to run from date of such ascertainment.

In a suit for redemption of a mortgage where the decree directs the mesne profits due to the mortgagor to be ascertained in the execution department, time begins to run when the profits are so ascertained. *Muhammad Umar Jan Khan v. Zinat Begam*, 1. L. R., 25 All., 385, followed.

EXECUTION FIRST APPEAL from a decree of G. O. ALLEN Esq., Subordinate Judge of Jaunpur.

The facts were these :—

A suit for redemption was brought in which the plaintiffs, mortgagors, claimed mesne profits on the ground that the mortgage had

* E. F. A. No. 278 of 1917.

been satisfied by the usufruct of the property and that a surplus was due to them. The court passed a decree in their favour and directed that the mesne profits should be determined in the execution department. This decree was made on November 2, 1904. In 1907 the mortgagors applied to have the mesne profits ascertained, and they were finally adjudicated upon in the year 1910. The decree was executed from time to time and various sums were realised. The present application for execution was made on April 18, 1917. It was objected that the application was barred by limitation. The objection was overruled, and the application for execution was allowed.

Judgment-debtor appealed.

P. N. Banerji, for the appellant.

Gokul Prasad, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of execution proceedings. The original suit was one for redemption, the plaintiffs alleging that they were entitled to possession of the property which had been mortgaged and mesne profits on the ground that the mortgage had been discharged by the usufruct, and a surplus was due to the mortgagor. This suit resulted in a decree for possession and a direction for an enquiry as to what amount of mesne profits the plaintiffs were entitled to. The matter had been litigated up to the High Court and its decree was dated the 2nd of November, 1904. In pursuance of the decree directing the enquiry as to mesne profits an application was made for that purpose in the year 1907 and the mesne profits were finally adjudicated upon in the year 1910. The decree was then put into execution and various sums were realised from time to time. The present application for execution was made on the 18th of April, 1917. This application was met with various objections. The objection insisted upon in this Court is that the decree which must be deemed as now executed is the decree of the High Court of 1904, and that accordingly its execution is barred either by the provisions of section 230 of the Code of Civil Procedure of 1882 or by section 48 of the present Code. These two sections appear to be almost identical with one exception, namely that section 230 of the Code of 1882 speaks only of a decree for "payment of money" whilst the present Code speaks of decrees generally except as therein provided. The words of the present Code are "where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from the date of the decree sought to be executed." The argument put forward is that the date of the present decree was the 2nd

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of November 1904. If this contention be correct the application was undoubtedly time-barred and could not be granted. The matter is not now of any very general importance because in future all decrees for mesne profits in a suit for recovery of immovable property must be made by the court which grants the decree for possession of the property (the rules provide for the making of a "preliminary" and a "final" decree). The contention put forward on behalf of the respondents is that the court having directed an enquiry as to mesne profits there was no complete, or (to adopt an expression used by their Lordships of the Privy Council) there was no "operative" decree until the mesne profits were ascertained in the year 1910. This very point was considered by a Bench of this Court in the case of *Muhammad Umarjan Khan v. Zinat Begam* (1). The learned Judges in that case referred to the judgment of their Lordships of the Privy Council in *Radha Prasad Singh v. Lal Sahab Rai* (2), and also to a Full Bench decision of the Calcutta High Court. We think that we ought to follow this case which is in accordance with the practice which has been adopted by the new Code of Civil Procedure and which moreover seems to be in accordance with justice. Applying the principle laid down in these cases to the present it must be deemed that the "date" of the decree so far as it related to mesne profits is the 15th of February, 1910, when the mesne profits were for the first time ascertained. Since that date there have been numerous applications for execution which have saved limitation and made the present application within time. On the general merits we have heard the parties and see no reason to differ from the view taken by the court below. We dismiss the appeal with costs.

Appeal dismissed.

(1) [1903] I. L. R., 25 All., 385.

(2) [1890] I. L. R., 18 All., 53.

RADHEY LAL (*Defendant*)*versus*BHAWANI RAM AND ANOTHER (*Plaintiff*)*

Hindu Law—Inheritance—Widow—Unchastity in husband's life-time—Condonation by husband—Husband and wife.

CIVIL

1917

November, 5.

PIGGOTT, J.

WALSH, J.

Under the Hindu Law, a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's life-time, if the husband condoned her unchastity.

SECOND APPEAL from a decree of B. C. FORBES ESQ., Subordinate Judge of Muttra, reversing a decree of Babu Gauri Prasad, Munsif of Mahaban.

Balmakund and Bhawani Ram, by caste Brahmins, were brothers, separate in estate. Balmakund died without issue in 1911. His widow Musammat Bidya took possession of his property. In 1912 she sold a house which formed part of that property to Lala Radhey Lal. Bhawani Ram brought a suit against the widow and the vendee for possession of the house on the ground that Musammat Bidya was unchaste during the life-time of her husband and, accordingly, not entitled under the Hindu Law to inherit. An alternative relief was claimed for a declaration that the sale would not be binding on the plaintiff after the widow's death. The court of first instance found that about 1904 Musammat Bidya had run away from her husband's house with one Babu Lal and had illicit connection with him; that subsequently her husband condoned the offence and freely took her back in his house where she lived with him as his wife up to the time of his death; and that she was neither outcasted nor treated as such. It was admitted, however, that since her husband's death she had taken up an immoral life with Radhey Lal and had an illegitimate child by him. It was not found whether or not she had performed any expiatory ceremonies for the act of unchastity committed in 1904. The court held that the unchastity having been condoned by the husband she was entitled under the Hindu Law to inherit her husband's property. As to the sale consideration the court found that a part of it was for legal necessity, and gave the plaintiff a declaratory decree in accordance with that finding. Both parties appealed, and the lower appellate court while upholding all the findings of the court of first instance was of opinion that unchastity during her husband's life-time debarred Musammat Bidya from inheriting the property and that the subsequent condonation by the husband was of no avail in removing the bar. The

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lower appellate court accordingly gave the plaintiff a decree for possession. The defendant Radhey Lal appealed to the High Court.

Narain Prasad Asthana, for the appellant.—The authoritative writings of Hindu Law-givers which make any mention of chastity in connection with the widow's right to inherit are founded on the two following texts, quoted in

Mitakshara :—Colebrooke's Translation ; Ch. II, Section 1, § 6 :

“ The widow of a childless man, keeping unsullied her husband's bed and persevering in religious observances, shall present his funeral oblation and obtain his entire share. (Vridhha Manu)” and “ Let the widow succeed to her husband's wealth provided she be chaste. (Katyayana).”

Although in the chapter dealing with the subject of exclusion from inheritance the *Mitakshara* does not enumerate unchastity by itself, i. e., apart from loss of caste that may result from it, as one of the grounds of exclusion, the courts have ascribed a binding character to these two texts and have accepted them as laying down that a widow who has been leading an unchaste life at the time of her husband's death is disqualified from succeeding to her husband's property. The texts are applicable only with reference to the time when the succession opens out on the death of the husband ; so that, a widow who had inherited her husband's property would not be liable to forfeit it by reason of subsequent acts of unchastity.

Moniram Kolita v. Keri Kolitani, [1880] I. L. R., 5 Cal., 776, p. c.

Further, it has been held that a woman who at the time of her husband's death has been living a chaste life is not disqualified from inheriting by reason of her having committed at some former time an act of adultery if that act has subsequently been condoned by her husband.

Gangadhar Parappa v. Yellu, [1911] I. L. R., 36 Bom., 138 ;

Matunginee Dabee v. Jaykallee Dabee, [1869] 14 W. R., (A. O. J.), 23.

In the last mentioned case MARKBY, J., dealt exhaustively with the various texts and authorities relevant to the subject.

According to Hindu texts unchastity is of different grades. Mere adultery is less heinous and is expiable ; but if followed by conception or child-birth or by loss of caste it is regarded as of an aggravated type and as being inextinguishable. No doubt the case might be different if the adultery in question were of the latter type. Here, the woman was not only not degraded or outcasted, but restored by the husband to the full status of a wife. Different questions might have arisen if the husband had altogether repudiated or abandoned her. The subject is discussed in

Siroza : Hindu Woman's Estate : 1913 Edn., pp. 37 to 39.

S. N. Sen, for the respondents.—The texts cited by the appellant as well as other texts, for example, that of Vrihaspati, to be found in

Sacred Books of the East, Vol. 33, Ch. XXV, sec. 49, p. 377,
and that of Prajapati, quoted in

Viramitrodaya : Translated by Sastri : 1879 Edn., p. 133,
emphatically make chastity a condition precedent to the widow's succeeding to her husband's property. And there is nothing in the texts to confine the enquiry as to her chastity to the time of her husband's death; on the other hand, the texts contemplate the whole of her married life. This is in accordance with the conception of marriage in Hindu Law, and with the reasons for the widow's inheritance.

According to Hindu Shastras marriage is not a civil contract but a religious institution or sacrament; it is a holy union for the performance of religious-duties.

Golap Sastri : Hindu Law : 4th Edn., pp. 85, 88.

And one reason for the succession of the widow to her husband's property is her competence to perform the religious rites in honour of him and his ancestors. The estate of the husband may be taken only by a wife who is chaste and who is competent to perform religious ceremonies conducive to the spiritual benefit of her husband.

Viramitrodaya : Translated by Sastri : 1879 Edn., p. 133.

Unchastity which has not been expiated by the performance of purifying ceremonies renders the widow incompetent to perform religious rites for the spiritual welfare of her husband.

The wife's right to be her husband's heir is founded on her fidelity and loyalty to him. It is her devotion to the husband that constitutes her to be the half of her husband, in which capacity it is that she inherits.

Golap Sastri : Hindu Law : 4th Edn., p. 365.

Further, it is observed at page 367 of the same book that mere unchastity, when not followed by conception or loss of caste, is expiable and cannot justify exclusion from inheritance, except in the case of the wife whose case stands on a different footing altogether from that of other female relations; for, conjugal fidelity forms the foundation and is the *sine qua non* of her right of inheritance.

The case in 14 W. R., 23, relied on by the appellant has no bearing on the present case; the question for determination there was not whether unchastity committed during the husband's lifetime debarred the widow from inheriting but whether unchastity committed after the husband's death divested her of the estate that had already vested in her. The case in 1 L. R., 36 Bom., 138, is distinguishable; there, seemingly, the adultery was committed at the

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husband's express desire and the person who was setting up the unchastity of the widow was a stranger.

As to the effect of condonation by the husband, the appellant has not cited any texts of Hindu law-givers in support of the proposition that such condonation makes an unchaste wife entitled to inherit. The texts which have been cited make no such reservation in favour of an unchaste wife. From what has been submitted above it follows that condonation can make no difference to her position regarding inheritance; for it cannot make her chaste who has been unchaste. The husband may forgive her and treat her kindly and suffer her to live with him; but his condonation cannot remove her spiritual degradation and incompetence for religious rites. It is not a substitute for expiation. The stain of unchastity cannot be removed either by the husband's previous consent or by his subsequent condonation.

Where the marriage is essentially a matter of contract it rests with the husband either to divorce an erring wife and deprive her of all rights or to condone the offence and to continue or reinstate her in all her rights. As has been already submitted a Hindu marriage is different. The husband cannot divorce an unchaste wife and reduce her to absolute deprivation; nor can he by condonation restore her to her full status.

Narayan Prasad Asthana, was not heard in reply.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This is a second appeal arising out of the following state of facts. One Balmakund died as a separated Hindu; he was childless and left him surviving a widow, Musammat Bidiya. The latter performed the obsequies of her deceased husband and entered into possession of his property, including a certain house. She subsequently sold this house to one Radhey Lal. Thereupon the present suit was brought by Bhawani Ram, brother of Balmakund, impleading Musammat Bidiya and Radhey Lal as defendants. Relief was sought in the alternative, either by immediate possession over the house in question, or by way of a declaration that the alienation made would not bind the plaintiff after the death of Musammat Bidiya. The reason why the first relief was claimed was that the plaintiff alleged that Musammat Bidiya, having been unchaste during the life-time of her husband, was not his heir at all under the Hindu Law and was disentitled to succeed to any of his property, even with the limited estate of a Hindu widow. With regard to this allegation of unchastity we have concurrent findings by the courts below and these findings are binding upon us in second appeal. Musammat Bidiya was in fact guilty of unchastity during the life-time of her husband. She left her home with a paramour some eight years before her husband's death; but her husband condoned the offence, forgave his erring wife and took her back into his house, where she

lived with him as his wife during the closing years of his life and was so living at the time of his death. A point has been made in argument before us that there is no evidence of the performance on the part of Musammat Bidiya of any of the expiatory ceremonies prescribed by Hindu Law. It is true that the record is silent on this point, but on the other hand there is no allegation that Musammat Bidiya was outcasted in consequence of her conduct, or that any social penalty was inflicted on Balmakund by the members of his brotherhood on account of his having re-admitted the erring woman to the privileges of wife-hood. On these facts the court of first instance held that Musammat Bidiya had succeeded to the estate of Balmakund with the rights of a Hindu widow. The learned Munsif went into the question of consideration for the sale-deed in suit. The total consideration was Rs. 500, and the finding is that out of this Rs. 200 was spent on the due performance of ceremonies and observances in connection with the funeral rites of the deceased. To this extent therefore the alienation was justified by necessity. The learned Munsif accordingly gave the plaintiff a declaration to the effect that the sale in favour of Radhey Lal was not binding upon him after the death of the widow, except to the extent of a sum of Rs. 200. There were appeals by both parties, and that is the reason why we have two appeals now before us, although in this Court both of them are preferred by the defendant, Radhey Lal. The learned Subordinate Judge has not dissented from the court of first instance on any finding of fact, but he had taken a different view of the law applicable to those facts. He holds that the proved unchastity of Musammat Bidiya disentitled her to inherit the estate of her deceased husband, and that this disqualification is in no way affected by the husband's condonation or forgiveness. In the appeals now before us Radhey Lal only asks for the restoration of the decree passed by the court of first instance, and we have nothing to consider except the question of law on which the two courts below have differed. There is no clear authority of this Court on the point, but there is a reported decision of the Bombay High Court which seems to go the whole length in favour of the appellant. This is the case of *Gangadhar v. Yellu* (1). It has been contended before us on behalf of the respondents that the facts of this case are distinguishable from those now before us, and a similar contention evidently found favour in the lower appellate court. The suggestion is that the two cases are to be distinguished on two grounds, (1), because in the Bombay case the allegation of the plaintiff was that the unchastity there alleged had been committed during the husband's life-time at his express desire; secondly, that the alienation in the present case is being contested, not by a stranger, but by a brother of the deceased. There is something to be said in support of both these contentions, the report of the Bombay case being very brief and not making it clear beyond dis-

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pute what was the precise state of facts on which the court proceeded. It seems clear however that the argument of the learned Judges, in which reference is made to a charge of unchastity brought forward by mere outsiders, cannot be regarded as affecting the decision in the sense contended for on behalf of the plaintiff respondent in the present case. In the first place it is by no means clear that the expression "mere outsiders" as used in the judgment of BEAMAN, J. means anything more than persons other than the husband or the wife. Apart from this, the learned Judge evidently conceived himself to be laying down a general principle of law which, unless affirmed, would leave it open to any person interested in the matter to deny on some future occasion the rights of a widow who had peacefully succeeded to the possession of her late husband's property, by raking up some ancient scandal long antecedent to the date on which the inheritance opened.

As regards the general question of condonation by the husband, it seems clear that the Bombay decision does not mean to lay down any distinction between an act of adultery committed with the previous knowledge and consent of the husband and a similar act committed behind his back, but covered by his condonation and forgiveness. Nor does it seem possible to lay down any valid distinction upon these lines. There is one other reported authority on the point which deserves careful consideration, namely *Matungnee Dabee v. Joy Kallee Dabee* (1). The actual point for decision in that case was the much controverted question, set at rest later on by the decision of their Lordships of the Privy Council in *Moni Ram Kolita v. Keri Kolitani* (2), as to the consequences of unchastity on the part of a Hindu widow after the estate had opened in her favour. The learned Judge however found it necessary to enter into an elaborate examination of the entire question and the result is that we find propositions of law laid down which have a direct bearing on the question now before us. Mr. Justice MARKBY quotes an older case of the same court as authority for the proposition that even adultery in the husband's life-time is not in itself necessarily sufficient to disentitle the wife to inherit. He goes on to explain his meaning by saying that, in his opinion, it is not the immoral act alone which in any case destroys the right, but the loss of caste or degradation which may follow thereupon. A more important passage of the same judgment is to be found at page 29 of the report, where the learned Judge quotes with approval the opinion of Babu Shama Charan Sircar, to the effect that, "the woman who is adulterous at the time when the succession opened, or who previously committed adultery which remained unexpiated by penance, forfeits her right to inheritance and maintenance, and not she who was previously adulterous but ceased to be so and co-habited with her husband or expiated, or was about to expiate, the sin by penance

(1) [1869] 14 W. R. (A. O. J.), 28. (2) [1880] 1. L. R., 5 Cal., p. 776.

before the time of succession." The decision of MR. JUSTICE MARKBY was appealed against and we have in the same report the decision of a Bench of two Judges who decided that appeal. PEACOCK, C. J. again referred to the words already quoted from Babu Shama Charan Sircar's work, and quoted them with approval as embodying a correct statement of law on the point. These opinions seem sufficiently to cover the state of facts now before us. It may be noted further that in the Privy Council case to which reference has already been made the learned Judges reproduced, with an expression of their approval, a portion of the decision of Sir BARNES PEACOCK above referred to. In the portion so quoted stress is laid upon the practical inconvenience which might result if it were held that any act of unchastity on the part of the widow, committed after the succession had opened in her favour, were to be treated as divesting her of the estate. It is obvious that a similar argument from convenience may be relied on in support of the appeal now before us; for a decision against the appellant would involve this consequence, that a Hindu widow who had been living in peace and harmony with her husband at the time of his death, and had obtained possession of his estate, might find her possession called in question years afterwards on the evidence, it may be, of a spiteful or dishonest servant, on the strength of acts alleged to have been committed by her many years prior to her husband's death. Their Lordships approved of the remark that, although inconvenience would not be a ground for deciding a case like the present if the law were clear upon the subject, it is an argument which may fairly be adduced under certain circumstances. The arguments based upon ancient texts which have been relied upon on behalf of the respondent in the present case are in substance the same arguments which were considered by their Lordships of the Privy Council, and rejected as unsatisfactory, when the question before them was whether a Hindu widow could be divested of the estate of her late husband by reason of acts of unchastity committed during her widowhood. On the authorities therefore, and on general grounds of public policy and convenience, we think that this appeal ought to be allowed. We set aside both the decrees of the lower appellate court and restore the decree passed by the court of first instance. The order of that court as to costs will stand, but the defendant Radhey Lal will get his costs on the appeal filed by Bhawani Ram in the lower appellate court and also his costs in this Court. On the other hand Radhey Lal will remain liable for his costs in the appeal filed by him in the lower appellate court.

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WALSH, J.SALAMAT-UL-ZAMINI BEGAM (*Defendant*)*versus*MASHA ALLA KHAN AND OTHERS (*Plaintiffs*) *

Transfer of Property Act (IV of 1882), sections 54, 48—Exchange of property valued over Rs. 100—Document unregistered—Bargain acted upon binding upon parties—Part performance.

An exchange of property, valued over Rs. 100, is binding upon the parties thereto when the bargain has been acted upon, even though the exchange is not in writing and is unregistered.

SECOND APPEAL from a decree of PANDIT DURGA DATT JOSHI, First Additional Judge of Aligarh, reversing a decree of Babu Kauleshar Nath Rai, Munsif of Bulandshahr.

By a registered sale-deed dated 14th August, 1905, the appellant sold the zemindary property in suit together with other property to Muhammad Ali Jan Khan. On the same date Muhammad Ali Jan Khan sold to the appellant by means of a registered sale-deed a certain shop together with some other property. A few days afterwards an exchange took place between the parties by a parole agreement and by virtue of it the zemindary property in suit and the shop went back to their respective former owners. No written instrument of exchange was executed. Possession of the property in suit remained all along with the appellant; Muhammad Ali Jan Khan had effected mutation in his favour of the other property purchased by him under the deed of 14th August, 1905, but not of the property in suit. The shop remained in the possession of Muhammad Ali Jan Khan, and after his death in 1910, was sold on 21st February, 1911, by his heirs. On 4th August, 1915, the heirs of Muhammad Ali Jan Khan brought a suit for recovery of possession of the property in suit on the basis of the sale-deed of 14th August, 1905. The court of first instance held that the transaction of exchange set up by the defence was proved, and the suit was dismissed. The lower appellate court held that as a matter of fact the exchange had taken place but that as it had not been effected by a registered instrument the exchange was invalid, and on that finding decreed the suit. The appeal to the High Court came up before a single Judge who remanded an issue as to the valuation of the property in suit and of the shop, respectively, at the time of the sale-deeds of 1905. The finding returned was to the effect that the value of each was over Rs. 100. The case was then referred to a Bench of two Judges.

Iqbal Ahmad, for the appellant.—Section 118 of the Transfer of Property Act read with section 54 of that Act no doubt requires that an exchange of properties of the value of Rs. 100 or upwards

* S. A. No. 442 of 1916.

must be made by a registered instrument. But the absence of a registered instrument would not necessarily entitle the plaintiffs to a decree. In this case according to the findings arrived at by the courts below the arrangement was carried out by the parties and complete effect was given to it. The acts of the parties based on and in accordance with the arrangement arrived at between them would cure the defect of want of a registered deed of exchange. Equity would not allow a statute to be made an instrument of fraud.

Walsbury: Laws of England, Vol. 13, p. 75.

Equity will support a transaction though clothed imperfectly in legal forms where the agreement has been acted upon by the parties.

Mahomed Musu v. Aghore Kumar, [1914] I L. R., 42 Cal., 801, P. C.

I am also supported by the case of

Jhanphu v. Kutramani, [1917] 15 A. L. J. R., 761.

Further, the plaintiffs are not entitled to the relief claimed, because having transferred the shop to a person who is a *bona fide* purchaser without notice, they are not in a position to restore to the defendant that for which the property in suit was exchanged; for, he who seeks equity must do equity.

S. M. Sulaiman, for the respondents.—The provisions of section 54 of the Transfer of Property Act are imperative. Consequently, the exchange set up by the defendant was not effective in law and the proprietary right in the share in dispute continues in the plaintiffs and did not pass to the defendant. The plaintiffs are therefore entitled to a decree for possession of the property. Where the words of a statute are clear and unambiguous no equitable considerations ought to be allowed to modify them. To hold that an oral agreement, acted upon by the parties can take the place of a registered instrument as required by section 54, would render that section nugatory. It will also lead to insecurity of title and open the door to perjury and fraud.

Kurri Veerareddi v. Kurri Bapireddi, [1906] I. L. R., 29 Mad., 336, F.B.;

Chidambara v. Ramasami, [1913] I. L. R., 38 Mad., 519.

The principle that equity considers that as done which ought to have been done has no application if in the result it defeats the express provisions of the law.

Sunsuddin v. Abdul Husein, [1906] I. L. R., 31 Bom., 165.

Iqbal Ahmad, was heard in reply.

The following judgments were delivered.

WALSH, J.—The facts of this case as found in both courts are simple, but the question of law is one of some importance. By a duly registered sale-deed, the defendant, Musammat Salamatul-Zamini, about the 14th August, 1905, sold and transferred to one Muhammad Ali Jan Khan (*inter alia*) the two and half biswaasis of land now in suit. On the same date Muhammad

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Ali Jan Khan by another duly registered sale-deed, sold and transferred to Musammat Salamat-ul-Zamini, (*inter alia*) a certain shop in Bulandshahr. The value of the shop on the said date has been found to have been Rs. 125, and the value of the land now in suit has been found to have been Rs. 100. Shortly after these two sale-deeds, Muhammad Ali Jan Khan and the defendant verbally agreed to re-transfer or to exchange these two properties which each had thus purchased from the other, and each remained in possession of what had originally been transferred by the deeds. Neither purchaser had any property in the district in which the property originally transferred to him by his deed was situate, and, although it is not found and therefore is not material to any point we have to decide, it is probable that the original inclusion of the two properties in the deeds of sale was only with the object of defeating, or technically complying with, the Registration Law. From the date of the agreement to re-transfer, or exchange, the two remained in possession of their original properties, and treated them as their own. Muhammad Ali Jan Khan was a Mukhtar. He obtained mutation of the other properties purchased by him from the lady, but not of the land now in suit. He died about five years afterwards, and at the date of his death the shop which he had agreed to take back in exchange, being still in his possession, was treated as part of his inheritance, and in February, 1911, was sold by his heirs to his widow, with the rest of his property in lieu of dower. In fact every thing was done as regards the property in suit, and the shop which it was agreed to exchange for it, as though the exchange had been formally carried out, as it ought to have been, by a registered instrument under sections 118 and 54 of the Transfer of Property Act (IV of 1882), except that there was no writing of any kind on either side. The plaintiffs, who are some of the heirs of Muhammad Ali Jan Khan and who sue in that capacity, now claim the land originally sold and transferred to him by the said deed. Both courts below are in agreement as to the facts above stated. The first court dismissed the suit. The lower appellate court reversed this decision upon the ground that the exchange was "not valid," or in other words, that there was no transfer by a registered instrument and no delivery of possession. The question which we have to decide is whether under the general principles of law in this country a transaction of this kind, so acted upon by the parties, has become effectually binding upon them, in spite of the fact that the provisions of sections 54 and 118 have not been complied with.

This question turns upon the further question whether the *dicta* of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (1), apply to this and other similar cases. In England if the question arose under the analogous case of the Statute of Frauds, and the contention was that no interest in the land had passed because the contract not being in writing did not comply with the provisions of

(1) [1914] I. L. R., 42 Cal., 817, 818.

the statute, the plaintiff's position would be quite untenable. As to this the law has been well settled since *Maddison v. Alderson* (1), where LORD SELBORNE with the concurrence of the other members of their Lordships' House said that in a suit founded on performance, or part performance, the defendant (in this case the plaintiff) is "really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the Statute of Frauds) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

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The case in the Privy Council above mentioned arose out of some mortgage transactions of 1848, and 1871, respectively. Differences arose between the parties. A suit was brought and a compromise was reached by which the mortgage debts were to be paid off and the properties were to be legally conveyed by the mortgagor to the parties entitled to them in certain shares. A decree was made that the suit was decided in terms of the compromise and struck off. No conveyances were executed in completion of the contract of compromise, nor was the compromise registered. But it was acted upon by the parties for a period of from 30 to 40 years. The Privy Council held that though the compromise and decree taken together might be considered defective or inchoate as a validly concluded agreement, the acts of the parties had been such, as to supply all defects. It was strongly contended that the document of compromise being unregistered was inadmissible, that oral evidence was inadmissible, that there had been no transfer, and that the acts of the parties conferred no title. In the judgment of their Lordships, delivered by LORD SHAW, it was pointed out that at that date no written conveyance was required by the law of India, and that the Transfer of Property Act, 1882, did not apply. But "in view of the argument strongly pressed upon them their Lordships think it right to say," that "the laws of India and of England follow the same rule," and following the principle of *Maddison v. Alderson* (supra) "equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon."

In my opinion this is an authoritative statement of the law binding upon the courts in India, and applicable to the case, as the facts have been found, now before us. Its binding effect can only be questioned in so far as it can be shown that there is some express statutory enactment inconsistent with it, and not present to their Lordships' mind. In my opinion section 54 is not inconsistent with it, and, moreover, it must have been present to their Lordships' mind. The defendant in this case is not relying upon a document of transfer, but upon the complete performance of a contract for sale by exchange.

(1) [1883] 8 A. C., 467

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Of the most recent authorities in this country, in which this question of principle has arisen, there are some in which the view of the Privy Council has clearly been acted upon, and there are none which suggest any special feature of the law of India which would appear likely to have affected their Lordships' opinion if their attention had been drawn to it.

In *Sumsuddin v. Abdul Husain* (1), JENKINS, C. J., said that the chance of an heir-apparent succeeding was not transferable, and that it could only be bound, if at all, by the application of the principles of equity, and that they could not be applied because *the property in question belonged to a category, the transfer of which was prohibited altogether.*

In *Naralia v. Mansukhlram* (2), JENKINS, C. J., had given effect to the principle by holding that a judgment-debtor who had sold certain land and delivered possession thereof and been paid the purchase money, had no attachable interest although there had been no transfer by him within the meaning of section 54. It follows logically from this decision that if he had lost all interest in the land, his purchaser must have acquired it though there was no transfer.

This case, and the case of *Ram Baksh v. Muglani Khangam* (3), to which reference will be made hereafter, were definitely said not to be good law in the Madras Presidency by the court which decided *Chedambara v. Ramasami* (4), following the so-called Full Bench decision in Madras in *Kurri Veerareddi v. Kurri Bajireddi* (5). This latter decision was the authority most relied upon by the respondent in the present appeal. It would, therefore, appear that there is a conflict of opinion, upon the application of the principles above stated to cases in India, between the Madras and the Allahabad decisions, and the question really arises whether the more recent pronouncement of the Privy Council has solved this doubt.

The Madras case was decided by the Chief Justice, and two Judges. The Chief Justice evidently entertained considerable doubt. In that case there was an agreement for sale, followed by delivery of possession to the purchaser and payment of the price. It was held that section 54 was imperative, and, unless complied with, equity could not uphold the transaction. The Chief Justice referred to the considerations of public policy, namely the intention of the legislature to minimise the chances of litigation, and the opportunity for perjury. These are equally applicable, if relevant, to the English Statute of frauds. It is not easy to follow the distinction drawn by the learned Chief Justice between the English and the Indian law. He takes the view that the courts in India are under no obligation to engraft the English decisions upon the Transfer of Property Act, and discusses the principles of the interpretation of statutes. But the question is not one of the interpretation of the statute. There

(1) [1906] I. L. R., 31 Bom., 165.

(2) [1900] I. L. R., 24 Bom., 400.

(3) [1904] I. L. R., 26 All., 266.

(4) [1913] I. L. R., 38 Mad., 519.

(5) [1906] I. L. R., 29 Mad., 336.

is admittedly no "transfer" within the meaning of the section. But the section does not *prohibit* the vesting of title to or interest in property unless effected by a formal transfer. The cases, which have dealt with the matter upon the principle that there can be no estoppel in the case of a statutory prohibition, are open to the same criticism, as the case of the defendant before us does not rest upon the doctrine of estoppel as applied to an admittedly invalid transfer. The learned Chief Justice points out that at that date (1904) the Indian authorities were in conflict, and it is not therefore profitable to examine them in detail. There are however, four cases in which the principle now contended for on behalf of the appellant has been applied by this High Court, *Begam v. Muhammad Yakub* (1), by a Bench of six Judges (of whom one dissented), *vide* the judgment of EDGE, C. J., on p. 350; *Ram Baksh v. Mughlani* (2), in which it was held that section 54 did not apply; *Muhammad Talib v. Inayat* (3), in which the section was not referred to, and the recent case of *Jhamphu v. Kutramani* (4), decided by my brother TUDBALL and myself. In the latter case there had been a relinquishment by the acts of the parties, which had originally been attempted to be carried out by an unregistered document, and adverse possession for the statutory period. The question was whether the unregistered document was admissible to explain the possession. The same point had been taken in the Privy Council in *Mahomed Musa v. Aghore*. Admittedly there had been no transfer, but we held that the document was admissible, and that the evidence supported the title of the party in whose favour the informal relinquishment had been made and the statute of limitation had run. I adhere to the view I then expressed that the judgment of the Privy Council as to the law in India was decisive upon the point.

Although it is not customary to refer to the works of living authors, I observe that in discussing this question Dr. Gour in the fourth edition of the "Law of Transfer" Vol. 1, p. 602, takes the other view, and referring to *Naralia v. Mansukhlram* (5), and *Ram Baksh v. Mughlani* (6), says that 'these cases are founded on no intelligible principle and if accepted would have the effect of over-riding the clear provisions of the law.' This is rather severe on the Privy Council, and is supported in the main by reliance upon the Madras cases cited above. However, in the addenda to Vol. III contained in the reprint which brings the citation of cases up to 1916, he refers to his notes above-mentioned and says, "But see *Mahomed Musa v. Aghore*," indicating that in his view the Privy Council has in that case decided otherwise.

From all these authorities it appears that there is nothing inconsistent in India with the rule of law in England on this matter,

(1) [1894] I. L. R., 16 All., 344. (2) [1903] I. L. R., 26 All., 266.

(3) [1911] I. L. R., 38 All., 623. (4) [1917] 15 A. L. J. R., 761.

(5) [1900] I. L. R., 24 Bom., 400. (6) [1904] I. L. R., 26 All., 266.

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unless it be section 54 of the Transfer of Property Act, and that this difficulty has been removed by the *dicta* of the Privy Council which are in my opinion binding upon us.

The question of limitation was not raised in the case in the Privy Council, and is not raised in the suit now under appeal. It is clear, however, from the judgment delivered by LORD SHAW that he was dealing with the period which had elapsed only as one of the details of the history, and not as a matter of principle.

This view is not inconsistent with the decision of the Privy Council in *Maung Shwe Goh v. Maung Inn* (1). Even accepting the *dictum* in the head-note, which however goes far beyond what was said by the LORD CHANCELLOR, the point in that case was, what were the rights of the parties under a decree for specific performance of a contract which had not been performed. Under an inchoate contract which remains unperformed in India, section 54 of the Transfer of Property Act prevents the purchaser being treated as the owner in equity of the estate as he would be treated in England.

In my opinion *Mahomed Musa v. Aghore Kumar Ganguli* (2) in effect over-rules *Kurri Veerareddi v. Kurri Baquireddi* (3), and is decisive of this appeal.

Piggott, J.

PIGGOTT, J.—I concur in the proposed order. I feel it incumbent on me to say that I am unable to apply the *dicta* of their Lordships of the Privy Council in *Mahomed Musa v. Aghore Kumar Ganguli* (4), to the facts of the present case so as to hold that there has been a valid transfer of the property in suit by way of exchange. Their Lordships were dealing with a suit to redeem a mortgage, and they held that the mortgage had long before been extinguished by act of parties. It is nowhere laid down in the Transfer of Property Act (IV of 1882) that redemption of a mortgage can be effected only by a registered instrument. Where the statute requires that a particular kind of transfer (as for instance a mortgage) shall be effected by a particular kind of instrument, it seems to me that their Lordships have always enforced such a provision with great stringency, as for instance in the importance attached to the word "attested" in section 59 of the Transfer of Property Act.

I think therefore that on the facts as found I must regard the plaintiffs as being in law the owners of the property in suit. It does not follow that they are entitled to present possession as against the defendants, who are obviously not mere trespassers. There has been a contract of exchange, partly executed by what must be regarded as equivalent to mutual delivery of possession; all that was required for complete execution of the contract was a registered instrument. There is no reason why the law should not hold the parties

(1) [1917] I. L. R., 44 Cal., 542. (2) [1914] I. L. R., 42 Cal., 817.

(3) [1906] I. L. R., 29 Mad., 336. (4) [1915] I. L. R., 42 Cal., 801.

bound by the contract so far as it was carried into effect and by the equities arising out of their own acts.

The contract between the parties clearly involved this agreement, that the defendants should not be disturbed in their possession of the Jafarabad property so long as Muhammad Ali Jan Khan or his successors retained the Bulandshahr shop, dealt with it as their own and did not make it over to the defendants. I do not think the plaintiffs are by law estopped from calling themselves the owners of the Jafarabad property; but I think they are bound, under the circumstances, by an agreement which the court will recognize and enforce, not to eject the defendants from the same. The case for the present defendants is stronger than that which found favour with a Bench of this Court in *Ram Baksh v. Mughlani Khanam* (2). I agree therefore that the decree of the lower appellate court must be set aside and that of the court of first instance restored. The plaintiffs will pay all costs throughout.

BY THE COURT.—The order of the Court is that this appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance is restored. The plaintiffs will pay all costs throughout.

[But see observations in *Maung Shwe Goh v. Maung Inn*, I. L. R., 44 Cal., 542, 552, P. O. Ed.].

B. K. M.

Appeal allowed.

(1) [1904] I. L. R., 23 All., 266.

DEBI

versus

EMPEROR *

Penal Code, (Act XLV of 1860), section 182—Defamation—Petition of resignation to Collector as officer-in-charge of the Court of Wards—False information.

Where a person submitted a petition of resignation to a Collector as the officer-in-charge of the Court of Wards and such petition contained an untrue account of an affray and defamatory statements and the District Magistrate ordered the petitioner's prosecution for giving false information under section 182, Indian Penal Code *held* that the ingredients of an offence under that section were wanting and the conviction was bad.

CRIMINAL REVISION from an order of SOTI RAGHUBANSA LAL, Sessions Judge of Farrukhabad.

Satya Chandra Mukerji, for the applicant.

R. Malcomson, (Assistant Government Advocate), for the Crown.

* Cr. Rev. No. 889 of 1917.

CIVIL

1917

SALAMAT-UL-
ZAMINI

v.
MASHA ALLA
KHAN.

Piggott, J.

CRIMINAL

1918

January, 4.

Piggott, J.

CRIMINAL

1918-

DEBI

v.

EMPEROR.

Piggott, J.

The following judgment was delivered by

PIGGOTT, J.—I take what seem to me the essential facts of this case from the judgment of the learned Sessions Judge. The applicant Debi, being at the time a peon in the service of the Court of Wards, had a quarrel with a youth of the name of Shiam Deo, brother of one Suraj Bali, zilladar in the service of the Court of Wards. The quarrel resulted in a scuffle and came to the notice of Mrs. Thomas, wife of the Special Manager locally employed by the Court of Wards. She interposed to stop the scuffle and later on Suraj Bali appears to have complained to the Special Manager, Mr Thomas. Under these circumstances Devi addressed to the Collector, the officer in charge of the Court of Wards, a petition in which he requested to be allowed to resign his employment. In that petition he embodied his own version of his affray with Suraj Bali's brother; and I have no doubt that in so doing he departed from the truth and made statements defamatory to Mrs. Thomas. The Collector seems to have felt it incumbent on him to make some enquiry into the matter and to record the statements on oath of Debi and Shiam Deo. The Sessions Judge says that this was done by the Collector of the district in the exercise of his powers as District Magistrate, but this I hesitate to believe. The petition addressed to the Collector by Devi did not amount to a complaint and the criminal offence therein referred to was not a cognisable one. At any rate, the result was that the Collector satisfied himself that the allegations made in Devi's petition against Mrs Thomas were untrue and he ordered his prosecution for committing an offence punishable under section 182 of the Indian Penal Code. I have to consider in revision whether the petition presented by Devi supplied the necessary ingredients for such an offence. I wish to make it quite clear that, if that petition had contained any allegations against any person employed as a subordinate under the orders of the Collector of the district as Manager of the Court of Wards, I should have been prepared to hold that the making of such allegations under the circumstances amounted to an offence under section 182 of the Indian Penal Code. The presumption would be that the person complaining to a superior officer of misconduct on the part of his subordinate intended that the superior officer in question should use his powers to the injury or annoyance of the person complained of, or at any rate knew that such a result was likely. I do not think however that anything in Devi's petition can be construed as an allegation either against Mr. Thomas, or against Suraj Bali. Reading this petition in connection with the facts as found by the Sessions Judge, it seems to me that Devi's object was, firstly, to get his resignation accepted at once, so that he might leave the neighbourhood, and secondly, to place on record a document containing a distorted version of what had actually happened, in order to discount beforehand any proceeding which might be instituted against him by Suraj Bali or his

brother in a Criminal Court, or by Mr. Thomas, as Special Manager of the Court of Wards, for his dismissal from his employment. I certainly do not think that he intended that the Collector should use his powers as Manager of the Court of Wards so as to cause injury or annoyance to Mrs. Thomas or to Suraj Bali's brother, nor am I prepared to infer that he knew it to be likely that such a result would follow. I do not think the conviction can be affirmed, I set aside the conviction and acquit Debi of the offence and direct that the fine, if paid, be refunded.

CRIMINAL

1918

DEBI

v.

EMPEROB

Piggott, J.

Conviction quashed.

DEVI PRASAD (*Applicant*)

versus

J. A. H. LEWIS (*Opposite-party*)*

CIVIL

1918

Jan., 18.

RAFIQ, J.

Provincial Insolvency Act (III of 1907), section 16 (2), cl. (a)—Code of Civil Procedure (Act V of 1908), section 60—Application praying half salary of insolvent be attached rejected—Rejection of application illegal.

When an appropriation of the income of an insolvent is made for the benefit of creditors, the court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance according to his position in life. The statute-law of this country fixes this amount by section 60 of the Code of Civil Procedure read with section 16, Sub-section (2) of the Provincial Insolvency Act. Consequently an order, rejecting a creditor's application praying for the attachment of half the salary of an insolvent on the mere ground that his pay is not large enough to allow half of it being attached, is illegal.

Ram Chandra Neogi v. Shyama Charan Bose, [1913] 18 C. W. N., 1052 and *Tulsi Lal v. H. Grisham*, 38 I. C., 410, followed.

CIVIL REVISION from an order of H. S. Ross Esqr., Officiating District Judge of Cawnpore.

Lalit Mohan Banerji, for the applicant.

The Opposite party was not represented.

The following judgment was delivered by

RAFIQ, J.—This is an application in revision by one of the creditors calling in question the order of the court below dismissing his application made under section 16 of Act III of 1907. It appears that the Opposite-party, J. A. H. Lewis, was declared an insolvent on the 21st of February, 1910, by the Small Cause Court Judge of

Rafiq, J.

* Civ. Rev. No 10 of 1917.

CIVIL

1918

DEVI PRASAD

v.

J. A. H.

LEWIS.

Rafiq, J.

Cawnpore. No receiver was appointed by the court to take possession of the property of the insolvent. The reason probably was that there was hardly any property to be made over; only a few *Mondhas*, I am told were available at the time. The insolvent left Cawnpore soon after. The applicant says that in 1916 when he went to Calcutta he learnt that the insolvent was employed in the Government Printing Press. On his return from Calcutta the applicant presented a petition to the Court of Small Causes, Cawnpore, on the 15th of April, 1916, praying that half the pay of the insolvent be attached and realised for the benefit of the creditors. A notice seems to have been issued on the application, to which the insolvent replied by a letter to the court dated the 15th May, 1916. In that letter he explained that he was a European, had a large family, was living in Calcutta and his pay was not sufficiently large to admit of half of it being attached. The learned Judge, without fixing a date for hearing and giving notice to the creditor, rejected the application on the 20th of May, 1916, saying that the creditor was absent, the insolvent was a European and his pay was not large enough that half of it should be attached. The applicant went in appeal to the District Judge who upheld the order of the first court. In his application for revision to this Court the applicant contends and I think rightly, that the reasons given by the courts below are no reasons at all for rejecting his application made under section 15 of Act III of 1907. When an appropriation of the income of an insolvent is made for the benefit of the creditors, the court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion of income for proper maintenance of the insolvent according to his position in life. The statute-law, in this country, has however fixed this proportion by section 60 of the Civil Procedure Code, read with section 16, subsection 2 of Act III of 1907. There is no rule under which such an order as passed by the courts below can be passed or upheld. I may here mention two cases which bear out the contention of the applicant, *Ram Chandra Neogi v. Shyama Charan Bose* ⁽¹⁾ and *Tulsi Lal v. H. Grisham* ⁽²⁾.

I therefore set aside the order of the courts below and direct the court of first instance to attach half the pay of the insolvent. Costs are allowed to the applicant

Application allowed.

(1) [1913] 18 C. W. N., 1052.

(2) 38 I. C., 410.

GHULAM MUHI-UD-DIN KHAN AND ANOTHER

(Decree-holders)

versus

DAMBAR SINGH (Objector)*

CIVIL

1918

January, 7.

RICHARDS,
O. J.
BANERJI, J.

Limitation Act (IX of 1908), art. 182, Expl. 1—Joint decree against several persons—Appeal by two out of such—Appeal dismissed with costs—Execution of decree for appellate costs against them—No further application within 3 years—Limitation.

S obtained a decree for possession and costs against *K, D* and certain other persons jointly. Out of these defendants *K* and *D* appealed to the High Court and their appeal was dismissed with costs. *D* held a decree against *S* and in execution thereof he attached the decree in favour of *S* against himself and his co judgment-debtors. *D* executed the decree from time to time and realised various sums, and eventually it was held that the first court's decree had been satisfied. *S* had applied for execution of his decree for costs obtained in the High Court in 1907. In this interval *S* had been adjudicated an insolvent and the official assignee transferred the decree in favour of *S* to *M*. *M* applied for execution on foot of the High Court's decree:—*Held* that the application was time-barred having been made more than three years from 1907.

EXECUTION FIRST APPEAL from a decree of Mr. S. SHAMS-UD-DIN KHAN, First Additional Subordinate Judge of Aligarh.

Application for execution of a decree under Order 21, rule 16, Civil Procedure Code.

Sri Kishen Das obtained a decree for possession and costs (Rs. 887-4) against Karan Singh, Dambar Singh, Ram Ohander Singh and others, jointly on August 6th, 1902. Two out of these defendants, viz., Karan Singh, and Dambar Singh, appealed to the High Court and their appeal was dismissed with costs (Rs. 1,229-8-3) awarded to Sri Kishen Das.

Dambar Singh had obtained a decree against Sri Kishen Das and he attached the decree of Sri Kishen Das mentioned above. As attaching-creditor he applied to execute the decree of Sri Kishen Das and on two occasions realised sums of money aggregating a little over

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SINGH.

Rs. 1,000. He again applied on September 6th, 1910, to realise the balance by attachment of certain property belonging to Ram Chander Singh defendant, who objected that the sum already realised had satisfied the decree for costs of the first court and he was not liable for the costs of the High Court. His objection was allowed, it being held by the court that the decree for costs of the first court had been satisfied and that the decree which Dambar Singh was executing was the High Court's decree for costs under which Ram Chander Singh was not liable. This decision was affirmed on appeal by the High Court in E. F. A. 49 of 1912 on 7th May, 1912.

Sri Kishen Das was subsequently declared an insolvent and the Official Assignee Bombay was appointed Receiver. A question arose in the course of execution as to whether after the insolvency of Sri Kishen Das, Dambar Singh by virtue of his attachment was entitled to execute the decree or whether by virtue of the insolvency the decree vested in the official assignee and it was ultimately decided by the High Court on 10th November, 1917, that the effect of the insolvency was to vest the decree in the assignee and that Dambar Singh could not execute the decree. This decision is reported in

Dambar Singh v. Munawar Ali Khan, [1917] 15 A. L. J. R., 877.

The official assignee transferred the decree to Chaudri Ghulam Muhi-ud-din who applied for substitution of his name to execute the decree under Order 21, rule 16. The court below dismissed the application as barred by limitation.

Chaudri Ghulam Muhiuddin appealed.

Panna Lal, for the appellant.

Although Dambar Singh was one of the judgment-debtors of Sri Kishen Das, he was competent to attach the decree in execution of his own decree against Sri Kishen. This had been held in respect of this very decree in an earlier execution.

Kalyan Singh v. Dambar Singh, [1909] 6 A. L. J. R., 564

Consequently any applications for execution made by Dambar Singh would enure to the benefit of the present applicant. It is true that Dambar Singh did not take out execution against himself, but execution taken out against any judgment-debtor would save time against all the judgment-debtors, *vide* Limitation Act, article 182, Explanation I.

The present application against Dambar Singh was therefore within time under article 182, clause 5.

Peary Lal Banerji, for the respondent.

As the result of the courts decision in 1912, the decree for costs of the first court had been satisfied prior to 6th September, 1910, and the application which was made on that day was therefore one to execute the decree for costs of the High Court and any subsequent application that was made was also therefore one to execute the High Court's decree for costs. As far as this decree was concerned, it was not against all the defendants jointly, but only against two, Karan Singh and Dambar Singh. There had been no application to execute this decree either against Karan Singh or Dambar Singh and any application made to execute this decree against persons other than these would not save time against Dambar Singh, as the persons against whom execution was sought were *not jointly liable* with Dambar Singh.

An application for execution against one of several judgment-debtors only saves time against the others; if the former is jointly liable with the others, *vide* Explanation 1, Article 182.

Panna Lal, was heard in reply.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts of this case are somewhat complicated but they can be shortly stated. One Sri Kishen Das obtained a decree. The decree was against one Dambar Singh, Karan Singh and certain other persons. The decree awarded possession of certain property and costs against all the judgment-debtors jointly. Karan Singh and Dambar Singh alone appealed to the High Court, which dismissed the appeal with costs against Dambar Singh and Karan Singh. This happened on the 1st of December, 1904. Dambar Singh had a decree against Sri Kishen Das, and he attached either the first court's decree, or both the first court's decree and the decree made by the High Court (it is not quite clear which) in execution of his decree against Sri Kishen Das. From time to time Dambar Singh sought execution against all the judgment-debtors other than himself and Karan Singh. From time to time he realised money as the result of these applications for execution and eventually it was held that he had realised the amount awarded by the first court's decree. No mutation appears ever to have been made specifically of the decree of the High Court, and it would almost seem as if it was the first court's decree, and not the High Court's decree which was being executed by Dambar Singh. So far as the High Court's decree is concerned the last application for execution previous to the present one was in the year 1907, Sri Kishen Das eventually became insolvent and the present applicants were purchasers at public auction of the assets of Sri Kishen Das including the decree or decrees to which we have referred above.

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Richards,
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C. J.

The present applicant is therefore entitled, (provided he is within time,) to execute the decrees which Sri Kishen Das obtained, and the present application was against Dambar Singh for the alleged balance still due upon foot of the first court's decree and the High Court's decree. It seems to us quite clear that so far as the first court's decree is concerned the full amount was already realised by Dambar Singh before Sri Kishen Das became insolvent. It is argued that the applications which were made from time to time by Dambar Singh, the last of which was admittedly within three years of the present application, saved limitation and entitled the present owner of the decree to apply for execution. We do not think that this can be so in the present case, because the money which it is now sought to realise is really the money due on foot of the High Court's decree, and that decree was against Dambar Singh and Karan Singh only. No previous applications since the year 1907, were made either against Dambar Singh or Karan Singh. This being so, the order of the court below was correct and must be confirmed. We dismiss the appeal with costs including in this Court fees on the higher scale.

P. L. B.

Appeal dismissed.

PRIVY COUNCIL.

SRI SETHURAMASVAMIAR AND OTHERS (*Appellants*)*versus*SRI MERUSVAMIAR AND OTHERS (*Respondents*).*Hindu Law—Grants for charitable purposes—Private charities—Devolution of the right of management—Rule where the grant itself is silent.*

CIVIL

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July 13, 18
and 17,LORD
BUCK-
MASTER,
SIR JOHN
EDGE,
MR. AMEEB
ALI AND
SIR WALTER
PHILLIMORE,
BART.

The general rule of Hindu Law is that the right of management of private charities passes to the natural heirs of the original grantees, and if there is no other arrangement or usage and no scheme settled by the court will be exercised by the managing member of the family before partition or in turn by the several heirs after partition.

But this rule does not apply (1) when there is an express provision to the contrary in the original grant, or (2) when there is a sufficient indication in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the founder's purpose.

A Hindu sovereign granted certain lands to *S.* his *guru* or spiritual preceptor, some without condition, and others for specified religious purposes. The original *guru's* descendants in regular succession filled his office and enjoyed and managed the lands. The Raj was escheated. The then *guru*, who was the first to leave more than one son, subsequently died leaving three sons. The eldest of the three was installed as *guru*. Thereafter one of his younger brothers sued for a share in the non-religious properties and in the management of the religious properties.

Held, that as regards the non-religious properties there was nothing to take their descent out of the ordinary rule of inheritance, and that plaintiff was entitled to partition: but that as regards the religious properties it was the founder's intention that they should be administered by the *guru* as head of a *muth*, an office not divisible among the members of a family, and this being so, the Indian Courts had no jurisdiction to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

Jafar v. Aji, [1864] I. L. R., 2 Mad., H. C. R., 19 ;

Trimbak y. Lakshman, [1895] I. L. R., 20 Bom., 495, approved.

APPEAL from a decree of the Madras High Court, dated August, 18, 1909, affirming a decree of the Subordinate Judge of Tanjore.

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—
SETHURAMA-
SVAMIAR
v.
MERU-
SVAMIAR.

The facts of the case are sufficiently stated in the judgment of their Lordships and in the report of the High Court proceedings in 34 Mad., 470. The first respondent sued his elder brother (the appellant) and his younger brother (the second respondent) and others on the allegations that the three brothers formed a joint family governed by the *Mitakshara*, that the properties in suit were joint family properties, and that he was entitled on partition to one-third share of such properties except those devoted to religious and charitable purposes, as to which he was entitled equally with his brothers to take part in the management. Appellant resisted the claim contending that succession was governed by primogeniture but that anyhow he alone was entitled to manage the properties devoted to religious and charitable purposes. The Subordinate Judge decreed the suit and his decree was confirmed on appeal by the Madras High Court (WALLIS and SANKARAN NAIR, JJ.)

Hence this appeal.

Sir Erle Richards, K. C., and J. M. Parikh, for the appellant, submitted that the High Court had erred in construing the documents relating to the grants as *sanads*. The grants were made orally: the documents in question were merely the Raja's orders to his officials. The properties in suit were given to the *guru* from time to time to maintain the dignity of his office: they were not given to him personally, but as holder of an office. The first defendant, who is the *guru* for the time being, is exclusively entitled: the plaintiff has no right to partition. The case as to the religious properties is even stronger: such properties are always held by the *muth* and managed by the head of the *muth*, i. e., one man. There is no question of ownership in this case: it is a matter of management, and plaintiff has no right to interfere.

It is admitted that the office of *guru* devolves by primogeniture, and this is material as showing that the property of the family devolves in the same way. There is a custom of *gaddi-nashini*, (installation) and this also points to primogeniture.

Thakur Nitipal Singh v. Thakur Jai Singh Pal, [1896] 23 I. A., 147, 151 152, 156 ;

Garudhwaja Prashad Singh v. Saparandhwaja Singh, [1900] 27 I. A., 238, 250 ;

Mayne's Hindu Law, 8th Edition, para. 469.

As to the action taken by the Government on the escheat of Tanjore Raj with reference to properties like those in suit, *vide*

Secretary of State for India in Council v. Kamachee Boy Saheba, [1859] 7 M. I. A., 476.

The fact that plaintiff accepted a fixed monthly allowance tends to show that he was excluded from enjoyment as a co-parcener of

the property which he asserts to be joint: it negatives his right to partition:

Rai Raghunath Bali v. Rai Maharaj Bali, [1885] 12 I. A., 112, 115.

The religious properties were given to the original *guru* for specified purposes. He was then the head of a *muth* which he had founded, and for over a century the properties have gone with the *muth* and been managed by the head thereof. The headship of a *muth* is impartible, and the property under the management of the head is therefore impartible.

Trimbak v. Lakshman, [1895] I. L. R., 20 Bom., 495, 500, 501;

Mayne's Hindu Law, paragraph 439.

Plaintiff does not allege that he has any right to be head of the *muth*, and cannot therefore claim any share in the management.

The cases relied on by the High Court are distinguishable. In

Nubkissen Mitter v. Hurrichundur Mitter, [1818] 2 Morley's Digest, 146,

the question was as to a family idol: it was a private endowment. The endowment here was a public one, made by a sovereign ruler, and the rules as to the management of private endowments do not apply. In

Ramanathan Chetty v. Murugappa Chetty, [1908] I. L. R., 27 Mad., 192;

Thandavaroya Pillai v. Shunmugam Pillai, [1908] I. L. R., 32 Mad., 167,

it was admitted that on the death of the last sole trustee the office devolved on his heirs, so these cases cannot be authorities here; moreover, the question there was as to the management of a temple, while here it is as to the management of properties connected with a *muth*.

If the court had jurisdiction, a scheme providing for equal rights of management by all the co-parceners would be detrimental to the interest of the charities themselves.

Their Lordships intimated that they desired to hear respondents' counsel as to the religious properties only.

De Gruyther, K. C., and *Kenworthy Brown*, for the respondents, submitted that the grants of the religious properties were made to Setubhava personally, subject to a charitable charge, and that the succession was governed by the ordinary rules of Hindu Law.

Lahar Puri v. Puran Nath, [1915] 42 I. A., 115;

Gyana Sambandha Pandava Samidhi v. Kundasami Tambrian, [1886]

I. L. R., 10 Mad., 375 at pp. 386, 387.

There was here no *muth* or religious institution at all. The installation of the first defendant by other *mahants* was simply an honour paid to him: it has no legal significance.

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SVAMIAR.

Even if there is a *muth* now there is no evidence that it existed at the time of the grants. The properties were at one time managed by the Court of Wards, which could not perform the duties associated with a *muth*. Both courts have held that the properties are not attached to the *muth*. They are family properties charged with a religious trust, and pass to the grantee's heirs

Mayne's Hindu Law, paragraphs 438, 439.

Reference was also made to

Ramanathan Chetty v. Murugappa Chetty, [1903] I. L. R., 27 Mad., 192, affirmed in 33 I. A., 139.

Sir Erle Richards, K. C., in reply, referred to

Sathianama Bharati v. Saravanabagi Ammal, [1893] I. L. R., 18 Mad., 266, 270,

and submitted that the first defendant was in possession and that it was for plaintiff to prove his title to a share in the management.

Their Lordships' judgment was delivered by

*Sir Walter
Phillimore.*

SIR WALTER PHILLIMORE.—The plaintiff in this suit is the younger brother of the first defendant, and the nature of his claim is two-fold.

He alleged, first, that there were certain joint family properties of which the first defendant had been manager, and of which he now desired his share.

Secondly, that there were certain properties devoted to charitable and religious purposes, and therefore not available for division, in the management of which he was entitled to share, and for which he desired that there should be a scheme of management settled by the court.

The second defendant is another younger brother having the same interest as the plaintiff; and the other defendants are widows entitled to allowances during their lives.

The properties, both non-religious and religious, were granted at various times by the then Raja of Tanjore to the ancestor of the parties, one Setubavaswami. They descended to his son, and that son having no natural children, to an adopted son, and then to his adopted son, Ramasetuswami, who died, leaving three natural sons, viz., the plaintiff and the first and second defendants.

At the time of the death of Ramasetuswami in 1886 his three sons were minors. The first defendant, came of age in 1890, and the plaintiff somewhere about the year 1894. He made a demand of his rights in 1901 and brought his action in 1904.

There is no dispute as to the circumstances in which the original ancestor received the grants of land from the Raja of Tanjore. He was a holy man, who, somewhere about the year 1739, was brought from a *muth* or religious institution at Mannargudi to Tanjore, and was constituted by the Maharatta Ruler of Tanjore his *guru*,

or spiritual preceptor. His descendants in regular succession became *gurus* to the Raja as long as the Raj remained, and were installed by the Raja for the time being with certain ceremonies, one of the most important being the placing of the new *guru* on the *gadi*. There was also a religious ceremony, in which the head of the *muth* at Mannargudi and certain other heads of *muths* took part, to which reference will be made later on.

- When Ramasetuswami, the father of the parties, died the Raj had escheated; but after the usual religious ceremony had taken place, the man claiming to be the adopted son of the last Raja installed the first defendant with the accustomed ceremony; and there is no doubt that the first defendant is the *guru* of the man who installed him.

The contention on behalf of the first defendant is that the office of *guru* is hereditary by way of primogeniture, and that the non-religious lands were given to the *guru* for the time being to maintain the dignity of his office, and are therefore impartible.

The contention for the plaintiff is that these lands were granted to the original *guru*, no doubt as a reward for his services, but to him personally and his heirs, and not as an appanage or endowment of the office of *guru*.

Shortly after the escheat of the Raj in 1855, enquiries were directed by the Government with a view of ascertaining whether the properties enjoyed by Ramasetuswami were service lands, that is, land enjoyed or endowments of offices held by servants or ministers of the Raja, which would escheat upon the termination of the Raj, or whether they had been bestowed as personal grants; and a report was made which was acted upon by the Government to the effect that these non-religious properties were not service lands but personal grants, and consequently had not escheated. Thereupon new *inam* grants in confirmation of the original grants were made by the Government to the father of the parties.

The original grants of the non-religious lands show no indication that they were made by way of endowment of an office. The utmost that can be said on behalf of that contention is that the grantee is sometimes described as a Royal Priest. But this is mere description.

The confirmation grants of the non-religious lands describe them as the personal *inams* of the grantee to be held by him as his absolute property to hold or dispose of as he thinks proper, subject to the quit rent. In some of the grants the *inam* is said to be tax-free and hereditary, and that on failure of lineal heirs it will lapse to the State.

There is nothing in these documents, or in any of the other circumstances of the case, to take the descent of the non-religious lands out of the ordinary rule of inheritance. This is what has been

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decided in favour of the plaintiff by the Subordinate Judge, and in the High Court of Judicature of Madras upon appeal; and their Lordships see no reason to differ from this conclusion. They arrive without hesitation at the result that the appeal of the first defendant against this part of the decision in the Courts of India fails.

Both courts have also decided in favour of the plaintiff on the other claim, and have directed that there should be a scheme for the management of the religious and charitable properties, to be settled in due course. This part of the case has given their Lordships more difficulty.

No scheme has, so far, been settled, but there is no doubt as to the lines on which the scheme would proceed. It would, as asked by the plaintiff, provide for equal rights of management by the plaintiff and the first and second defendants and their heirs, either by giving the management to each in rotation, or possibly by dividing the charities and assigning the management of some to one and of the others to the others.

This will be the nearest approach that can be made to the ordinary partition which is granted at the request of any one of the co-parceners of Hindu family lands.

The objects for which these properties were given are described in the deeds as being for the purpose of perpetually conducting a food *chatrum* near the tomb of the holy man Meruswami, and in one case for the purpose of making an *agrahar* by building houses round about the holy place.

With regard to what are called private charities, such as endowments for the support of the family idol, the law, as laid down by various decisions in India, and apparently accepted in one case by the Privy Council (*Ramanathan Chetty v. Murugappa Chetty*) (1), is that, if there is no contrary provision in the original grant, the right of management passes to the natural heirs of the original grantee, and, if there be no other arrangement or usage and no scheme settled by the court, will be exercised by the managing member of the family before partition, or in turn by the several heirs after partition.

But their Lordships' attention has not been drawn to any case in which these decisions as to management have been applied to lands which constitute the endowment of such a charity as those in question in this suit.

The case most nearly in point is *Thandavaroya Pillai v. Shunmugam Pillai* (2), but it does not decide this question, and does not seem to have come up before the Privy Council.

(1) [1903] I. L. R., 27 Mad., 192, L. R., 33 I. A. 139.

(2) [1908] I. L. R., 32 Mad., 167.

It is unnecessary, however, to decide whether there is a general rule for the devolution of the management of charities of this class because, in their Lordships' view, there is sufficient indication in the documents and in the surrounding circumstances of this case that a devolution of the management to the heirs of the original donee is inconsistent with the purposes of the founder when he created the endowments.

The grants of the religious or charitable lands made by the Mah-ratta Raja to Setubavaswami, which take the form of orders to his officers, describe them as being for the purpose of *inam* and for the purpose of perpetually conducting or establishing the defined charity; and they proceed to state that for this purpose they had been given to the Royal Priest, Setubavaswami.

Having regard to the donee's position and the way in which these grants are set forth, it would be difficult if there was nothing else to guide the court to determine whether these grants were made to the person or to the office. But the deeds of confirmation of the religious lands made by Government in 1865 are of assistance. They are in a different form from that used in the confirmation grants of the non-religious lands. Each is described as a title-deed granted to the manager for the time being of the charity, which is then described. By the deed the title of the manager is acknowledged, and the *inam* is confirmed to him and his successors. There is no personal name, and it is only from external evidence that it can be determined that the grant was to Ramasetuswami, the father of the parties.

Taking as their Lordships do, the view that it was not intended by these confirmation deeds to vary the previous rules as to the descent of the religious lands, any more than it was intended to vary the previous rules as to the descent of the non-religious lands, these confirmation grants afford evidence as to the nature of the tenure, as it was commonly understood at the time. These lands, then had been held, and were to be held in future, by the particular office-bearer from time to time. That office-bearer is, in their Lordships' opinion, to be found in the head of the *muth*, or institution founded when the original *guru* was induced by the Raja to migrate from Mannargudi. He would be one person, not several, and the first defendant is the present head.

It is in evidence that the installation ceremonies which are believed to have occurred upon the succession of each new *guru* were of a double character. The induction, as it may be called, by the Raja to the office of Royal Guru with a seat upon the *gadi* was preceded by a religious ceremony in the nature of an ordination or institution in which the *Mahant*, or head of the parent *muth*, placed the first defendant in the seat of headship, other heads of *muths* taking part in this ceremony, and certain religious rites following.

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It is in evidence that the defendant, as the head of the *muth* thus constituted, performs in person, or by deputy, certain religious rites, has given initiation to some people, no doubt not many, and has on some, not very frequent occasions given religious instruction. He is thus pointed out as the natural head and administrator of religious charity; and the office of head of the *muth* and administrator of the charity have been associated from the first.

The headship of a *muth* is not a matter of partition. Indeed, the plaintiff admits that he has no claim to share in it. This being so, it appears to their Lordships that the intention of the founder must be deemed to have been that his religious charities should be administered by the man who was head of the *muth*, to which office the eldest son of the previous holder would naturally succeed, the office being indivisible among the members of the family, and the principles to be applied being those laid down in the case of *Jafar v. Aji* (1), and further approved in *Trimbak v. Lakshman* (2). This being so, there was no jurisdiction in the Indian court to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.

This part of the appeal therefore succeeds.

Their Lordships think that the plaintiff should have his costs in the court of first instance, as he there recovered a very substantial part of his claim *viz.*, his right to share in the inheritance, and to have partition, if he desired, of the non-religious lands; but they think that there should be no costs of the appeals to the High Court and to his Majesty in Council.

Their Lordships will therefore humbly recommend His Majesty that the decree of the High Court of Judicature of Madras be varied, in so far as it confirmed that part of the decree of the lower court, paragraph 8, which ordered that a scheme be settled for the due management of the religious and charitable properties, and so far as it ordered the first defendant to pay the costs on appeal of the plaintiff and second defendant; and that the decree of the lower court be varied by striking out paragraph 8, and that there be no costs of the appeal to the High Court or to His Majesty in Council.

Chapman Walker and Shephard:—Solicitors for the appellants.

Douglas Grant:—Solicitor for the respondents.

A. P. P.

Decree varied.

(1) [1877] 2 Mad., H. C. Rep., p. 19. (2) [1895] I. L. R., 20 Bom., p. 495.

HIGH COURT.

MOTI CHAND AND OTHERS (*Plaintiffs*)

versus

LALTA PRASAD AND OTHERS (*Defendants*)*

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Dec. 14.

PIGGOTT, J.
WALSH, J.

Evidence Act (I of 1872), section 68—Meaning of—Mortgage-deed—Attesting witness called but not examined—Document not admissible independently as mortgage—Admissible as interpreting rights and obligations of parties—Identified in another document.

A and B were members of a joint Hindu family with their father. They carried on saltpetre business and standing in need of money they executed what purported to be a mortgage-deed in favour of the plaintiffs on 15th May, 1909. It was duly signed and attested, but it was not registered till it was signed by their father on 31st May, 1909. The father's signature was not attested by either of the attesting witnesses. In this document the money was advanced on the security of property belonging to the executants and it provided for interest at the rate of /8/ per cent per annum. The stipulation as to interest was a slip for /8/ per cent per mensem made by the scribe, and in order to rectify the error on 21st July, 1909, another document was executed signed by the plaintiff, A, B and their father and attested by two witnesses. It was also duly registered. Default having been made by the defendants the plaintiff brought a suit on foot of both the bonds. The document of 21st July, 1909, referred to and embodied certain clauses of the deed dated 15th May, 1909. One of the attesting witnesses was dead and the other, though summoned, was not examined. The court of first instance held that the deed dated 15th May, 1909, was not proved and it was rejected as inadmissible in evidence. A simple money decree was granted by that court. On appeal by the plaintiff held that the deed of 15th May, 1909, having been referred to and identified in the document of 21st July, 1909, was admissible in evidence for the purpose of interpreting the rights and obligations of the parties, even though as an independent legal document it was itself inadmissible.

By the terms of section 63 of the Evidence Act, when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested : but this does not prevent it from being used in evidence as something else or for any other purpose. Section 68 is subject to the limitation, viz., that if the document were tendered in some other proceeding for the purpose of proving the

* F. A. No. 225 of 1915.

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hand-writing of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it, it could not be used in evidence at all.

FIRST APPEAL from a decree of BABU GOPAL DAS MUKERJI, Third Additional Subordinate Judge of Aligarh.

Claim for recovery of money.

The court of first instance decreed the claim in part.

Plaintiffs appealed.

Sir Sundar Lal, Tej Bahadur Sapru and Radha Kant Malaviya, for the appellants.

Motilal Nehru and Surendra Nath Sen, for the respondents.

The following judgments were delivered.

Walsh, J.

WALSH, J.—The facts of this case are remarkably simple though the questions which have been raised and discussed before us have covered a wide area. The plaintiffs, who brought this suit in the court of the Third Additional Subordinate Judge of Aligarh to enforce a mortgage or rather as they alleged two mortgages dated respectively the 15th of May and the 21st of July, 1909, carry on business as bankers and commission agents in the city of Benares. The defendants at or about the time carried on business as saltpetre merchants and were in the year 1909 obviously in considerable difficulties. Through the medium of an agent or general-attorney of the plaintiffs, one Beni Prasad Dube, it was arranged between the plaintiffs and one of the defendants, Sri Krishn Chand that inasmuch as a considerable sum was already due from the defendants to the plaintiffs in respect of commission and other dealings which had taken place between them, the plaintiffs instead of pressing for payment should render assistance to the defendants by treating the existing debt as a loan and taking security over their property. The present defendants were members of a joint Hindu family and carried on business together as such, Lalta Prasad being father and Sri Krishn Chand and Jhabbu Lal being the two sons. There was a good deal of delay in the completion of the necessary formalities to carry out the transaction, due apparently to some discussion with regard to the amount of the outstanding account between the defendants and the plaintiffs at that date. This however is not material because the amount of the debt was agreed and there is in fact no dispute as to the substantial effect of the transaction which was entered into. The whole difficulty that has been raised is one of form. A document was prepared by a pleader which was intended to be a mortgage to carry out the arrangement which had been agreed upon. It was written by a scribe of the name of Mukundi Lal and the plaintiff's general attorney Beni Prasad, according to his own account, with certain other persons who were to act as witnesses attended at one of the defendants' places of business in Farrukhabad.

The father was absent. It is suggested that he was keeping out of the way on account of the pressure of his creditors. However that may be, it is clear that he was not present on the occasion when the parties met with a view to executing the document, and it was signed only by the two sons above mentioned and by Sheobandhan Dube and Janki Das as attesting witnesses. It was also signed by his own hand by the scribe in the sense that it contained a clause in his own hand-writing stating that he had written the document on the 15th of May. And undoubtedly at one time it was suggested, and one of the grounds raised in the memorandum of appeal was, that if there was any defect in the document by reason of the absence of sufficient attestation, that was cured by the clause containing the signature of the scribe. That argument however was not seriously pressed; the scribe's evidence shows that he did not purport to attest and no further reference need be made to it. The document having been thus executed by the two sons whose signatures are said to have been attested by these two men, Sheobandhan Dube and Janki Das, it appears to have been originally intended to have the document registered in accordance with law as quickly as possible. But the plaintiffs the mortgagees, required the signature of the father and the document was sent to him for signature and returned to the son, Sri Krishn Chand, duly signed by the father on the 31st of May, 1909, after a delay of some 13 or 14 days. What happened when the father affixed his signature does not appear. It is however quite clear that his signature was not attested by either of the attesting witnesses to the deed. The document, having been thus executed and registered and being at that time clearly regarded by every body as a complete, valid and properly executed mortgage-deed in accordance with the strict provisions of the law, was discovered to contain a slip by the scribe. The agreement had been for a rate of interest at eight annas per cent per mensem, but only eight annas per cent per annum was provided in the interest clause. It became necessary to correct this blunder and by consent of every body a fresh deed was entered into on the 21st of July, 1909, with this object. The terms and effect of that deed it will be necessary to consider with some care hereafter. It was duly signed by Lalta Prasad, the father, and by both his sons in the presence of two attesting witnesses. It was duly attested by Janki Das, one of the attesting witnesses to the former deed, and by Makundi Lal the scribe, and it was registered according to law on the 16th of November, 1909. Default having been made the plaintiffs instituted this suit on the 18th of April, 1914. Substantially there was very little contest about the merits. The main controversy turned upon the question of the attestation and the admissibility of the deed of the 15th of May, 1909. One of the defendants Jhabbu Lal put in no appearance. The other two, the father and one of the sons, admitting their signatures and denying that the amount entered in the deed was correct, alleged that the deed had not been duly executed and that the signatures had not

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been attested according to law. The first court held that the document was inadmissible under section 68 of the Evidence Act for the following reasons. At the trial it appeared that Sheobandhan Dube was dead. Janki Das was in court. He was not called. The document was one which was required by law to be attested and no attesting witness, although one was alive, was called, as required by section 68 of the Evidence Act. He had been summoned and was present in court. The expression "called" used in the section clearly means tendered for the purpose of giving evidence. The learned Judge therefore had no alternative but to reject the document and we agree with the course which he took and with the reason which he gave for so doing. Very little attention, judging from the evidence and from the judgment, appears to have been paid to the supplementary or second deed, of the 21st of July, 1909. But relying on certain authorities which the learned Judge refers to in his judgment he gave effect to the deed of the 15th of May, 1909, which he had rejected as inadmissible as a mortgage, as evidence of a covenant to pay, and passed a personal decree against all three defendants for the amount due. Thereupon an appeal was brought to this Court by the plaintiffs, challenging the decision upon three grounds.

1. That the execution of the deed had been proved.
2. That the evidence of the scribe who had in fact been called was sufficient as that of an attesting witness and,
3. That the learned Judge had not properly weighed the evidence.

There was a difficulty in serving the respondents with the notice of appeal. Ultimately substituted service was ordered by means of advertisement in the newspapers, and whether or not they had knowledge of the proceedings they did not in fact appear, although the order for substituted service was duly carried out, at the hearing of the appeal which was opened before my brother PIGGOTT and myself on the 29th of March, 1917. During the discussion in the opening of the appeal it was pointed out amongst other things that there was some difficulty in appreciating the grounds upon which the learned Judge had given effect to the deed as a covenant to repay the money, while rejecting it as inadmissible under section 68, and it was urged upon us with some force that if the failure of the suit resulted from the omission to call Janki Das during the trial, that was an omission which might, subject to certain penalties, be repaired without injustice to the defendants, if we were to afford an opportunity to the plaintiffs of producing him as a witness in this Court. We made an order on the 29th of March, 1917 in the following terms:—"Without discussing further the question of law raised by this appeal, we think it sufficient to say that, under the circumstances, the appellants are entitled to an opportunity of producing before this Court for examination the witness Janki Das, who should perhaps have been

produced by them in the court below. Assuming that the appellants are prepared to deposit the necessary fees and expenses we order that this case be put upon any near convenient date, and summons to issue for the attendance of the said witness, Janki Das, son of Khiali Ram, caste Mahajan, resident of muhalla Mufti Saheb, in Farrukhabad, in this Court on such date." Difficulties arose in carrying out that intention owing to the illness of Janki Das. Adjournments were applied for from time to time, which were granted in the hope that the whole thing might be settled by hearing the evidence of this witness, who might have been tendered in the court below. Unfortunately the witness got worse and died and it was therefore impossible for the appellants to call him. The case therefore came on for re-hearing before us in the condition in which it was, when it was originally opened before us in appeal with the addition which we had made by the order we passed on the 29th of March, 1917. On this occasion the respondents put in an appearance and several questions have been argued in attack upon and in support of the decision of the court below. The real question which we have to decide is whether in fact the plaintiffs, in the events which have happened, have been able to establish by legal evidence the execution in their favour of a mortgage for this debt over the property of the defendants, and whether they are entitled to an order enforcing it in this suit. Now it is abundantly clear that the loan was made, that it was obtained by the defendants offering a substantial and valuable security, that the money is still due, and that the defendants have no merits of any kind. The case is an illustration of the pitfalls which the prudent provisions of the legislature made for the protection of ignorant and foolish persons may possess for the ordinary men of business and the use that knaves may make of them. There are in evidence, some copy letters dated one of the 19th of May, 1909 and two each of the 1st of June, 1909. These, if genuine, are conclusive as to one material fact in dispute, namely, the attestation of the father's signature. Due notice to produce the originals of these letters was given to the plaintiffs through the court on the 25th of January, 1915. Beni Prasad, the general attorney of the plaintiffs, was cross-examined with a view to explaining the absence of the originals which were not forthcoming. He explained that after some short period it was the practice in the plaintiff's business to weed out and destroy letters, and the topic was pursued no further. Clear notice was given to the plaintiffs of the existence of these letters. They were called upon to produce them and the defendants were entitled to use their copies. We have examined the defendants' press copy letter book, in which these copies are contained. It is, relatively speaking, well kept and we are both satisfied that it is a genuine book.

These copy letters, show three things. Firstly, that after being written out the day before, the document of the 15th of May, 1909, was signed by the two sons and attested by Sheobandhan Dube if not by Janki Das, but that on the 19th of May the father had not

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signed it. Secondly, that registration was delayed until after the 31st of May, 1901, when the document was received back by Sri Krishn Chand from his father with the father's signature upon it, and that if the plaintiffs had not insisted upon the father's signature the defendants would have registered the document without it regarding the execution as then complete, and thirdly, that the defendants were in need of money, that they were in profound misery, that their honour was in jeopardy and that they were anxious to do all they could to complete the security.

What happened at the trial as to the failure to call the attesting witness has been clearly stated in the judgment of the first court and has already been referred to above. The only living attesting witness was present in court and was deliberately not called. This fact alone prevents the document by virtue of the provisions of section 68 of the Evidence Act from being "used as evidence," and if the plaintiffs' case rested upon the document of the 15th of May, alone it must fail. We see no escape from this conclusion.

It was urged that the events which happened in this Court on the 29th of March, 1917, and the death of the missing witness have removed this case from the operation of section 68. We cannot agree with this view. We ordered that the plaintiffs appellants should be given an opportunity of producing the witness. It seems to us that that order had none of the attributes of finality. It was made at an *ex-parte* hearing. The respondents ought not to be allowed to improve their position by the fact of their absence. But it appeared to us that, apart from the debatable point as to whether the learned Judge ought, in the circumstances, to have given a decree for the principal money at all, it was possible that the omission of the plaintiffs in the first court was a mere error of judgment which it was not too late to repair and that by allowing them to repair it justice might be done by penalizing them by some order in respect of costs for their error. But it now appears perfectly clear that their act in refraining from calling Janki Das was due to their deliberate decision as to the conduct of their case. The letters of the 19th of May, and the 1st of June, 1909, though on the file, had not been printed in this Court's book and had unfortunately been ignored in the judgment of the first court and had not been considered relevant by the appellants in their presentation of the evidence. When we made the order of the 29th of March, 1917, we had no notion of their existence. They now make it plain that the plaintiffs' general attorney endeavoured to prove the due attestation of the document of the 15th of May, by the grossest perjury. He swore that the signatures of the father and the two sons were affixed in his presence and in that of Janki Das, Sheobandhan Dube and the scribe. "Jhabbu Lal," he said, "read the document and the other defendants (that includes the father, there can be no mistake about it) heard it." The fact is that the father was not there. Further

he said in cross-examination "no body signed the document on the day it was written. The signatures of the witnesses and the executants were affixed on the following day. Lalta Prasad was not present on the day the document was written. He came the next day, and the signature was affixed on the same day." These statements are clearly deliberate falsehoods. Moreover the evidence of Beni Prasad made an unfavourable impression upon the learned Subordinate Judge who was not inclined to believe that Beni Prasad was present even when the document was signed by the sons, and in this conclusion he is very likely correct. Makundi Lal was even more specific both in examination-in-chief, and in cross-examination. He lied with elaborate and vivid detail and identified Janki Das as having attested all the three signatures on the same afternoon. He described in minute detail the process of execution and stated that Lalta Prasad affixed his signature first of all.

What the condition of Janki Das's mind may have been it is idle to speculate, but he could not if called have stated, what the contemporaneous documents now show to have been the facts, without destroying the plaintiffs' case and casting discredit upon both their general attorney and the scribe. Had we known on the 29th of March, the real state of the evidence on the record it is unlikely that we should have granted any indulgence to the plaintiffs who had conducted their case with such materials. We think it was open to this Court at any time to hear further argument and finally to refuse to allow additional evidence to be given. Our previous order, made by us under a misapprehension, cannot be used to enable the plaintiffs to avail themselves of section 69. We hold, therefore, that the document of the 15th of May cannot be used in evidence in the sense contemplated by section 68, that is to say, as a mortgage which is required by law to be attested and has in fact been attested.

The three letters to which I have referred further show that the document was not in any case duly attested, one of the signatures having clearly signed it at another place and on some date subsequent to the attestation by the only witnesses who are alleged to have attested. It was urged with great force by *Sir Sundar Lal* on behalf of the appellants that it might be treated as a document duly signed; attested and executed by two members of a joint Hindu family dealing with joint family property and that the consent of the remaining member of the family in this case the father who alone could object, could be proved by any method known to the law. Speaking for myself I do not think it necessary to decide whether this contention is sound or not because in either view the provisions of section 68, not having been complied with, the document cannot be used as evidence at all as a document either requiring attestation or in fact attested.

But this does not, in the events which have happened, prevent it from being used in evidence as some thing else or for any other

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purpose. It is obvious that section 68 is subject to some limitation, *e. g.*, if the document were tendered in some other proceeding for the purpose of proving the hand-writing of the scribe, it could not seriously be objected to upon the ground that, no attesting witness being called to prove it, it could not be used in evidence at all. The second deed of the 21st of July, as I have pointed out, was signed by all the parties to the transaction in this suit, duly attested and duly registered. It treated the document of the 15th of May as a valid mortgage-deed and repeated some, at any rate, of its stipulations as being the terms which were to govern the new contract. We think it quite clear that we are entitled to look at the document of the 15th of May identified by reference, as it clearly is, in the document of the 21st of July in order to ascertain what these stipulations were. If they had been contained in some other kind of document, clearly identified, to which the parties agreed that reference should be made for the purpose of interpreting their rights and obligations, such a document would clearly be made admissible by the act and contract of the parties, even though as an independent legal document it was itself inadmissible. It derives its admissibility from another source which binds the parties. This would apparently be so according to English law, under what is described in Taylor on Evidence as the sixth exception to the rule of inadmissibility due to the absence of an attesting witness, if the party objecting to it took some benefit from the latter document which treated the earlier one as valid. This is not the case here, the party objecting clearly undertook a greater burden. But I think, in truth that it is not really an exception to the rule at all, but merely an illustration of a document to which the rule in England is inapplicable, and that the rule in India, that is to say, section 68 is equally inapplicable in the present case for the purpose of deciding whether the earlier document is admissible as a document to which the parties have referred otherwise.

The case before us on this point bears a remarkable similarity to the case of *Fishmongers Company v. Dimsdale* (1). In that case the decision of the Chief Justice TINDAL, as reported in the statement of facts at page 57, of the Law Journal Report, is precisely the objection now raised to the admissibility of the document of the 15th of May, but an exceptionally strong Court of the Exchequer Chamber overruled this objection and held that the document was admissible. The case occurred before the Common Law Procedure Act of 1864, and the rule of law which had to be dealt with, namely, with regard to the necessity of calling a subscribing witness in order to render a document admissible at all, in substance did not differ from section 68. BARON PARKE in giving judgment gave as the reason, that the memorandum endorsed, which corresponds in this case to the document of the 21st of July, incorporated the original argument. I prefer the judgment of COLERIDGE, J., as reported in the Law

(1) 18 L. J. C. P., 65, S. C., 6 C. B., 896.

Journal Report, who added his own reason in these words.—“There is a complete identification by words of reference.” It is somewhat remarkable that when a similar case arose at a later stage with reference to its admissibility having regard to the stamp, the Chief Justice was overruled for treating the earlier document as incorporated thereby, following the dictum of PARKE, B (*vide* 22 L. J., C. P.) But the principle is clear although the language in which it is expressed in the published report of the judgment may not be scientifically accurate. And we find it difficult to draw any distinction between that case and the case before us. We were referred to a further decision which is also very much in point. In 1885, the question arose as to the due registration of a deed of conveyance. There had been an earlier deed of 1873, which was not registered. The transaction was sought to be carried out and put in force through a subsequent deed, namely of 1878, which, no doubt, did a little more than the document of the 21st of July does, actually re-affirmed and repeated in its entirety the deed of 1873, referring to it in express terms and setting it out in a schedule as part of itself, namely the deed of 1878. When presented for registration, the memorandum of registration was written not on the first sheet but at the end of the deed which was annexed as a schedule to the deed of 1878. I take that statement from the judgment of Sir BARNES PEACOCK, and it would appear from that, that the deed of 1873 had actually been copied out or itself annexed as a schedule to the subsequent deed of 1878. But there can be no difference in principle whether the document is incorporated by actual physical annexation, or by reference in unmistakable terms of identification. The High Court in that case had held that the registration was insufficient because the latter document had not been registered and the endorsement upon the deed in the schedule being upon a document which in itself could not be proved, could not be looked at. The Privy Council overruled that contention in these words, “that document (that is referring to the earlier document) was not proved. It could not be proved because it could not be given in evidence. But the fact that the deed itself could not be given in evidence was no reason why the deed of 1878, should not be given in evidence and that deed (referring to the deed of 1873) was proved to have been executed and duly registered.” That language covers, in our view, in almost express terms, the point raised in this case, namely as to whether the document of the 21st of July, having been duly executed and attested does not in sufficient terms refer to the earlier document which was inadmissible in itself so as to make it admissible as part of the latter document.

The question of interpretation remains. This of course is totally distinct from the question of admissibility. What is the effect of these two documents, bearing in mind that we are not entitled to treat the document of the 15th of May as a mortgage at all or even

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as a document in itself binding upon the parties for anything? On the whole we think that the document of the 21st of July, 1909, hypothecates the property described in the specification, for interest at eight annas per cent per mensem on the sum of Rs. 32,914-3-9, from the 15th of May, 1909. We also think, although we feel some doubt about it, that it sufficiently hypothecates the property for the principal sum. It clearly repeats or incorporates the clauses in the deed of the 15th of May, which relate to interest. It says "we shall pay interest on the debt due to the Babu Sahibs, at Rs. *6. per cent. per annum, which is equal to eight annas per cent per mensem, in accordance with the stipulation laid down in the aforesaid mortgage deed." The document must, at any rate, therefore be construed as having contained within it, in express terms, at least clauses 1, 2 and 3 of the document of the 15th of May. Clause 2 provides that if the interest is not paid within 6 months the executants shall be liable to pay compound interest at eight annas per cent. per mensem, and further that, (after fulfilment of certain provisions which involve a reference to the body of the document to ascertain the meaning of the words "the above term,") "the said Babu Sahib will be at liberty to recover the entire amount payable to them by taking proper proceedings, from our person, the property mortgaged and other property, movable as well as immovable, belonging to us, the executants." The indebtedness for the principal is clearly acknowledged by the deed of the 21st of July, and we find it difficult to give effect to clauses 1, 2 and 3 which are thus clearly incorporated and accepted in the document of 21st of July, as governing the payment of interest together with the consequences for non-payment without also giving effect to those parts of them which govern the payment of the principal. The two are indissolubly connected. The property mortgaged is clearly specified in the later document of the 21st of July, clause 2 can only mean that a power of sale is to be exercised by the Babu Sahibs for non-payment, and clause 3 refers to realisation which can only be read having regard to the provisions of clause 2 as meaning sale. The terms of section 58 defining a mortgage are "a mortgage is the transfer of an interest in specified immovable property for the purpose of securing an existing debt."

"Where a mortgagor binds himself personally to pay the mortgage money and agrees expressly or impliedly that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the property to be sold and the proceeds of sale to be applied in payment of the mortgage-money, the transaction is called a simple mortgage." We think that that is what all three executants impliedly did when they signed the document of the 21st of July. Their intention is obvious. The only doubt is as to whether they carried it out. It was unnecessary that they should repeat in express terms all that they had agreed to in the previous transaction, for both parties treated the previous deed as binding upon them

but it so happens that out of extra-precaution they did repeat and reiterate those terms which we have mentioned and thereby impliedly gave the mortgagees a power to sell not only for the new rate of interest but for the principal. A mortgage need not be contained in one or any other particular number of documents. It may be collected from a variety of documents so long as the effective document is a duly signed attested and registered instrument in accordance with section 59 of the Transfer of Property Act. We think that this is the real legal effect of the document which was duly executed and attested on the 21st of July and that therefore the plaintiffs are entitled to succeed in this suit upon that ground. It is not the ground upon which the case was first launched in the plaint, nor upon which the case was fought in the first court, nor is it the ground upon which the plaintiffs by their memorandum of appeal sought relief in this Court, but, we think, it is the ground which gives effect to the real transaction between the parties, and which does substantial justice in spite of the mistakes the plaintiffs have made. The plaint and the memorandum of appeal must be treated as having been duly amended for the purpose of raising the claim in this form based upon the subsequent document of the 21st of July, 1909. But we do not think that the omission by the plaintiffs in the conduct of their suit ought to stand in the way of our doing what nobody can doubt is substantial justice in the case.

On the other hand we feel it impossible to pass by without marking our sense of the conduct of the plaintiffs in presenting their case to the trial court. As one would expect, no attempt has been made by their representatives in this Court to defend or justify it. We think that so far as that is concerned, the justice of the case will be met by altering the decree of the court below and giving them a decree for sale of the mortgaged property without costs either of the suit or of this appeal.

Piggott, J.—I agree generally. The only difficulty I have felt is with reference to the principal of the mortgage debt. I may put my point in this way : as regards the interest at six per cent per annum it seems to me that, when the parties entered into the contract embodied in the agreement of July, the 21st, 1909, it was a definite part of the intention of the executants of that document to charge the extra rate of interest on the property which they conceived to have been already mortgaged by the deed of the 15th of May. They may have done this only by way of extra precaution ; but on the terms of the deed of July, the 21st, 1909, even considered by itself alone, it seems to me that a hypothecation of the property specified at the foot for payment of the interest therein covenanted for is made by necessary implication. If the intention of the parties had been otherwise, I do not believe there would have been any specification of the property in this deed at all. As regards the principal my difficulty is this, that the parties conceived themselves to have

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already effected a valid mortgage of the same property as security for the repayment of this principal, and it was presumably no part of their intention on the 21st of July, 1909, to make a fresh hypothecation for that purpose. At the same time I agree with what has been said as to the anomaly of drawing any distinction between the effect of the transaction of July the 21st in respect of the principal and its effect as regards the interest. Broadly speaking, what the law requires is a registered instrument, duly executed and attested, in order to effect a mortgage; we have such an instrument before us in the so-called agreement of July the 21st, 1909. I think that we are entitled to read it in connection with the earlier document to which it refers, and that the results stated in the judgment of my learned colleague necessarily follow.

BY THE COURT.—We allow this appeal and direct that in lieu of the simple money-decree passed by the court below a decree for sale be drawn up in the proper form in respect of the property specified in the plaint. Interest must be calculated at the rate of six per cent per annum on the amount claimed up to the date fixed for payment which we hereby fix at six months from this date. The decree will embody the usual provisions as to the consequences of payment or non-payment on the part of the judgment-debtors, and the same decree will carry future interest at six per cent per annum from the date fixed for payment until realisation. For reasons which we have already stated we leave the parties to bear their own costs in both courts.

Appeal allowed.

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WALSH, J.HAMID HUSAIN (*Plaintiff*)*versus*KUBRA BEGAM (*Defendant*).*

Mohammedan Law—Restitution of conjugal rights, suit for—Legal cruelty.

In a suit for restitution of conjugal rights by the husband the court found that the husband and the wife (both Mohammedans) were on the worst possible terms, that the husband though not actually ill-treating her physically yet ill-treated her in other ways that is to say, mentally, and that by her return to his custody her health and safety would be endangered, *held* that the wife could not be delivered over to the husband. *Armour v. Armour*, [1904] 1 A. L. J. R., 318, followed.

SECOND APPEAL from a decree of F. S. TABOR Esq., District Judge of Saharanpur, reversing a decree of Babu Kalika Singh, Subordinate Judge.

Suit for restitution of conjugal rights.

Defence legal cruelty.

The court of first instance decreed the suit but the lower appellate court dismissed it.

* S. A. No. 616 of 1916.

Plaintiff appealed.

The case coming on for hearing before PIGGOTT and WALSH, JJ. the following order was made —

This was a suit for restitution of conjugal rights by a Mohammedan husband. It was decreed by the court of first instance; but has been dismissed by the learned District Judge of Saharanpur in appeal, on the ground that the plaintiff "had treated his wife in such a way that he has lost all right to claim restitution of conjugal rights."

We are of opinion that the findings of fact recorded by the lower appellate court are not specific enough to dispose of the suit. The principles of law applicable to a defence of "legal cruelty" raised in a case of this sort were laid down by their Lordships of the Privy Council in *Munshi Buzloor Raheem v. Shamsunisa Begam* (1). We may refer also to two decisions of this Court viz :— *Husaini Begam v. Mohammad Rustam Ali Khan* (2), and *Khurshedi Begam v. Khurshaid Ali* (3). We remit the following issues for determination by the court below, on the evidence already on the record :—

(i) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff?

The finding on this issue should be as specific as possible as regards time, circumstances and the nature of the ill-treatment found.

(ii) On the case as a whole, is the court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

Ten days will be allowed for objections after the return of findings.

The findings returned hereto by the lower appellate court, were as follows :—

The issues remitted here are :

(1) Is it proved that the defendant has in the past been subjected to ill-treatment, physical or mental, by the plaintiff?

(2) On the case as a whole is the court of opinion that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody?

The story which the defendant put forward in an application sent by her to the Collector of Muzaffarnagar and Saharanpur was that the plaintiff was really only her agent, but that by some cunning he had made himself out to be her husband; that he wanted her money and with the assistance of a vakil named Liaquat Husain tried to induce her to transfer her property to the plaintiff's name; and that when she refused to comply took her to kasba Kairana,

(1) [1863] 11 Moo I. A. p. 551 at pp. 610, 611.

(2) [1907] 1 L. R., 29 All., p. 222. (3) [1914] 12 A. L. J. R., 1065.

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and kept her a prisoner for $1\frac{1}{2}$ years in the vakil's house, after pretending that he was taking her to Meerut to have false teeth made, that in order to extort property from her he prevented her relations from coming to her; that she was beaten by Liaquat Husain, and treated in a manner in which prisoners in jail are probably not treated. The result she said was that she suffered from facial paralysis and palpitation of the heart. She went on to say that plaintiff and Liaquat Husain compelled her by deception to transfer property in their favour, and had got her thumb-impression on some paper. That the plaintiff told her that the house at Kairana was that of a robber and kniffer. "That Jawad Husain (son of the other defendant Zabid Husain) her sister's daughter's son came and called out her name. She ran to see him, but Liaquat Husain scolded his servants for letting him in. That Jawad Husain told her that the house (in which she was imprisoned) was Liaquat Husain's and not that of a robber, that Liaquat Husain did not allow her to say any thing more. That plaintiff then took her from Kairana to Sarsena, and then from Sarsena to Kalear, where she was made to execute a sale-deed in favour of the wife of one Ashiq Husain and register it before the Sub-Registrar. That this document was for 20,000 or 21,000 rupees, of which 7,000 were paid before the Sub-Registrar, of this plaintiff deposited 6,000 with the banker Jagmandar Das and kept 500 himself, 500 had been taken by him previously as earnest money. That plaintiff then put her in the train with his servant to take her back to Kairana. He did not however tell her where she was to go, when the train arrived at Saharanpore, she saw Jawad Husain on the platform, jumped out, and embraced him, and asked him what station it was. On his telling her she went home with him.

She said also that she had fever when she executed the sale deed and that in addition to the 7,000 rupees above mentioned, plaintiff took from her, her boxes containing ornaments to the value of 2,000 rupees. That plaintiff is a pauper, he uses violence to me and robs me of my money.

Jawad Husain corroborates this story as far as his going to Kairana is concerned, and says that he received a letter from the defendant complaining of ill-treatment, he, however, met her at Saharanpur by chance. Sabir Husain, who went with him to Kairana, also corroborated.

Examined in court, defendant added that when she was at Saharanpur with him (before she was taken to Kairana) plaintiff beat her very much, that sometimes she aches even now from the wounds. After marriage, he sometimes used to dine out, and was always quarrelling with her, and abusing her and her parents, saying that she was of loose behaviour, demanded money of her, sometimes 2,000 and sometimes 3,000 rupees.

She adds that she has transferred her property to Jawad Husain her child, who is now owner of the property.

When defendant took up her residence in Zahid Husain's house plaintiff made an application to the Magistrate under section 552, of the Code of Criminal Procedure asking that the police should order the release of his wife. Then he brought a complaint under section 498, of the Indian Penal Code against Zahid Husain saying that he had enticed her away, and was keeping her as his wife. The Joint Magistrate dismissed this on the 18th March, 1915, and it was absurd enough complaint, defendant is about 50 years of age, and is said to have lost all her teeth. Plaintiff then filed the present suit.

The plaintiff's evidence shows him to be probably without property, although he says that property entered in Liaquat Husain's name belongs to him, he has had no residential house for ten years; Liaquat Husain is helping him in this suit by "money and advice" he now lives in Liaquat Husain's house. He admits having kept the defendant "aloof" so that no relations might carry her off.

The plaintiff has called witnesses to prove that though they live close to where he lives, they never heard any sounds as if plaintiff was ill-treating the defendant. So far as direct evidence is concerned, the case is really one of taking the wife's word against the husband or *vice versa*.

The defendants married life has been peculiar. In 1902, or 1903, she appears to have run away with one Diwan Shah. The plaintiff lodged a complaint under section 522, and lost it. In 1904, he instituted a suit for restitution of conjugal rights and appears to have been supported in that suit by Zahir Husain, the present second defendant. In her defence in the suit she totally denied having been married to the plaintiff, and further charged Zahir Husain with the intention of taking away her property in favour of his son. The suit was decreed, and as defendant declined to submit to the decree, she was put into jail for some months. She had sued the plaintiff unsuccessfully for dower, and had executed a deed of gift of all her property in favour of Diwan Shah. When she got out of jail and joined the plaintiff the latter caused her to bring a suit against Diwan Shah to cancel the deed of gift in his favour and for possession of her property. In this suit she was successful, and in 1906, she conferred upon the plaintiff the rights to manage her property though not to alienate it or raise money upon it. After that she seems to have lived with the plaintiff to outward appearance peacefully until the year 1914, when the execution of the sale deed of the 18th May, was immediately followed by her leaving her husband.

According to the written statement in this case she has now transferred the whole of her property to Jawad Husain, but in her

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evidence she alleges that it is still hers. It is in Jawad Husain's name but she maintains that her son has no interest in it during her life-time. Jawad Husain of course, contends that according to the deed of gift he is owner of the house.

As I have intimated, both plaintiff and defendant are well stricken in years, and it seems clear that the defendant is in the unfortunate position of a woman with property which is desired by a needy husband on the one hand and needy relations on the other. The learned Subordinate Judge thinks that plaintiff at one time beat her, but he says that any husband would do that to a wife whose fidelity he suspected. On the whole the evidence that plaintiff has ill-treated the defendant physically except, if it be an exception to this extent, is not satisfactory, when giving her evidence she alleged merely that he abused her, and the allegations in her written petitions appear hardly to be made out. That she has been ill-treated by him in other ways that is to say mentally is however reasonably likely; he admits having prevented her relations from having access to her, he did not hesitate to keep her for months in jail and she selected to stay in jail rather than return to him; and it is not likely that she voluntarily suffered him to deal with her property. Similarly there appears to be reasonable ground for supposing that her health and safety would be endangered if she were compelled to return to him. He and she are on the worst possible terms, and there can be no natural love or affection between them, and in his house she would be completely in his power. There is too much reason for supposing that the plaintiff's desire in pressing the suit is to get hold of defendant's property rather than to have her to live with him, and as she has executed a deed disposing of this property it is more than likely that he would subject her to distress to induce her to cancel the deed in his favour. It is contended on plaintiff's behalf that defendant is really an unwilling tool in the hands of her relations, and is being opposed by them. That is of course a possibility, but there is no evidence to enable me to say that it is in fact the case.

There is every reason to suppose that she left the plaintiff voluntarily and that so far at any rate she was in no way coerced by her relations. If she is ill-treated by them in future, she will have only herself to thank. It seems to me that it could not be safe, having regard to all that has happened, to order her to be delivered over to the plaintiff.

S. M. Sulaiman, for the appellant.

Tej Bahadur Sapru and *Kailas Nath Katju*, for the respondent.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This was a suit by a Mohammedan husband for restitution of conjugal rights in which, by our order of the 8th of August last, we thought it necessary to remit certain issues for more specific findings by the lower appellate court. Those findings

have now been returned and we are satisfied that they cannot be successfully assailed on the grounds taken in the petition of objections filed by the plaintiff-appellant. We desire to refer to the case of *Armour v. Armour*(1), as laying down sound principles of law which we accept and propose to apply to the facts found in this case by the learned District Judge. We think the findings of the learned District Judge proceed upon evidence and are not vitiated by any erroneous view of the law. We must accept his finding that the defendant has reasonable grounds for believing that her health and safety would be endangered if she returned to her husband's custody and in our opinion this finding disposes of the appeal. We dismiss the appeal accordingly with costs.

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Appeal dismissed.

(1) [1904] 1 A. L. J. R., 318.

HABIB-UL-LAH (*Plaintiff*)

versus

MANRUP AND OTHERS (*Defendants*)*

Priority—Occupancy holding—Usufructuary mortgage—Mortgagees in possession—Proceedings for compulsory registration of mortgage—Lease granted by mortgagees during pendency of those proceedings—Lease registered—Lessees entitled to recover possession of leased plots without payment of mortgage-money.

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Where an occupancy tenant made a usufructuary mortgage of certain plots of land, but during the pendency of proceedings to get the mortgage-deed registered granted a registered lease of some of those plots of land, and no fraud or collusion on the part of the lessee was proved, and the lessee sued to recover possession from the mortgagee who had been put in possession, *held* that the lessee was entitled to possession without having to pay the mortgage-money.

Bahoran Upadhyaya v. Uttamgir, [1911] 8 A. L. J. R., 931, distinguished.

SECOND APPEAL from a decree of PANDIT DURGA DATT JOSHI, District Judge of Azamgarh, reversing a decree of BABU RAMESHWAR DAYAL SHARMA, First Additional Munsif.

The facts of the case are set forth in the referring order of

RAFIQ, J.—The facts which have given rise to this appeal are stated in my order of remand, dated the 18th of April, 1917, but in order to make the present judgment intelligible I propose to recite some of the salient features of the case. It appears that defendant No. 5 has an occupancy holding. He executed two mortgage deeds of the said holding on the 7th of July, 1914, in favour of defendants 1 to 4. He however denied execution of the deeds before the Sub-Registrar, and the mortgagees brought a regular suit for compulsory registration. Before the conclusion of the suit for compulsory registration, the defendant No. 5 on the 10th

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of August, 1914, executed a lease of the same occupancy holding which he had mortgaged to the defendants Nos. 1—4 in favour of the plaintiff-appellant for five years. Subsequent to the execution of the lease the defendant No. 5 entered into a compromise with the mortgagees and agreed to have the deeds of mortgage registered. The deeds were accordingly registered on the 13th of July, 1915. It should be noted here that the mortgagees obtained possession of the occupancy holding from the date of their mortgages and have remained in possession ever since. On the 26th of October, 1915, the lessee brought the suit out of which this appeal has arisen for possession of the occupancy holding on the basis of his lease. He impleaded in the case, as defendants, his lessor and the four mortgagees. Various defences were urged in bar of the claim. The court of first instance decreed the claim holding that the mortgages were collusive. The claim of the plaintiff for damages was dismissed. He preferred an appeal from the decree dismissing his suit for damages while the mortgagees preferred an appeal from the decree awarding possession to the lessee. The learned Judge who heard the appeals did not consider the question of collusion between the defendant No. 5 and defendants Nos. 1-4, that is between the mortgagor and the mortgagees. He decided the appeals on another point. He held that if the lessor himself could not recover possession from the mortgagees without paying the mortgage-money, though the mortgages were invalid at law, the lessee who claimed through him could not be in a better position. The lessee therefore could not get possession without paying off the mortgages. The appeal of the mortgagees was allowed and the claim of the lessee was accordingly dismissed both for possession and damages.

The lessee who is the plaintiff in the case, has come up in the second appeal to this Court, and has preferred two appeals one from the decree in the appeal of the mortgagees and the other from the decree in his own appeal before the lower appellate court. I remanded the case at the last hearing to the lower appellate court for the trial of the issue relating to the alleged collusion between the mortgagor and the mortgagees. The learned Judge has returned a finding to the effect that no collusion has been proved. The finding is one of fact and it must be accepted. The plaintiff appellant however contends that he ought to succeed on the ground of his having a legal title as against the mortgagees. It is said that the mortgages to the defendants Nos. 1-4 are admittedly invalid at law while the lease in his favour is admittedly legal and open to no objection on any legal ground. The case relied upon by the court below is one that was between the mortgagor and the mortgagees. It was held in that case that one who seeks equity must do equity. The mortgagor having taken the money of the mortgagees and delivered the possession of the occupancy-holding to the latter could not equitably demand return of possession on the ground

that the mortgage was invalid without paying off the money. Both the parties had entered into a contract knowing it to be invalid and both of them were equally wrong and if the mortgagor derived any benefit from the money raised on the mortgage, it was but equitable that he should be made to return the money before getting back his property. These considerations it is argued do not apply to the present case. The plaintiff who is the lessee, has a perfectly valid title at law, while the mortgagees have no such title. The plaintiff's position is such that he is not called upon to do any equity to the mortgagees before he can enforce his lease. For the mortgagees the reply is that the plaintiff knew perfectly well of the existence of the mortgages because his father had attested one of the mortgage-deeds. If the contention of the lessee is allowed all that the holder of an occupancy tenancy has to do is to execute a mortgage, deliver possession to the mortgagee and the next day give a lease for consideration to a third party and thus defeat the mortgagee of his mortgage-money. The lessee need not be necessarily cognizant of the mortgage executed by his lessor. Both the lessee and the mortgagee derive their title from the occupancy tenant, and what the latter himself could not do his lessee ought not to be allowed to do. There is no case-law on the point, at least none has been cited at the Bar. I have no doubt that whichever way I decide the losing party is bound to go up in Letters Patent Appeal. The point is one which will probably arise in future in other cases also, and in order to set it at rest once for all, I think it desirable to refer the case to a Bench of two Judges, and I do so.

Peary Lal Banerji, (with him *R. Malcomson*), for the appellant.—The plaintiff has not received any portion of the mortgage-money by payment of which the mortgagees got possession. He has derived no benefit under the mortgage transaction. As between him and the mortgagees there are no benefits to be returned, and so no equities in favour of the latter against the former. The equities being equal, the law must prevail; and the legal estate is with the plaintiff, the transfer to him being valid and the mortgage being invalid. The present point did not arise in the case relied on by the lower court, namely the case of

Bahoran Upadhyaya v. Uttamgir, [1911] 8 A. L. J. R., 931.

There it was the mortgagor himself who came forward to recover possession, and the court held that he must refund the benefit first. The ruling in the case of

Chiddu v. Sheo Mungal, [1916] 15 A. L. J. R., 44,

is not applicable to the present case. There, the plaintiff, zemindar, was aware of the existence of the mortgage. In the present case it has not been proved that the plaintiff had acted in bad faith or in collusion with the mortgagor in order to defraud the mortgagees. It is not proved that he had any knowledge of the existence of the mortgage. The fact that the plaintiff's father was an attesting witness

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of the mortgage deed proves nothing; mere attestation of a deed is no notice of its contents.

Nand Lal v. Jagat Kishore, [1915] 14 A. L. J. R., 1103; at p. 1113, P. O.

There is no reason why the plaintiff should be called upon to pay the mortgage-money. If a person transfers property by a deed which is imperfect and then transfers it to another by a deed which is perfect, and the second transferee sues the first for possession, it is not open to the latter to plead that he shall first be repaid the money which he had paid to the transferor. Similarly, where there are two deeds, one of which is unregistered and the other registered, the holder of the registered-deed can always succeed on the strength of his title and is never made to pay the consideration advanced by the holder of the unregistered-deed.

S. M. Yusuf Hasan, for the respondents.—If the mortgagor himself had been suing for recovery of possession he would undoubtedly not be given a decree for dispossessing the mortgagees except on repayment to them of the money which they had advanced. His lessee who derives title from him can have no higher rights. To give the plaintiff a decree for possession without requiring him to repay the mortgagees would be to allow the mortgagor in a round about way to defraud, the mortgagees, which he would not be allowed to do if he himself came into court. The lease is an obvious dodge to defraud the mortgagees; the fact that it was given while the mortgagees were in possession shows that the mortgagor was acting dishonestly. The mortgagees' possession was sufficient notice to the lessee.

Equity demands at any rate that the lease should be transferred to the mortgagees until their money is repaid.

Peary Lal Banerji, was not heard in reply.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—The essential facts out of which these two appeals arise are as follows:—One Mahadeo, an occupancy tenant, executed on the 7th of July, 1914, three mortgage-deeds, one in favour of Sarup and Manrup and the other two in favour of Ram Jas and Ram Phul. The deeds in question purported to give the aforesaid mortgagees possession of plots of land forming part of Mahadeo's occupancy holding. One plot was given in the first mentioned mortgage and six more plots were added in the other two. After executing these documents Mahadeo refused to get them registered and eventually the mortgagees were driven to institute a regular suit in order to obtain registration. When this suit was instituted Mahadeo declined to contest it and it was decreed against him on his own confession, so that registration was at last effected in the month of July, 1915, almost one year after execution. We must take it however, on the findings of the courts below, that possession had at once been given to the mortgagees of the plots specified in their mortgages. In the meantime, that is to say, on the 10th of August

1914, before the suit by the mortgagees had been instituted and while the question of registration was still pending before the District Registrar, Mahadeo executed another deed by which he purported to lease 20 plots of land, including the six plots specified in the mortgages in favour of Ram Jas and Ramphul, but not including plot No. 859 specified in the mortgage in favour of Sarup and Manrup, to the plaintiff Habib-ul-lah at a yearly rent. Habib-ul-lah failed to obtain possession and thereupon brought the present suit, impleading as defendants the four mortgagees, the tenant Mahadeo and one Debi Din with whose position we are not now concerned. It would seem that in the courts below it was not noticed that the plaintiff's claim did not include plot No. 859, and that the mortgages in favour of Ram Jas and Ramphul only affected six out of the 20 plots specified in the plaint. The case was contested as if the area affected by the mortgages and by the lease were identical. The court of first instance held that the mortgages, being mortgages of an occupancy holding, were contrary to the express provisions of the Tenancy Act and conferred no title on the mortgagees. The lease in favour of the plaintiff Habib-ul-lah on the other hand was a valid contract of lease for a period of five years, permissible under the provisions of the Act. The learned Munsif therefore held that the plaintiff had a good title to possession over the land in suit as against all the defendants, subject only to the framing of the decree in such a form as to safeguard the rights of the additional defendant Debi Din. With this qualification the court of first instance overruled all the objections taken by the mortgagees and decreed the plaintiff's claim. There was an additional claim for damages, based upon allegations of fact which the learned Munsif found not to be substantiated by the plaintiff's evidence and this part of the claim was therefore dismissed. There were two appeals to the District Judge, one by the plaintiff against the order dismissing his claim for damages and the other by the mortgagee-defendants against the decree awarding possession to the plaintiff. The learned District Judge, referring to the decision of a Bench of this Court in *Bahoran Upadhya v. Uttam Gir* (1), has held that the plaintiff is not entitled to recover possession without refunding the mortgage-money and he has accordingly dismissed the plaintiff's claim altogether. On this view of the case the appeal filed in the court below by the mortgagees was allowed and the cross-appeal of the plaintiff was dismissed. Hence there are two appeals now before us, both brought by the plaintiff, against the two decrees passed by the lower appellate court. The learned Judge of this Court before whom the matter first came found it necessary to remit certain issues for determination by the court below and afterwards referred the appeal to a Bench of two Judges for consideration of the question of law involved. In our opinion the facts of this case are not covered by the ruling upon which the learned District Judge has relied. The plaintiff accepted

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(1) [1911] 8 A. L. J. R., 931.

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his lease after the execution of the three mortgages in question, but before their registration, and it is certainly not proved by any evidence on the record that he had notice of the existence of these mortgages, much less that he was acting fraudulently or in collusion with the occupancy tenant in order to defeat the rights of the mortgagees. Something has been made in argument of the fact that the plaintiff's father witnessed the execution of one of the mortgage-deeds, but after considering the evidence given by this man, Faqirey, in the trial court we are satisfied that it is not proved that Faqirey knew that the land comprised in the mortgage-deed, which he witnessed, was also included in the lease afterwards taken by his son, Habib-ul-lah. Under these circumstances it seems to us that Habib-ul-lah is as much entitled to maintain the present suit, for recovery of possession, as lessee, under the terms of the contract in his favour, as he would have been to maintain a suit against a rival lessee, that is to say, against a person to whom Mahadeo had also granted a lease of a portion of the same land, in respect of which it could be contended that it was not binding on Habib-ul-lah, either because it was subsequent in date or because it was, for some other reason, invalid in law. The equitable principle upon which the case of *Bahoran Upadhyaya v. Uttam Gir*(¹), was decided does not seem to us to affect a *bona fide* transferee from the occupancy tenant. If the mortgagees have any remedy it is as against Mahadeo.

The appeal before us challenges the decision of the court of first instance on the question of damages. This matter has not been adequately gone into on the facts by the lower appellate court, but we are content to say that no sufficient cause has been shown to us for dissenting from the finding on the strength of which this part of the plaintiff's claim was dismissed by the court of first instance. The arguments before us have proceeded on the assumption that the plaintiff has not hitherto succeeded in obtaining possession under his lease and that his allegations to the contrary in his plaint were not well founded. On this basis the claim for damages as brought must be dismissed, but otherwise we are of opinion that the decrees of the lower appellate court must be set aside and the decrees of the court of first instance restored. The respondents will pay the costs in this and in the lower appellate court.

B. K. M.

Appeal allowed.

(1) [1911] 8 A. L. J. R., 981.

AHMAD KHAN AND OTHERS (*Objectors*)

versus

GAURA (*Applicant*) *

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December, 3.

RICHARDS,

C. J.

BANERJI, J.

Limitation Act (IX of 1908), sch. 1, art. 181—Suit on mortgage—Preliminary decree—Six months fixed for payment of mortgage-money—Application for decree absolute—Dismissal of application for default—Second application more than three years after accrual of right to apply.

Under Act No. V of 1908 (Code of Civil Procedure) a 'final decree' in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. A second application cannot be regarded as a revival of a previous application which was disposed of. A preliminary decree under Order 34, rule 4 of the Code of Civil Procedure, was passed on August 27, 1908, and six months were allowed to the defendant to pay the mortgage-money. No payment having been made the mortgagee applied for a decree absolute on August 26, 1911. It was dismissed for default on April 9, 1912. On September 10, 1912, a second application was made:—*Held* that the application was time-barred, inasmuch as the right to apply under article 181 of the first schedule to the Limitation Act, accrued within three years after the expiration of the time allowed by the decree for the payment of the mortgage-money.

FIRST APPEAL from an order of Babu SUDERSHAN DAYAL, Second Additional Subordinate Judge of Jaunpur.

The respondent obtained a preliminary decree for sale on 27th August, 1908. She applied for a final decree on 26th August, 1911, but the application was dismissed for default of both parties on 9th April, 1912. The respondent again applied for a final decree on 10th September, 1912. This application was resisted on the grounds that after the dismissal of the previous application the present application was not maintainable and that it was barred by time. The first court held that the proper remedy of the respondent was to apply for the revival of the previous application and that the subsequent application was not maintainable. The lower appellate court reversed the decision of the first court and remanded the case for proceeding with the application. The judgment-debtors appealed to the High Court.

Iqbal Ahmad, for the appellants.—When the first application was dismissed for default the proper remedy of the decree-holder was either to appeal against the order of dismissal or to apply under Order 9, rule 9, Civil Procedure Code for an order setting aside the

* F. A. F. O. No. 72 of 1917.

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dismissal. The present application is neither in form nor in substance an application under Order 9, rule 9 and was presented long after the period prescribed for such an application by Article 163 of the Limitation Act had expired. The present application, therefore, cannot be treated as an application for the revival of the former application.

Even assuming that the application is maintainable it is barred by time. The present Code of Civil Procedure makes it clear that an application for a final decree is not an application in execution of a decree but an application in the suit itself. Therefore Article 182 of the Limitation Act is not applicable to the case, and the previous application made by the respondent cannot give a fresh start to the period of limitation. The present application is governed by Article 181. As it was made more than three years after the expiry of the time for payment fixed by the preliminary decree it is barred by time.

S. M. Sulaiman, for the respondent.—No appeal lies from the order of remand passed by the lower appellate court in this case. Every order of remand sending a case back for trial on the merits is not necessarily appealable.

Wahid un-nissa v. Kundan Lal, [1913] 11 A. L. J. R., 615.

In the present case the order of remand having been made in an appeal from an order and not from a decree no further appeal lies to the High Court.

[BANERJI, J., referred to Order 43, rule 1 (u), Civil Procedure Code.]

The present application is maintainable. The order of dismissal of the previous application was by reason of the non-appearance of both parties; it was an order under rule 3 and not rule 8 of Order 9, Civil Procedure Code. In such a case a fresh application is maintainable.

[BANERJI, J.—Yes, but subject to the law of limitation.]

The question of limitation has not yet been decided by the courts below; it will be one of the questions for determination by the lower court when the case goes back in accordance with the order of remand.

The period of three years should be calculated from the date of the dismissal of the previous application, and not from the date of the expiry of the time fixed for payment.

Iqbal Ahmad, was not heard in reply.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of an application for a final decree in a mortgage suit. The preliminary decree was passed on the 27th of August, 1908, and six months were allowed to the defendant to pay the mortgage money. It is stated in the petition

filed by the decree-holder that no payment was made. He made an application on the 26th of August, 1911, for a final decree under Order 34, rule 5. That application was dismissed for default on the 9th of April, 1912. On the 10th of September, 1912, the present application was made for a final decree. It was opposed on two grounds, first that the order dismissing the previous application was a bar to the present application and secondly that the application was time barred. The court of first instance allowed the first objection and did not decide the second. It dismissed the application now made. Upon appeal the lower appellate court disagreed with the court of first instance and remanded the case for proceeding with the application.

So far as the first point is concerned the defendant's objection was without force, because the first application having been dismissed for default of appearance of both parties a fresh application could be made, but this second application ought to have been made within the period prescribed by the law of limitation. It is clear that the application was beyond time. The period of limitation which governs a case of this kind is three years, under article 181, of the first schedule to the Limitation Act, from the date on which the right to apply accrued, that is from the expiration of the time allowed by the decree for payment, of the mortgage money. In the present case the six months expired on the 27th of February, 1909, and as the present application was made on the 10th of September, 1912, it was clearly beyond time. The court below seems to have overlooked the fact that in the present Code of Civil Procedure a "final decree" in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. The second application cannot be regarded as a revival of an application which was disposed of. In this view the present application was clearly beyond time and ought to have been dismissed.

We accordingly allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts.

B. K. M.

Appeal allowed.

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ANGAD SINGH AND OTHERS (*Defendants*)*versus*ZORAWAR SINGH AND OTHERS (*Plaintiffs*)*

December, 7.

Agra Tenancy Act, (II of 1901), section 164—Suit for profits—Co-sharers in possession of sir and khudkasht in excess—Basis of calculation of profits.

RICHARDS,

C. J.

BANERJI, J.

Where some of the co-sharers in a *mahal* are found to be in possession of considerable areas as *sir* and *khudkasht*, in calculating the profits the following matters should be taken into consideration :—(1) Where different co-sharers are entitled to different portions of the *mahal* as their *sir* and *khudkasht* each co-sharer would be entitled to the profits of his own *sir* and *khudkasht* and he would not be obliged to account for those profits to other co-sharers ; (2) if, on the other hand, any co-sharer had in his hands and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkasht* he should account for the excess. In this case the quality of the land in excess will have to be taken into consideration ; (3) if some of the co-sharers neglect to cultivate their *sir* and *khudkasht* they cannot call upon the others to account for the profits of the *sir* and *khudkasht* of those co-sharers unless such *sir* and *khudkasht* were in excess of their own.

APPEAL under section 10 of the Letters Patent, from a judgment of MR. JUSTICE RAFIQ, confirming a decree of H.E. Holme Esq., District Judge of Aligarh, who confirmed a decree of Pandit Gokaran Nath Ugra, Assistant Collector, First class.

M. L. Agarwala and Peary Lal Banerji, for the appellants.

Tej Bahadur Sapru, for the respondents.

The judgment of the Court was delivered by

Richards,

C. J.

RICHARDS, C. J.—This appeal arises out of a suit brought in the Revenue Court for profits. One of the plaintiffs happened to be the lambardar but we think that this fact ought to be left out of consideration for the purposes of the case. The plaintiff is not suing as lambardar. He is suing as one of the co-sharers. The learned Assistant Collector at the commencement of his judgment says —“The peculiarity of this case is that one of the plaintiffs is the lambardar; and the defendants being only pattidars have so much land as *sir* and *khudkasht* that the lambardar instead of distributing profits has been reduced to the position of a sharer claiming profits.” The defence to the suit was that the defendants were not in the habit of making any collections, and that any profits that they had in their hands were the profits from their own *sir* and

khudkasht, and that they had not more *sir* and *khudkasht* than represented their share in the village. Another defendant pleaded much the same thing but also alleged that the plaintiffs, particularly the lambardar plaintiff had purposely allowed land to go out of cultivation. The court of first instance gave a decree in the plaintiff's favour for the following sums for 1317 fasli Rs 63-7-10
 1318 „ „ 109-7-11
 1319 „ „ 129-3-8.

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The lower appellate court dismissed the appeal of the defendants. In the course of his judgment the learned District Judge says, "The first point for determination is on what basis the liability if any, of the defendants appellants should be calculated. I decide that the calculation ought to be made on the basis of actual collections made, including of course nominal rental of *sir* and *khudkasht*." The defendants have appealed and it is urged on their behalf that in a general way the real issue between the parties has not been decided. It would rather seem as if the expression "basis of actual collections" was not very appropriate, because the defendants have all along alleged that they make no collections at all and there is nothing in the finding of either the court of first instance or the lower appellate court to show that they did. So far as we can gather from the findings arrived at in the court below, the defendants have been in possession of a considerable amount of land and such profits as they have in their hands are the profits derived from land which they have been cultivating themselves or by sub-tenants. We think that if the different co-sharers are entitled to different portions of the mahal as their *sir* and *khudkasht*, each co-sharer would be entitled to the profits of his own *sir* and *khudkasht* and he would not be obliged to account for those profits to the other co-sharers. It would seem to be only common justice that if one co-sharer was industrious and made a considerable profit out of his *sir* and *khudkasht*, he should not be obliged to share that profit with another co-sharer, who neglected or was less fortunate with his *sir* and *khudkasht*. On the other hand if any co-sharer had in his hands and in his own cultivation an excess of land, over and above his proper share of *sir* and *khudkasht*, he should certainly account for the excess. The share of each co-sharer in *sir* and *khudkasht* need not necessarily be identical in area, because a larger share of inferior land might be given to one co-sharer where the others had land of superior quality. We must also point out that if the plaintiffs were entitled to certain land as their *sir* and *khudkasht* and for any reason they neglected to cultivate it, they would not be entitled to call upon the defendant to account for the profits of his *sir* and *khudkasht* unless the latter was in excess of what the plaintiffs were to cultivate. After these general remarks we think it advisable to refer certain issues to the court below before deciding the appeal:

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(1) Was the land divided between the co-sharers as *sir* and *khudkasht*?

(2) Was the *sir* and *khudkasht* of each co-sharer in proportion to his share in the village?

(3) Were the defendants in possession by themselves or through sub-tenants of *sir* and *khudkasht* in excess of their share, and if so to what extent? In considering this issue the court will have regard to the quality of the land.

(4) Having regard to the findings on the above issues, have the defendants realised any thing, and, if so, how much in excess of what they were entitled to?

The parties may adduce further evidence relevant to the above issues. On return of the findings the usual ten days will be allowed for filing objections.

On return of the findings the following judgment was delivered by

Richards,

C. J.

RICHARDS, C. J.—Having regard to the findings we think this appeal must fail. We accordingly dismiss it with costs.

Appeal dismissed.

CRIMINAL

1917

January, 19.

TUDBALL, J.

SATOLA AND OTHERS

versus

EMPEROR.*

Cattle Trespass Act (1 of 1871), section 22—Prosecution of Municipal Servants for impounding cattle—Act unjustifiable—Cattle not found to have done damage to Municipal trees—United Provinces Municipalities Act (11 of 1916) section 326 (1).

Section 326 (1) of the Municipalities Act relates only to suits of a civil nature in a Civil Court and has nothing to do with prosecutions under the Cattle Trespass Act.

Where a Magistrate found that cattle had done no damage to Municipal trees and that consequently the seizure of the cattle by the accused who were municipal servants was without justification, *held* that the accused were rightly convicted under section 22 of the Cattle Trespass Act.

CRIMINAL REFERENCE made by R. L. H. CLARKE Esq., District Magistrate of Jhansi.

* Cr. Ref. No. 1019 of 1917.

The applicants were not represented.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

TUDBALL, J.—This case has been referred to this Court by the District Magistrate of Jhansi. The facts are simple on the evidence and as found by the Magistrate. The accused persons are certain Municipal servants who illegally and without justification seized and impounded cattle belonging to the complainant. A complaint was made before a Joint Magistrate under section 22 of the Cattle Trespass Act, and it was transferred by him to the court of the third class Magistrate for decision. The Magistrate found the accused guilty and directed them to pay Rs. 10 as compensation to the complainant under section 22 of the Act. The District Magistrate admits in his order of reference that the case is trivial, but is of opinion that the lower court's order was illegal and irregular, because the accused persons were servants of the Municipality and quite within their rights in impounding cattle damaging Municipal trees, and that the court ought to have acted under section 326 (1) of the Municipalities Act. The District Magistrate at the end of his reference expresses what to me is an astounding opinion. He says "the lower court may or may not believe the evidence but I think it is exercising a very unwise discretion in fining them." In the first place section 326 (1) of the Municipalities Act has nothing to do with the proceedings in a Criminal Court. It relates only to suits of a civil nature in a Civil Court. The wording of the section is plain and it has nothing to do with prosecutions under the Cattle Trespass Act. In the next place it is very material indeed whether the evidence for the prosecution in the case was worthy of belief or not. The Magistrate has given his reasons and they are fairly cogent for holding that the seizure of the cattle was without justification and that no damage whatever had been done to the Municipal trees. No Municipal servant is authorised in these circumstances to seize and impound cattle. It is only where the latter are damaging or have damaged the Municipal trees, that these servants would be at all justified in impounding them. I must say I am surprised that the learned Sessions Judge should have sent up a reference of this nature without any remarks and without any expression of opinion. There is absolutely no force whatsoever in it and the time of this Court and other persons has been unnecessarily wasted in a very trivial matter. Let the record be returned.

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Tudball, J.

Record returned.

CIVIL

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July, 25.

BANERJI, J.
TUDBALL, J.BUDDHU MISIR AND OTHERS (*Decree-holders*)

versus

BHAGIRATHI KUAR (*Judgment-debtor*)*

Code of Civil Procedure (Act V of 1908), Order 21, rule 95, sections 115, 146
—Revisional jurisdiction of High Court—Another remedy open to applicant
—Delivery of possession to transferee from auction-purchaser—Whether
transferee may apply for delivery of possession.

No appeal lies from an order delivering possession under Order 21, rule 95 of the Code of Civil Procedure, and a court entertaining an appeal therefrom acts without jurisdiction.

Having regard to section 146 of the Code of Civil Procedure a transferee from an auction-purchaser is entitled to delivery of possession under Order 21, rule 95 of the Code.

Ordinarily the High Court does not interfere where another remedy is open to a party, but each case must be judged on its peculiar facts. Where, therefore, in a case there were no complicated questions of fact or law and the applicants were clearly entitled to possession by virtue of their purchase from the auction-purchaser, the High Court interfered in revision with the order dismissing the application for delivery of possession.

CIVIL REVISION against an order of G. C. BADHWAR Esq., District Judge, Ghazipur, reversing an order of M. Nadir Husain, Munsiff of Ghazipur.

Buddhu Misir and others held a decree against Musammat Bhagirathi. In execution of that decree certain immovable property of Musammat Bhagirathi was sold and purchased by one Sukh Narain Lal, a third party. The auction-purchaser, the said Sukh Narain, subsequently sold the property by a private deed to Buddhu Misir and others, the decree-holders. The decree-holders then applied under Order 21, rule 95 of the Code of Civil Procedure, to be put in possession of the property. The auction-purchaser vendor, Sukh Narain Lal, admitted the sale-deed in favour of the decree-holder and supported the latter's application. The judgment-debtor objected on the ground that Order 21, rule 95 applied only to an auction-purchaser and a subsequent vendee by private treaty from the auction-purchaser could not apply under that Rule. The court of first instance overruled the objection and directed possession to be delivered to the decree-holders. On appeal by the judgment-debtor, the District Judge reversed the order of the Munsiff, holding that the auction-purchaser alone could apply to be put in possession under Order 21, rule 95, remarking; "the law even prohibits purchase at an auction sale in the name of another. If the vendee of Sukh

*Civ. Rev. No. 65 of 1917 with E. S. A. No. 76 of 1917.

Narain were given the aid of the court, the provision of the law just referred to would be defeated." He also held that section 146 of the Code had no application to the case. He was of opinion that section 146 "was enacted merely because a representative had no remedy under section 108 of the old Civil Procedure Code." He further observed, "there being a special provision in Order 21, rule 95 about possession being delivered only to the auction-purchaser, section 146 does not apply to this case." The decree-holders filed a second appeal as well as applied in revision against the order of the District Judge.

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Tej Bahadur Sapru (with *Kamla Kant Varma*), for the applicants.

The District Judge has entirely misunderstood section 146 and Order 21, rule 95 of the Code. The decree-holders, having purchased the property from the auction-purchaser, are as his representatives, clearly entitled to apply under Order 21, rule 95, read with section 146.

[BANERJI, J.—Suppose the auction-purchaser dies immediately after the auction-sale, cannot his son apply under Order 21, rule 95 ?]

To be consistent, one will have to hold that he cannot. Or, suppose the auction-purchaser becomes an insolvent, cannot the Receiver in Insolvency apply ?

Whatever may have been the immediate cause of the enactment of section 146, its language is perfectly general.

[BANERJI, J.—Did an appeal lie to the District Judge in this case ? He referred to

Bhagwati v. Banwari Lal, [1909] I. L. R., 31 All., 82, F. B.]

If no appeal lay to the District Judge, his order against me, made on the judgment-debtor's appeal, is without jurisdiction, and I am entitled to come up to this Court in revision.

If the District Judge's order is *ultra vires*, then I submit that the view of the law taken by him is incorrect and my appeal should be allowed on that ground.

Abdul Raoof, for the respondent.—The second appeal does not lie, because there is no appeal from an order under Order 21, rule 95, which corresponds to section 318 of the old Code.

As for the revision, the appellants have a remedy by suit, and it has been repeatedly held that where another remedy is available, this Court will not interfere in revision. I, therefore, submit that the revision application should not be entertained.

Tej Bahadur Sapru, was not called upon to reply, but referred to *Ram Narain v. Muhammad Shah*, [1914] 12 A. L. J. R., 899.

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Banerji, J.

The judgment of the Court was delivered by

BANERJI, J.—The facts out of which this application for revision arises are these.—In execution of a decree held by Buddhu Misir and others, the present applicants, the property of the judgment-debtor was sold by auction and was purchased by one Sukh Narain. The auction-purchaser sold the property purchased by him to the decree-holders. The decree-holders purchasers applied for delivery of possession under Order 21, rule 95 of the Code of Civil Procedure. The court of first instance granted their application. An appeal was preferred to the District Judge and he held that the applicants for possession, who were purchasers from the auction-purchaser, were not entitled to make an application under Order 21, rule 95 and accordingly set aside the order of the court of first instance. From this order of the learned District Judge the present application for revision has been preferred and it is contended that the learned Judge had no jurisdiction to entertain an appeal from the order of the court of first instance. The contention is fully supported by the ruling of the Full Bench in the case of *Bhagwati v. Banwari Lal* (1). That was no doubt a case under section 318 of the Code of Civil Procedure of 1882 ; but the place of that section has been taken by Order 21, rule 95 of the present Code. It is clear, therefore, that the court below acted without jurisdiction in entertaining an appeal from the order of the court of first instance. Moreover, in our opinion, in view of the language of section 146 of the Code of Civil Procedure, the applicants were entitled to maintain their application though they were transferees from the auction-purchaser and were not themselves the auction-purchasers. On behalf of the opposite party we are asked not to interfere as it is the practice of this Court not to exercise its powers of revision in cases in which another remedy is open to the applicant, that remedy being a suit for possession. No doubt ordinarily this Court would not interfere in revision in a case where a remedy is open to a party. But, as observed in *Ram Narain v. Muhammad Shah* (2), each case must be judged upon its peculiar circumstances. In the present case there were no complicated questions of fact or law, and the applicants were clearly entitled to obtain possession by virtue of their purchase from the auction-purchaser. We allow the application, set aside the order of the court below and restore that of the court of first instance with costs in all courts.

R. V.

Application allowed.

(1) [1909] I. L. R., 31 All., 83.

(2) [1914] 12 A. L. J. R., 899.

CHHOTE LAL

versus

EMPEROR *

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Penal Code (Act XLV of 1860), section 456—Lurking house-trespass by night—Intent—Facts from which intent may be inferred—Burden of proof. November, 8.

* *Per PIGGOTT, J.*—When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Indian Penal Code.

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Balmakund Ram v. Ghansham Ram, [1895] I. L. R., 22 Cal., 391; and *Premamundo Shaha v. Brindabun Chung*, [1895] I. L. R., 22 Cal., 994, referred to.

In dealing with cases of this sort (lurking house-trespass). Magistrates should not overlook the existence of section 509 of the Indian Penal Code when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. When, however, the accused pleads and establishes, either by direct evidence, or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult, or annoy any person in possession of the house, then the provisions of section 106 of the Indian Evidence Act should be referred to.

Where, again, an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the court may find that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected.

Emperor v. Lakshman Raghunath, [1901] I. L. R., 26 Bom., 558, referred to.

Per WALSH, J.—If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order and an intention to annoy the author of the order may be inferred from it.

A person was found inside the house of another at night and he pleaded in defence, first that he had entered the house at the request of one of the inmates and, secondly, that he had no intention of insulting or annoying the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner:—*Held* that the conviction of the accused without enquiry into the truth or otherwise of the defence set up was bad in law.

Emperor v. Mulla, [1916] I. L. R., 37 All., 395, followed.

Emperor v. Gaya Bhar, [1916] I. L. R., 38 All., 517, explained.

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CRIMINAL REFERENCE made by E. F. OPPENHEIM, Esq., District Magistrate of Banda.

The parties were not represented.

The judgment of the Court was delivered by.

PIGGOTT, J.—This is a reference by the District Magistrate of Banda in a case in which one Chhote Lal was tried summarily by a first class Magistrate of that district. The offence alleged was that of lurking house-trespass by night, and it is clear from the record that the prosecution led evidence to prove, not merely that the house of the complainant was entered by Chhote Lal under circumstances covered by the definition in section 443 of the Indian Penal Code, but also that the lurking house-trespass in question was committed with intent to commit theft. The accused in his defence admitted having been caught at night inside the house of the complainant Badri under the circumstances deposed to by the prosecution witnesses. He suggested that those witnesses were not speaking the truth with regard to his having stolen or attempted to steal any of Badri's property. He pleaded that his intention in effecting a secret entry into Badri's house had been to carry on an intrigue with the widowed mother of the said Badri. He pleaded, further, that he had entered the house at the express invitation of this woman. The trying Magistrate refused to enquire fully into the facts. He has left it uncertain whether there was any truth in the defence above set out. He says that, even on the accused's own statement of the facts, an offence, namely, the offence of lurking house-trespass by night, punishable under section 456 of the Indian Penal Code was established. He convicted and sentenced Chhote Lal accordingly. The District Magistrate, in referring the case, has relied upon the reported decision of a Judge of this Court in the case of *Emperor v. Gaya Bhar* (1). It has been suggested that this decision is inconsistent with that of another Judge of this Court in the case of *Emperor v. Mulla* (2). In our opinion the two decisions are not inconsistent and we agree substantially with both of them. When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Indian Penal Code. This was clearly laid down in the case of *Balmakund Ram v. Ghansham Ram* (3), and also in the case of *Premanundo Shaha v. Brindaban Chunj* (4), at page 994 of the same volume. And in dealing with cases of this sort we may remark that Magistrates should not overlook the existence of section 509 of the Indian Penal Code when they are considering the

(1) [1916] I. L. R. 38 All., 517.

(2) [1916] I. L. R., 37 All., 395.

(3) [1894] I. L. R., 22 Cal., 391.

(4) [1895] I. L. R., 22 Cal., p. 994.

allegation on the part of the prosecution that the entry by the accused into the premises in question must, presumably, have been with intent to commit some offence. Difficulties are only likely to arise when the accused himself pleads in his defence and establishes, either by direct evidence, or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult or annoy any person in possession of the house. The provisions of section 106 of the Indian Evidence Act (Act I of 1872) may also be referred to in this connection. In the case now before us the accused alleged two things: firstly, that he had entered the house at the request of one of its inmates and, secondly, that he had no intention of insulting or annoying the complainant Badri. Presumably it might be suggested in his defence that this latter plea was sufficiently established by the precautions taken by him to conceal from Badri the fact of his presence in the house. At any rate it was clearly no part of the case for the prosecution that Badri knew of the existence of any intrigue between the accused Chhote Lal and his mother, or had ever forbidden Chhote Lal's access to his house on the ground of his knowing or suspecting the existence of such intrigue. We make these remarks because we think it possible that the decision of the learned Judge of this Court in the case of *Emperor v. Gaya Bhar* (1), may possibly be interpreted too widely and may be held to apply to cases in which an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof. In such cases it might not be a sufficient answer to a charge of criminal trespass for the accused to say that he personally hoped that the owner would remain in ignorance of the fact of his entry. The court may find on the facts that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected. On this point the remarks of the learned Judges of the Bombay High Court in the case of *Emperor v. Lakshman Raghnath* (2), are certainly pertinent. In our opinion there should have been a further enquiry into this case before the accused was either convicted or acquitted. He was anxious himself to summon the complainant's mother as his witness, and the trying Magistrate has given no valid reasons for refusing that request. It may be that this woman's evidence would have entirely satisfied the Magistrate as to the facts of the case, and the Magistrate may come to the conclusion that the allegations made by the accused in his defence are wholly false and that he has aggravated his position by putting forward these allegations and dragging a respectable woman into court on the strength of them. On the other hand, if the Magistrate finds the facts to be as alleged by the accused, the case

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(1) [1916] I. L. R., 38 All., 517. (2) [1902] I. L. R., 26 Bom., 558.

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should be decided on the principles of law laid down in the rulings to which we have referred, including the decision of this Court in the case of *Emperor v. Gaya Bhar* (2), from which, if the principles laid down are properly limited and understood, we see no reason to dissent. We set aside the conviction and sentence in this case, but we do not acquit the accused Chhote Lal of the offence charged. On the contrary we direct the Magistrate to proceed with the trial, to enquire into the truth or otherwise of the defence set up and to pass such orders in the case as appear to him correct and appropriate.

Walsh, J.

WALSH, J.—I agree. What I propose to say on the question of law referred to us, covers this case and also Criminal Reference No. 837 of 1917 before us for orders. I think it is a question of fact in each case. As LORD JUSTICE BOWEN once said "the state of a man's intention is as much a question of fact as the state of his digestion" and the real question of law is whether, when there has been a conviction, there is any evidence of intention justifying the conviction. There is no conflict between the reported cases and I venture to sum up the result of them in this way. They come to this, that if there is an invitation, or complicity by the woman, combined with an intention to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused, then his act becomes a direct defiance of an express order, and it is impossible to say that you cannot infer from it an intention to annoy the author of the order. I think this is what has already been established by the decided cases. I agree with the decision of MR. JUSTICE KNOX in *Emperor v. Mulla* (1), that a man found inside the complainant's house who makes no statement of his reasons for being there or gives an explanation which is demonstrably false, is clearly liable to be convicted, on the ground that the burden of proof lies upon him and he has not discharged it. I do not understand that MR. JUSTICE SUNDAR LAL differed from that decision. On the contrary he seems to have agreed with it. MR. JUSTICE SUNDAR LAL held, in *Emperor v. Gaya Bhar* (2), that mere knowledge, on the part of the accused, that he is likely to cause annoyance is not sufficient, and in coming to that conclusion he merely followed the case of *Queen Empress v. Rayapadayachi* (3), where it was held that although a man may know that his act is likely to cause annoyance it does not necessarily follow that he does the act with intent to annoy. And, so far, I think MR. JUSTICE SUNDAR LAL and the Madras High Court were really giving effect to the absence from this section (section 441) of the words found in a cognate section, namely, section 297, where the knowledge that the feelings of a person are likely to be wounded, is one of the

(1) [1915] I. L. R., 37 All., 395. (2) [1916] I. L. R., 38 All., 517.

(3). [1896] I. L. R., 19 Mad., 240.

ingredients of the offence. This view is borne out by the decision in *Emperor v. Lakshman Raghunath*⁽¹⁾, to which my brother PIGGOTT has already referred. In that case there was a distinct prohibition. The accused only wanted to get at their judgment-debtor and trespassed upon the complainant's house in order to do it. Some people might be annoyed by that, while some people might not mind it, and an enemy of the judgment-debtor certainly would not. But in the particular case the complainant forbade them to do it and it was held, and I agree with the decision, that, in the face of his order directly forbidding them, an offence was committed within this section. There is a passage in that judgment which I adopt "When it is uncertain whether a particular result will follow (as in the Madras case in which the accused hoped to keep his conduct secret), there may be no intent to cause that result even though it may be known that the result is likely. But it seems impossible to contend, when an act is done with a knowledge amounting to practical certainty that a result will follow, that it is not intended to cause that result." Regard must, obviously, be had to all the circumstances of the case. It may sometimes happen, I suppose, in this country as in others, that a man who is making love to another man's wife is doing it not merely with the tacit approval of the husband but as the result of a conspiracy, if I may use the word, between the husband and the wife to enable the wife to get away from the husband, and find a protector. Such cases are not unknown. In such a case the man might not know that his visits were approved by the husband and might think that he was successfully carrying on a secret intrigue, the truth being that the husband was assisting the wife all the time. I take it that no court ought to find, if those facts were established and although the man complained against himself might have thought that his conduct was likely to annoy, that he had any intention of annoying the husband. I agree with the view taken by the learned Sessions Judge of Cawnpore in the case which is before us reference No. 837 of 1917, *Lala v. Emperor**,

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* PIGGOTT & WALSH, JJ.—This is a case in which a conviction of lurking house-trespass by night (section 456 of the Indian Penal Code) has been recorded by the trying Magistrate and has been confirmed by the Sessions Judge on appeal. The case has come before us in revision, substantially upon the pleading that on the view of the facts taken by the learned Sessions Judge the latter ought to have held that no offence had been proved. One difficulty we must necessarily feel in dealing with the case on these lines is that the learned Sessions Judge has not definitely found the facts to be in accordance with the argument addressed to us in support of this application. The facts in question were not alleged by the accused himself, but certain circumstances suggesting the possibility of their existence were deposed to by some of the witnesses called for the defence.

(1) [1902] L. L. R., 26 Bom., 558.

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that if the accused knew that he had been expressly prohibited from entering the house by the uncle it is legitimate to infer that he intended to annoy by persisting. Another example is that of a son in disgrace who persists in entering his father's house after a direct prohibition. I think this feature of the case in Reference No. 837 of 1917 just marks the dividing line between the two cases. I netirely agree with the order proposed in the case before us. The facts must be ascertained before the final decision can be arrived at.

Conviction quashed.

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December, 5.

RICHARDS,
C. J.
BANERJI, J.

FAZAL AHMAD AND ANOTHER (*Defendants*)

versus

RAHIM BIBI AND OTHERS (*Plaintiffs*) *

Mohammedan Law—Marz-ul-maut, doctrine of—Applicability.

Where a transaction purports to be a sale, the doctrine of *Marz-ul-maut* does not apply to it; while if it is a *waqf* created when the *waqif* was suffering from death-illness it is valid to the extent of a third; and that if it is a gift, it cannot take effect at all.

FIRST APPEAL from a decree of BABU GAURI SHANKAR, Subordinate Judge of Pilibhit.

Claim for recovery of possession on certain share.

The court of first instance decreed the claim in part.

* F. A. No. 21 of 1916.

The learned Sessions Judge has in effect said that, even supposing the facts to be as now suggested on behalf of the accused, the conviction must be upheld. In substance the case before us is really governed by the decision of this Court in the case of *Emperor v. Mulla*, [1915] I. L. R., 37 All., 395, and might well have been affirmed on those grounds. Apart from this, we have just been considering in connection with Criminal Reference No. 752 of 1917 the question of law which has been discussed in connection with the present application, and we need only say that we think the conviction in the present case could be justified along the line of argument followed by the learned Sessions Judge. In saying this we are by no means admitting the facts to be as suggested on behalf of the accused. It would be unfair to do so in the face of the express denial of those facts by Musammat Bhagia (the young woman principally concerned) in the evidence given by her before the Court. We dismiss the application and confirm the conviction and sentence passed by the Magistrate. The accused must surrender to his bail to undergo the unexpired portion of his sentence.

Defendants appealed.

B. E. O'Connor, Sir Sundar Lal and S. M. Sulaiman, for the appellants.

Tej Bahadur Sapru, Preo Nath Banerji and Iqbal Ahmad, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This and the connected appeals arise out of two suits which related to certain property, movable and immovable, which belonged to one Manzur Ahmad, who died on the 2nd of September, 1912. Manzur Ahmad, although he had been married (four times, it is stated) never had any children. His heirs were first Fazal Ahmad (his paternal-uncle), secondly his mother Musammat Rahim Bibi, and thirdly his two widows Musammat Qamar-un-nissa and Musammat Jilani Begam. Under the Mohammedan Law of inheritance Fazal Ahmad would have been entitled to 10 *Sihams* out of 24, Rahim Bibi to 8 *Sihams* and the two widows to 6 *Sihams* between them. Fazal Ahmad was not only uncle to the deceased but he was also the father of Musammat Jilani Begam, his youngest wife. Before his death Manzur Ahmad was possessed of a considerable amount of property. He had deposited in the house of Lala Khub Chand (banker) the sum of Rs. 16,876. He had also in cash in his house the sum of Rs. 8,500 and 4,000 sovereigns, (equal to Rs. 60,000) which was buried in a house which was occupied by Jilani Begam. He had also Rs. 58,000 on fixed deposit with the Allahabad Bank. Besides this cash the deceased was possessed of some house property and a considerable amount of zamindari property including two villages called Mauza Bithaura Kalan and Mauza Amkhera. These two villages were worth about two lakhs of rupees. The property of the deceased was worth probably between 5 and 6 lacks (if jewellery ornaments *etc.*, be included).

Very shortly before his death Manzur Ahmad had transferred the two last mentioned villages to his mother Musammat Rahim Bibi. He had also given her the 4,000 sovereigns. He caused the Rs. 16,876 deposited with Lala Khub Chand to be transferred to her name. The Rs. 8,500 in cash had also been brought to the house of Lala Khub Chand and placed to the credit of Musammat Rahim Bibi. It thus appears that the deceased transferred very shortly before his death, property and money to the extent of Rs. 2,85,376.

After the death of Manzur Ahmad there was litigation in the Revenue Court as to mutation of names with regard to the two villages to which we have referred, with the result that Fazal Ahmad succeeded in having his name recorded as one of the heirs of Manzur Ahmad, and he was appointed lambardar. This suit was thereupon instituted in the Civil Court and Musammat Rahim Bibi claims against the other heirs that she is entitled to the villages by

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virtue of a deed, dated the 29th of August, 1912. In the other suit Fazal Ahmad is plaintiff and seeks therein (amongst other things) his share of the four thousand sovereigns, of Rs. 16,876 and of Rs. 8,500.

The defendants in the suit brought by Rahim Bibi pleaded (1) that Manzur Ahmad was so ill that he knew nothing about the transfer at all, (2) that if he was capable of understanding the transaction it was in truth and fact a gift, and that the gift, being to an heir was invalid having regard to the Mohammedan Law of *Marz-ul-maut*. Rahim Bibi answered these pleas by contending (1) that the transaction was not a gift but a sale in which case "*Marz-ul-maut*" did not apply, (2) that having regard to the nature of the illness which was long protracted the doctrine of *Marz-ul-maut* did not apply, and (3) that even if the doctrine of *Marz-ul-maut* did apply the transaction was a *waqf* and was valid to the extent of one-third of the entire property of Manzur Ahmad. In answer to the suit brought by Fazal Ahmad, Rahim Bibi pleaded that the gift of the money was valid because *Marz-ul-maut* did not apply and that the money was transferred not as a gift but in discharge of a debt due by the deceased to her.

Both suits were tried together upon the same evidence. We have come to the conclusion, for reasons which we shall state later on, that the transfer of the villages and of the money *etc.*, to Rahim Bibi were in truth and in fact gifts to Rahim Bibi, made by the deceased because he wished to benefit her more than his other heirs. In this view of the case the all-important issue is whether or not the illness of Manzur Ahmad was such as to render the gifts void according to Mohammedan Law that gifts made in *Marz-ul-maut* are invalid. Rahim Bibi has since Manzur Ahmad's death attempted to make a *waqf* of the property (perhaps more or less illusory and she has given away most of the money to her own relatives who are not heirs of Manzur Ahmad. We may mention here that the learned counsel for Fazal Ahmad in the appeal before us abandoned the contention that the deceased did not know and understand what he was doing when he made the transfer and learned counsel laid no stress on the evidence of Fazal Ahmad or his witnesses.

[Here their Lordships discussed the evidence and proceeded as follows.]

During all this time and when the deceased died he was staying in the house of Ala-ud-din. In the same house also lived Wisal-ud-din, a nephew of Rahim Bibi, that is to say the son of her deceased brother. Wisal-ud-din and his brothers are the persons in whose favour Rahim Bibi has since parted with the greater part of her property and they were not heirs of Manzur Ahmad.

As already stated, while the deceased was staying in this house he had sent to Dhundree to have the four thousand sovereigns dug up from the house of Jilani Bibi in order that they might be re-buried in the house of his mother Rahim Bibi. Directions were also given to bring the Rs. 8,500 to Khubchand banker. The latter money duly reached Khubchand but the sovereigns after being dug up were stolen, (half were afterwards recovered). This happened about the 20th of August or a little late. On the 29th of August the deceased executed a deed of transfer in favour of his mother Rahim Bibi in the following form—"I, while in a sound state of body and mind, have absolutely sold of my own free will the entire 20 biswas zamindari property in Mauza Bithaura Kalan, pergunah and district Pilibhit, and the entire 20 biswa zamindari property in Mauza Amkhera, including the hamlets called Zahurganj, Manzurganj, Samaria, and Makruli, pergunah Richa, tahsil Baheri, district Bareilly and with all the appertenances and interests appertaining thereto, without the exception of any right or share, to my mother, Musammat Rahim Bibi, wife of Sheikh Zahur Ahmad, Sheikh, resident of Mauza Dhundri, pergunah Jahanabad, district Pilibhit, for two lakhs of rupees, half of which is one lakh of rupees, and made over the possession of both the properties sold to the vendee. Now neither I nor any of my representatives have any right in the above mentioned properties sold. Out of entire sale consideration I have received Rs. 10,000 in cash, and have left Rs. 1,90,000 with the vendee with my directions, in order that she may spend it with her own authority and at her own discretion for good purposes for the benefit of my soul in the next world. Hence I executed this document as a sale deed giving authority in respect of the sum held in deposit for charity, on a stamp paper of Rs. 2,000 under article 23, and on a stamp paper of Rs 15 under article 7, Schedule I, Act II of 1889, so that it may serve as evidence."

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Registration was duly effected and the deed has the following endorsement. "Let it be known that the executant is ill and he submitted a certificate of his illness given by the Assistant Civil Surgeon, Pilibhit, who is now Civil Surgeon in charge of Pilibhit with his application for issue of a commission which is in the office."

The certificate is as follows—"I came to dress Sheikh Manzur Ahmad of Dhundri at the time when the deed was presented and execution admitted by him before the Sub-Registrar. I found his mental faculties, unimpaired and he answered to every question referring to the deed quite correctly."

The deed was registered between 5 and 6 o'clock in the evening on the 29th of August 1912. This certificate was given by Dr. Chatterji at 5-30 in the evening. At 9-30 in the morning of the same day Dr. Chatterji had given another certificate as follows:—

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"Certified that I examined Sheikh Manzur Ahmad, zamindar of Dhundri, this morning at the request of the Sub-Divisional Magistrate and found his mental faculties not affected yet, although his general condition is extremely weak."

It is pretty clear that the Sub-Registrar had some hesitation in registering the deed, having regard to the condition of the deceased and notwithstanding the explanation which Dr. Chatterji gave when giving his evidence we think that his first certificate shows that the deceased's condition was very critical on the morning of the 29th of August. The certificate was given in English and Dr. Chatterji understands English. The words "found his mental faculties not affected yet," are significant. Immediately after the execution of the deed men were sent off post haste to make collections at the two villages and to apply for mutation of names. It was not the time of year at which collections are made, and the collections which were in fact made were more or less of a formal character, obviously the intention was to show that the deed had been acted upon and possession taken. Certainly these steps were taken with the least possible delay.

[After discussing the evidence their Lordships proceeded as follows:—]

The conclusion that we have come to is that the illness of Manzur Ahmad all along rapidly progressed and increased between June, and the 2nd of September, when he died and that it cannot possibly be said that he suffered from a lingering disease. There is no very satisfactory evidence when consumption commenced but even if we assume that the seeds of the disease were present for some time the progress of the disease was rapid between June, and 2nd September. We believe Dr. Chatterji when he says that when Manzur Ahmad left him on the 7th of August, the deceased was under the apprehension of death and if this view be correct nothing which subsequently happened was at all likely to lessen that apprehension. The sufferings of the deceased continued steadily to increase. The evidence of Rahim Bibi herself shows that the deceased apprehended death and that she was frequently trying to console him and remove his apprehension. We think that the two certificates which Dr. Chatterji gave show that those about Manzur Ahmad believed that he was going to die, and that this apprehension was shared by the Sub-Registrar. That those who were about him (near relatives of Rahim Bibi) believed he was going to die is also shown by the very great haste there was in sending off men to make the collections at the two villages and filing an application for mutation of names on 30th August. What other people thought who were daily seeing the deceased is not without some bearing on what the deceased was likely to think himself. The learned Judge referring to the evidence of Abdul Aziz a witness for Fazl Ahmad says

that the deceased told the witness that he was better and that *as soon* as he would recover he would show him the villages that required water. This is not quite what the witness said. Witness said that the deceased said "if he recovered." The learned advocate for Rahim Bibi admitted that if there was a rapid increase in the disease about the time when the "gift" was made, and if the deceased was under apprehension of the near approach of death, the rule of *Marz-ul-maut* would apply even though the deceased had been suffering from consumption for more than a year before he made the gift. In our opinion the illness of the deceased was not a lingering disease and he was under the apprehension of near approaching death and if the transfers of the money and of the land ought to be regarded as "gifts" to Rahim Bibi, they were void under the Mohammedan Law as having been made when the donor was suffering from his death-illness. The doctrine of *Marz-ul-maut* is founded on the Koran which ordains that *the heirs must inherit*. Even though our sympathies may be to some extent more with Rahim Bibi, the affectionate mother of the deceased, we are bound to administer the law.

The next question we propose to deal with is what was the real nature of the transaction. If the transaction was a sale the doctrine of *Marz-ul-maut* does not apply. If the transaction was the creation of a *wagf* by the deceased, the transaction would be good to the extent of one-third of the entire estate of the deceased. If it was a gift to Rahim Bibi one of the heirs, it was altogether void. On the face of it the deed is a sale deed. But it is abundantly clear that Rahim Bibi had nothing like two lakhs of rupees wherewith to purchase the property.

[Their Lordships, after discussing evidence, proceeded as follows :—]

As to the question of *wagf*.

The deed does not say that the villages were to be held as *wagf* property. If the deceased wanted to dedicate the villages there is no reason why he should not have expressly dedicated them as he did the property in 1906 on the occasion of his previous illness. If he did not think he was going to die he might have named himself as *mutawalli* as he did in 1909 or he might have named his mother *mutawalli*. The deed only says that Rs. 1,90,000 of the price (which was not and could not be paid) was to be applied for charitable purposes at the discretion of his mother. Looking at the evidence of Ala-ud-din, of Rahim Bibi herself, the condition of the donor and the surrounding circumstances we have come to the conclusion that the handing over of the sovereigns and the transfer of the Rs. 8,500, Rs. 16,876 and the two villages were in truth simply gifts made by the deceased to his mother and the provision in the deed that Rs. 1,90,000 should be applied in charity at the discretion of Rahim Bibi was a somewhat ingenious device to give the transaction the appearance of a sale so as to enable the Moham-

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medan Law which forbids a Musalman in his death-illness to make a gift to one heir at the expense of the others.

[Their Lordships again dealt with the evidence and observed:—]

On both sides, there was, as the learned Judge says a considerable amount of hard swearing. Fazl Ahmad not only alleged but stated in his evidence that the deceased did not even know the contents of the deed; while we think that the deceased was in a very weak condition when he executed the deed. We agree with the court below that he understood what he was doing.

[Here the evidence was discussed.]

We have come to the conclusion that this appeal must be allowed. But to mark our strong disapproval of some of the evidence adduced on behalf of Fazl Ahmad we disallow all costs of witnesses in the court below. The order of the court is that the appeal is allowed, the decree of the court below set aside and the claim of Rahim Bibi is dismissed with costs in both courts, save as mentioned above.

We direct the Receiver to prepare and bring in as soon as reasonably possible a final account with a view to his being discharged.

Appeal allowed.

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January, 8.

KNOX, J.

BAKHTAWAR

versus

EMPEROP. *

Workman's Breach of Contract Act (XIII of 1859), section 2—Workman receiving advance from employer—Breach of contract—Refusal to work without lawful or reasonable excuse—Provisions of Act strictly enforceable.

Where a workman knowing that there is a law like Act XIII of 1859 enters into a contract voluntarily, and willingly, he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse, and one of the terms of the contract itself cannot be held up afterwards as a reasonable excuse for non-performance.

C. J. Lucas v. Ramai Singh (Vide foot-note), followed.

CRIMINAL REFERENCE made by E. H. ASHWORTH ESQ., Sessions Judge of Cawnpore.

The parties were not represented.

The following judgment was delivered by

Knox, J.

KNOX, J.—The learned Sessions Judge of Cawnpore has reported this case for orders. The case is thus stated by him:—One Bakhtawar, a workman already in the service of a master, whose name is not given, took an advance of Rs. 10 and promised to work for

* Cr. Ref. No. 14 of 1918.

ten months on the understanding that one rupee was to be deducted each month from his wages. He worked for a very small portion of the time and then refused to go on working. The Joint Magistrate of Cawnpore directed him to perform the contract on a bond of Rs. 50 with one surety in Rs. 50 or in default to undergo two weeks' rigorous imprisonment. The learned Sessions Judge considers it absurd to allow an employer to tie down a servant to work with him for ten months on a mere advance of a sum amounting to Re. 1 for each month of the service. But he apparently feels that the language of the Act is too strong for his view unless it can be held that there is some lawful or reasonable excuse for refusal to perform the contract. In his referring order he says that Bakhtawar, so he is told, is perfectly willing to pay back the Rs. 10 and considers that an offer on Bakhtawar's part to pay back the Rs. 10 would constitute a reasonable excuse for refusing performance of the contract. Further the learned Judge says that it is not clear whether there was any evidence of such an offer by the appellant as the record is summary and suggests that the High Court will be prepared to hold that any excuse is a reasonable excuse under section 2 of Act XIII of 1859 for not performing an unreasonable contract. Apparently the case of *C. J. Lucas v. Ramai Singh* (1), decided on July 21, 1910, was never brought to the notice of the learned Judge.

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(1) JUDGMENT—The parties to this application entered into an agreement, dated the 27th of March, 1906. The agreement was, as it purports to be, under Act XIII of 1859. This Act has been in existence in the town of Mirzapur from which the case comes for a number of years and so well-known in the factories of Mirzapur that we need not be under any apprehension that persons who enter into contract under it are ignorant of the law or do not know the nature of the contract into which they are entering. We have examined that contract and, in spite of what the learned Judge says, we are satisfied that it is a contract that is contemplated under Act XIII of 1859. The learned Judge has quite misunderstood the provisions of the law and also the terms of the contract and he has needlessly gone out of his way when he says that the order of the Magistrate before him was silent as to how the balance of the advance was to be paid or how long the appellant was to work for Mr. Lucas. The contract was for a term of 50 months and as soon as those 50 months expired and the money advanced under the contract has been re-paid, Ramai Singh is free

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The difficulties which occurred to the learned Judge were put forward in that case and considered. That was a Division Bench case and I am bound by the ruling. Over and above that I am not prepared to hold that such a contract is unreasonable or absurd; the more so when the contract is made and breach of it occurs in a town like Cawnpore where unless it is proved to the contrary, every workman knows that there is a law like Act XIII of 1859 and enters into a contract voluntarily and willingly. When a man enters into a contract he must carry out the terms of the contract into which he has entered unless he can show some reasonable excuse. One of the terms of the very same contract can hardly be afterwards held up as reasonable excuse for non-performance. Let the record be returned with this expression of opinion from this Court.

Record returned.

to enter upon any other work and in any other place that may seem good to him. What the learned Judge writes about Ramai Singh incurring the possibility, under this order of the Magistrate, of having to work for the rest of his life and yet the balance be not re-paid could only be true if Ramai Singh does not pay up the balance that may be due from him. As soon as the fifty months are over Ramai Singh can pay the balance the very next day, till that time he must carry out the terms of the contract into which he has entered. We are most unwilling to interfere in cases of this kind, but we feel that the terms of the learned Judge's judgment may be so mischievously interpreted that we are compelled to interfere. We set aside the order of the learned District Judge and we restore that of the Magistrate. It has not been shown to us that the terms of the bond are at all beyond the means of Ramai Singh.

Ramai Singh will work from the date the order of this Court is certified to the court below until he has completed fifty months of work from the date of the contract and will pay up the sum of Rs. 19-4. Until he has worked for this period and paid up this sum he will continue to be liable for work. Any period for which he worked in the past and has worked since the 6th of February, 1910, is to be deemed as work under this order and any payments made subsequent to the 6th of February, 1910, and accepted by Mr. Lucas are to be deemed as payments made in liquidation of the sum of Rs. 19-4 otherwise the order of the learned Magistrate will hold good.

RATAN SINGH (Plaintiff)

versus

KHEM KARAN (Defendant).*

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* *Court-Fees Act (VII of 1870), Schedule II, article 5, section 7, cl. II—Suit for declaration that plaintiff is an occupancy tenant—Agra Tenancy Act (II of 1901), section 95—Court-fee payable on memorandum of appeal.* TUDBALL, J.

In a suit to establish or disprove a right of occupancy the plaint or memorandum of appeal should bear a court-fee of eight annas as provided in Article 5 of Schedule II to the Court-Fees Act, and section 7, clause II of the Act does not apply to such a suit.

Office Report:—The suit being for declaration of the nature of tenancy under section 95 of the Tenancy Act a court-fees of Rs. 10, must be paid by the plaintiff-appellant on this appeal irrespective of valuation as held by this Court in S. A. No. 475 of 1912, dated the 16th of January, 1913, *Piara Lal v. Gangā Ram*. This appeal is therefore insufficiently stamped by Rs. 7-12-0. There is also a deficiency of Rs. 9-8-0 due from the defendant respondent on his appeal to the lower appellate court.

Objection to Office Report:—The Stamp Reporter's report absolutely overlooks the provision of the Court-Fees Act, Schedule II, Article 5. A court-fee of 8 annas only was payable on the memorandum of appeal.

The earlier case referred to by the Stamp Reporter contains no reference to this provision, consequently the decision cannot be accepted as it is contrary to an express provision of law.

Office Report:—With reference to the objection taken by the learned Vakil for the plaintiff-appellant that a plaint or memorandum of appeal in a suit brought under section 95 of the Tenancy Act is governed by Article 5, Schedule II of the Court-Fees Act, I have grave doubts. This question came up once before when Mr. Burkitt was the Taxing Officer. He referred a similar question to the Hon'ble Mr. Justice AIKMAN as Taxing Judge, who held that a memorandum of appeal in a suit under section 95 of the Tenancy Act must be stamped with a fixed fee of Rs. 10. The same view was taken by the Hon'ble Sir H. D. GRIFFIN as a Judge of this Hon'ble Court (Both rulings are put up). If you think that these rulings are not binding in this case in view of the objection taken by the appellant's Vakil the matter may be referred to the Hon'ble Taxing Judge for a third decision.

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Taxing Officer's Report :—This is a suit under section 95 of the Tenancy Act for declaration of occupancy rights, on which a court-fee of 8 annas has been paid. Office objects that the fixed fee of Rs. 10 for a declaration without consequential relief should be paid, while the appellant points to Article 5 of Schedule II of the Court-Fees Act. I see no reason why the suit should not be held to come under that Article both in the lower courts and in this Court, but as the two rulings placed below, though for some reason they do not consider this specific question, appear to be against me, I put the case up for your orders under section 5 of the Court-Fees Act.

The following judgment was delivered by

Tudball, J.

TUDBALL, J.—This is an appeal in a suit brought by the appellant for a declaration under section 95 of the Tenancy Act, that he has occupancy rights in a certain holding. The suit is purely a declaratory suit. The question is what is the court-fee payable on the appeal. *Prima facie* the suit falls clearly within Schedule II, Article 5 of the Court-Fees Act which lays down that on a plaint or memorandum of appeal in a suit to establish or disprove a right of occupancy a court-fee of eight annas should be paid. The only difficulty in the case arises by reason of two previous Judges of this Court having in similar cases directed that a fee of Rs. 10 was payable. In neither of these decisions was Schedule II, Article 5 apparently considered. The suit is not one to which section 7, clause II of the Court-Fees Act is applicable. As I have said above, it is purely a declaratory suit and nothing more in which the plaintiff seeks to establish that he has a right of occupancy. In my opinion the law is plain and the appeal is governed by Schedule II, Article 5 of the Court-Fees Act and the court-fee payable is eight annas according thereto. I so direct.

YUSUF HUSAIN

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PIGGOTT, J.

• *Penal Code (Act XLV of 1860) section 97—Right of private defence—Onus of proof—Indian Evidence Act (I of 1872), section 105—Practice—Alternate pleas.*

The right of the accused to defend himself upon a criminal charge can only be limited by the provisions of the statute law and the provisions to be considered are those of section 105 of the Evidence Act. The law does not prevent a man on his trial on a charge of culpable homicide from setting up the defence in the alternative, *viz.*, either that he was not present at the occurrence or that he was acting in the exercise of the right of private defence.

ORIGINAL APPEAL from an order of F. D. SIMPSON, Esq., Sessions Judge of Allahabad.

G. W. Dillon and Peary Lal Banerji, for the appellant.

Lalit Mohan Banerji (Government Pleader), for the Crown.

The following judgment was delivered by

PIGGOTT, J.—On the 26th of June last, in the morning, in a frequented part of the city of Allahabad, a scuffle took place between Yusuf Husain, who is the appellant now before this Court, and one Musi Raza. The two men came to the ground, the appellant being underneath and Musi Raza uppermost. When the scuffle ended Musi Raza was found to be bleeding profusely from wounds in the chest. There were two distinct wounds, one of which was on the right side of the chest and the other on the left, over the region of the heart. The wound on the right side was long and superficial, and so far as the medical evidence goes, might have been caused by the knife or other weapon which had just inflicted the wound on the right side slipping along the body. The wound on the left side was of a peculiar character and seems to have honestly puzzled the medical officers who examined it. The most remarkable feature about it was that it was angular in shape, with two distinct limbs each about three quarters of an inch long. The medical officer whose evidence appears the more reliable was of opinion that this wound had most probably been inflicted with a knife, but that both the injuries on the chest looked as if they had been caused by a single blow, the knife having slipped round after penetrating and

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then slid along the body in the course of a scuffle. It so happened that the wound on the left side, while dangerous, did not prove fatal. The pleural cavity was not penetrated and, though one of the minor arteries was severed and there was serious effusion of blood, at one time threatening to prove dangerous to life, the injury yielded to skilful treatment and Musi Raza recovered. Yusuf Husain was committed for trial on a charge framed under section 307 of the Indian Penal Code. The learned Sessions Judge has found that Yusuf Husain stabbed Musi Raza with a knife, that he did so with intent to cause death, or at least to cause such bodily injury as he knew to be likely to result in death; but that even if death had resulted the case would have been covered by Exception 1 to section 300 of the Indian Penal Code, in that Yusuf Husain had acted under sudden and grave provocation. He has accordingly convicted the appellant under section 308 of the Indian Penal Code and has sentenced him to rigorous imprisonment for three years.

The memorandum of appeal to this Court, apart from calling in question the severity of the sentence, raises two distinct pleas. The first is whether the prosecution evidence, even if accepted at the value put upon it by the learned Sessions Judge, justifies a finding that the appellant intended to cause death or even injury likely to result in death. The other is that the appellant was acting in the lawful exercise of his right of private defence and is completely protected by the provisions of section 97 of the Indian Penal Code. On this latter point there has been considerable argument before me. With regard to the legal aspects of the case, I have been referred more particularly to three reported cases of this Court. *Queen Empress v. Prag Dutt* (1), *Queen Empress v. Timmal* (2), *Queen Empress v. Gullu* (3).

The first of these rulings seems to have only a remote bearing on the facts now before me. It lays stress upon the provisions of section 105 of the Indian Evidence Act, and there can be no doubt whatever that, if the present appellant is to secure an acquittal on the ground that he acted in the exercise of his lawful right of private defence, it must be because the court finds this affirmatively, after laying the burden of proof on the accused person. With regard to the second of these two cases, it seems to me that the head-note goes very considerably beyond anything that was decided in the case itself. The learned Judges did not confine their consideration of that case to the fact that the right of private defence had not been pleaded by the persons whose case they were considering. The contention before them on behalf of the prosecution did not limit itself to this fact, but it was pleaded "further that there was no evidence on the record upon which any circumstance could be

(1) [1898] I. L. R., 20 All., 459. (2) [1899] I. L. R., 21 All., 122.

(3) [1904] A. W. N., 113.

inferred which would substantiate a plea of private defence." This was the contention which found favour with the court and upon which the case was definitely decided. There is nothing to the contrary in the third of the cases to which I have above referred. The right of an accused to defend himself upon a criminal charge can only be limited by the provisions of the statute law, and in this case the provisions to be considered are those of section 105 of the Indian Evidence Act already referred to. I cannot see anything in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these:—
"Firstly, I was not present at the occurrence referred to by the prosecution witnesses and they are giving false evidence against me; secondly, even if I fail to persuade the court of this fact, I can show from the statements of the prosecution witnesses themselves that, if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence."

Now in the present case the accused has done something like this, but not precisely this. He said that he was coming along the road on his bicycle when he was set upon and assaulted by Musi Raza, that he fell off his bicycle on to the ground and Musi Raza on top of him, the two of them being mixed up with the bicycle which fell to the ground at the same time. Musi Raza received his injuries in the course of this fall and they must presumably have been caused by some portion of the bicycle. The defence as thus set up was not substantiated by the evidence. If it were necessary for me to go into the matter, I could give my reasons for concurring in the finding of the learned Sessions Judge that Musi Raza was not injured by falling on the bicycle, but that he was struck in the chest by the appellant Yusuf Husain, holding a pen-knife or some similar implement in his hand. I do not feel called upon to go into this question in detail, because the appeal has been argued before me, in substance, upon the admission that this was what actually happened. It is unfortunate that Yusuf Husain was not sufficiently well advised to have admitted this fact frankly in the trial court. The result has been to involve him in that necessity for arguing two inconsistent defences on which stress is laid in more than one of the rulings to which I have just referred. He endeavoured to support his position by calling a number of witnesses, and these witnesses themselves laboured under the disadvantage which the accused had imposed on the entire conduct of the defence. They gave evidences as to the circumstances under which the affray between the two men commenced, which evidence has in the main been accepted by the trial court in preference to that of the prosecution witnesses. They described Musi Raza as the aggressor and as having set upon Yusuf Husain while the latter was riding by on his bicycle. They said that the two men fell together on the ground with Musi Raza

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uppermost; but there they had to stop, unless they were to give away the defence principally relied upon at the trial. None of the defence witnesses would admit that he saw Yusuf Husain strike a blow with any weapon or instrument whatsoever. They could only say that when the two men stood up Musi Raza was bleeding at the chest. The defence evidence given under these limitations cannot be relied upon further than it has been by the learned Sessions Judge himself. It was not accepted even by the assessors who would have preferred to find the accused not guilty. They were both of opinion that the injuries on Musi Raza's person were caused by a blow or blows struck by Yusuf Husain. On the principles already laid down the only question which remains is whether the plea of private defence can be made out on the evidence of the prosecution witnesses themselves. I have to criticize that evidence in connection with the other plea taken in the memorandum of appeal and I need not anticipate those criticisms. It is sufficient for me to say that even the evidence of the witness Safdar Husain, who is certainly the most reliable of the prosecution witnesses, falls short of making out a satisfactory answer to the charge on the ground of private defence. He admits that he saw the two men struggling on the ground, that Yusuf Husain was underneath with Musi Raza on the top of him and that Musi Raza had his hands, one on the back of the accused's neck and one underneath it; then he says he saw two distinct blows struck by the accused, inflicting stabs on the chest of his opponent. We have no statement from Yusuf Husain himself that he was being throttled, that the pressure upon his neck was such as to inspire him with fear for his own life; in fact, we have no exposition from the accused himself of the motives for his action. On the evidence therefore as it stands I am not prepared to find that the right of private defence of the person in favour of Yusuf Husain, even admitting such right to have arisen in consequence of an assault commenced by Musi Raza, was not vitiated by the fact that harm was caused more than was necessary for the purposes of defence.

At the same time I think that the case comes very near the limit, and that it is at least possible that a full defence on these lines might have been made out if the appellant had been better advised at his trial. It does not seem to me at all necessary to take as serious a view of this case as has been done in the court below. The prosecution evidence is scanty to a degree. The statement of Musi Raza is corroborated by two witnesses only—Safdar Husain and a woman named Musamat Sakina. The learned Sessions Judge has distrusted the evidence of the woman and I think it sufficient to say that the record discloses abundant grounds for putting her statement aside as altogether unreliable. The long and short of the matter is that Musi Raza elected to come into court with a version of the facts which

diverges very widely from the truth as regards the origin and commencement of the affray. He found it difficult to get any witness to support his false statements on this point. The learned Sessions Judge remarks that the investigating Police Officer found it difficult to obtain evidence because the sympathies of persons in the neighbourhood seemed to be with Yusuf Husain. He does not appear to have adequately appreciated the importance of this remark. What the investigating officer found difficult to obtain was evidence supporting Musi Raza's version of the facts, and his difficulty arose simply from the fact that the shop-keepers of the neighbourhood saw no adequate reason for perjuring themselves to oblige Musi Raza. Their sympathy for the accused amounted to mere disinclination to see him involved in a serious charge upon a version of the facts which they knew to be in material points untrue. When a number of them finally decided to come in court as witnesses for the defence, they unfortunately thought themselves to be precluded, under the circumstances already referred to, from telling the whole truth; but their version of the commencement of the affray has been in substance accepted by the trial court. The result of this is that Musi Raza has been disbelieved by the learned Sessions Judge in very material parts of his evidence and, this being the case, I do not find myself able to follow the learned Sessions Judge in accepting as established beyond reasonable doubt Musi Raza's version as to the particular manner in which he was struck by the accused. The medical evidence is not merely consistent with the assertion that only one blow was struck, but it tends to make that assertion probable. The appearance of the wounds as described by that medical officer, whose evidence I agree with the learned Sessions Judge in accepting as reliable, suggests that the theory formed by that officer as to the manner in which the injuries were caused is probably correct. I think it quite unlikely that Musi Raza is speaking the truth when he says that the superficial cut on the right side of his chest was inflicted first and was followed by a stab aimed directly at his heart. It is true that Musi Raza's statement on this point is to some extent corroborated by the evidence of Safdar Husain. The latter speaks of two distinct blows being struck, though of course he cannot say which of the two injuries was caused by which blow. In some respects Safdar Husain has shown himself an impartial witness and I do not see that the learned Sessions Judge was in any way justified in rejecting that portion of his evidence which bears out the statements of the defence witnesses as to the position of Musi Raza's hands at the moment when the accused struck him. It must be remembered, however, that this witness is admittedly a friend of Musi Raza and that his account of the manner in which the affray commenced has been rejected by the learned Sessions Judge, who has preferred the version given by the defence witnesses. It seems to me that to hold that Yusuf Husain struck two blows at his assailant, or even

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to hold that the curiously shaped injury on the left side of Musi Raza's chest was the result of a blow intentionally aimed at that portion of his anatomy, is to place an unwarranted degree of reliance on the veracity of Safdar Husain and on his opportunities of observing precisely what took place in what must have been a very brief scuffle.

In my opinion the prosecution evidence, fairly considered, so far from warranting the conclusion that when Yusuf Husain struck at Musi Raza with the pen-knife, or whatever other implement he had about his person at the time, he did so with the intention or knowledge referred to in Section 299 of the Indian Penal Code, does not even justify the conclusion that the hurt which he intended to cause or knew himself likely to cause was grievous hurt, reference being made to the provisions of section 322. The offence committed therefore would be that made punishable by section 324, were it not for the fact that the appellant acted on grave and sudden provocation. This has been found by the learned Sessions Judge himself and I agree with him. The offence committed therefore must be reduced to one punishable under section 334, Indian Penal Code. The result is that I set aside the conviction and sentence in this case, convict Yusuf Husain of an offence punishable under section 334, Indian Penal Code, and sentence him to pay a fine of Rs. 100. I allow one week within which the fine may be paid, the appellant's security remaining in force till that period. In default of such payment the appellant will suffer simple imprisonment for a period of one month.

Conviction altered. Sentence reduced.

ABINASH CHANDRA (*Plaintiff*)

versus

SHEKHAR CHAND AND OTHERS (*Defendants*)*

CIVIL

1918

January, 26.

TUDBALL, J.

Court-Fees Act (VII of 1870), section 7 (i) and (vi)—Suit for pre-emption—Consideration stated in sale deed as Rs. 44,000, plaintiff alleges a smaller consideration—Suit decreed in respect of some property on payment of Rs. 21,000—Court fee payable on memorandum of appeal—Appeal divisible into two parts.

A suit for pre-emption was brought in respect of five villages, on payment of Rs. 2,500 as consideration. The consideration stated in the sale deed was Rs. 44,000. The suit was dismissed in regard to three of the villages and it was decreed in respect of the other two on payment of Rs. 21,000. It was held that the consideration was Rs. 44,000. The plaintiff preferred an appeal against that decree and paid a court-fee on five times the Government revenue of all the five villages on his memorandum of appeal:—*Held* that the appeal was divisible into two parts; that, in respect

* Stamp Reference in F. A. No. 293 of 1916.

of that part in which the question related only to the sale consideration the plaintiff must pay *ad valorem* court-fee on the difference between the amounts alleged as the sale price on the one side and decreed on the other, and that in regard to the other part in which the right of pre-emption was in dispute he need only pay court-fees on five times the Government revenue.

Office Report.

This appeal arises out of a suit for pre-emption. In the plaint filed in the court below the plaintiff asked for possession by right of pre-emption of certain shares in 5 villages on payment of Rs. 2,500-0-0, the actual sale consideration, alleging that Rs. 44,000-0-0 entered in the sale deed was the ostensible amount of consideration. A court-fee of Rs. 180-0-0 was paid on the plaint on Rs. 3,100-0-0 being 5 times the Government revenue of the shares to be pre-empted. The court below decreed the claim for possession of the property specified in the plaint situate in mauza Parkariar and mauza Cheontaha on condition of the plaintiff's depositing Rs. 21,000-0-0 as the proportionate amount of sale consideration in respect of those villages. The claim for possession of the three remaining villages viz., Rampur, Lachmipur and Jotepur was dismissed.

Against the decree of the court below the plaintiff has filed this appeal valuing it for purposes of jurisdiction at Rs. 25,00 and for payment of court-fee at Rs. 3,100-0-0 being 5 times of the Government revenue of all the 5 villages as said above and paying a court-fee of Rs. 180-0-0 on the latter valuation. The relief sought in this appeal is that the decree of the court below be varied and the claim decreed *in toto*. A reference to the pleas urged in the memorandum of appeal to this Court will show that the plaintiff not only claims possession of the 3 villages named above in regard to which the claim has been dismissed, but he also contends that the actual sale consideration of all the properties claimed is Rs. 2,500-0-0 and not Rs. 44,000 as found by the court below, and so the claim in respect of mauzas Parkariar and Cheontaha ought to have been decreed on payment of the proportionate amount of the actual sale consideration. Practically there are two reliefs asked for in this appeal viz., (1) to obtain possession of the three villages in regard to which the claim has been dismissed and (2) to reduce the proportionate liability in respect of two villages decreed in plaintiff's favour. As regards (1) the court-fee ought to be paid on 5 times the Government revenue of the three villages viz., Rampur, Lachmipur and Jotepur. According to the plaint 5 times, of the revenue of these three villages is Rs. 1,741-4-0. In regard to (2) the court-fee should be paid on the difference between the amount decreed against the plaintiff appellant and that admitted by him as the actual sale price. According to the plaintiff's allegation as to the actual sale consideration the rateable contribution of the value of the two villages decreed should be in proportion to Rs. 44,000 ; 2,500 ; 21,000.

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This comes to Rs. 1,193. The value of this relief is therefore Rs. 21,000-0-0 *minus* Rs. 1,193-0-0 = 19,807-0-0. Adding the two reliefs the value of this appeal should be Rs. 21,548-4-0 and on this valuation a court-fee of Rs. 815-0-0 is payable. A court-fee of Rs. 180-0-0 having been paid there is therefore a deficiency of Rs. 635-0-0 due from the plaintiff appellant in this Court.

Objection to Office Report:—

The report is not correct. The nature of the suit has not been changed in appeal and the subject matter of the dispute between the parties is the right of pre-emption the value of which for the purposes of court-fees is to be determined in the manner directed by section 7, clause VI, of the Court-Fees Act. The matter is concluded by following observation of their Lordships sitting in Full Bench in the case of

Hafiz Ahmad v. Sobha Ram, [1884] 1. L. R., 6 All., 488, F. B

“We are of opinion that where an appeal is preferred in a suit for pre-emption on the grounds that the right to pre-empt has or has not been established as the case may be no matter what other pleas may be taken, the value of the subject-matter in dispute for the purposes of the Court-Fees Act must be determined as in terms provided in Article VI, of section 7 of the Act. But when the question in appeal relates solely to the amount to be paid by the pre-emptor then we think that it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and the other.”

The present appeal not relating solely to the amount to be paid by the pre-emptor the view taken by the Stamp Reporter is legally unsustainable and no additional amount of court-fee is leviable.

Taking Officer's Report:—

In this case the plaintiff claimed the right of pre-emption certain shares of five villages on payment of Rs. 2,500, the actual consideration alleged being Rs. 44,000. In regard to three villages the claim was dismissed, and in regard to the other two it was decreed on condition of the payment of Rs. 21,000, the sum of Rs. 44,000 being accepted as the true consideration. In appealing the plaintiff pays a court-fee based on five times the revenue of the villages. Office suggests that as regards the two villages Pakariar and Cheontaha, in the case of which the sole question now at issue is the amount of consideration, the court-fee should be paid *ad valorem* on the difference between the consideration claimed and that accepted by the lower court. Both office and the learned Vakil for the appellant rely on the Full Bench ruling in *Hafiz Ahmad v. Sobha Ram*. It is here laid down that when an appeal is preferred on the grounds that right to pre-empt has or has not been established, as the case may be, no matter what other pleas may be taken, the

value of the subject-matter in dispute for the purposes of the Court-Fees Act must be determined as provided in Article VI of section 7 of the Act. But where the question in appeal relates solely to the amount to be paid by the pre-emptor, there it should be calculated *ad valorem* on the difference between the amounts alleged as the sale price on the one side and on the other. The appellant maintains that it is impossible to split up this appeal, that the whole consideration is one, and that the first part of this ruling must apply to the whole. • Office on the other hand contend that the nature of the appeal is quite different as regards the villages Parkariar and Cheontaha, and that the appeal as regards them must be taxed as laid down in the second part of the ruling quoted. I think that office is right, but as there appears to be no clear ruling as to whether an appeal which like this, has two distinct parts with two different natures owing to the form of the decree of the lower court, can be practically treated as two different appeals for court-fee purposes. I refer the question for your decision.

The following judgment was delivered by

TUDBALL, J.—The facts are fully set out in the referring order of the Taxing Officer. The present appeal is divisible into two parts. In regard to the three villages Rampur, Lachmipur, and Jotepur, the suit has been dismissed and it has been held that the plaintiff has no right of pre-emption in these villages. In regard to Parkariar and Cheontaha the court below has held that the right to pre-empt exists and it has directed the plaintiff to deposit the sum of Rs. 21,000 as the value thereof. The whole sale deed purported to be for the sum of Rs. 44,000. The plaintiff sought to pre-empt the whole property upon the payment of Rs. 2,500. The court below has held that Rs. 44,000 is the correct amount and in respect of the two villages Parkariar and Cheontaha it has directed the payment of a proportionate part, namely the sum of Rs. 21,000. The appellant claims to be allowed to appeal on the payment of court-fee based upon five times the revenue of all five villages. The Taxing Officer's opinion is that the appeal being divisible into two parts and the sole question which arises in one part of the appeal respecting the two villages being a question of consideration, the appellant must pay an *ad valorem* court-fee as laid down in the ruling in *Hafiz Ahmad v. Sobha Ram* (1). In regard to the three remaining villages, as the right to pre-empt is in dispute, the court-fee in respect thereto must be calculated according to section 7, clause 6 of the Court-Fees Act. On behalf of the appellant it is urged that the question of consideration arises on the whole appeal and as that is not the sole question, inasmuch as the right of pre-emption is in dispute in respect to at least three villages, under the ruling quoted he need only pay court-fees on five times the Government revenue as mentioned above, on the whole estate.

(1) [1884] I. L. R., 6 All., 488, F. B.

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In my opinion the appeal is divisible into two clear and distinct parts and the report of the Taxing Officer is correct. In regard to the two villages of Parkariar and Cheontaha, the court-fee will be calculated *ad valorem* on the difference between $\frac{21}{40}$ of Rs. 2,500 and Rs. 21,000. The court-fee in respect of the other three villages will be calculated according to section 7, clause 6, on the basis of 5 times the Government revenue. If the appellant so pleases he may amend his plaint of which notice will have to be given to the other side and the office will calculate the court-fees after the amendment has been made. I allow three weeks for the making of the amendment and after it has been made a necessary period will be allowed for the payment of any deficiency that may then be found due.

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January, 28. Penal Code (Act XLV of 1860) section 302—Murder—Poisoning by arsenic
—Intention—Knowledge.

BANERJI, J.
PIGGOTT, J.

GAURI SHANKAR

versus

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Where accused, knowing its effect, administered arsenic to a boy nine years of age with the object of preventing the father of the boy from appearing as a witness against himself in a criminal case, but in such quantity that the boy died in the course of three days:—*Held* that he was guilty of murder, though his intention might not have been to cause death.

CRIMINAL APPEAL from an order of F. H. ASHWORTH, Esq.,
Sessions Judge of Cawnpore.

E. A. Howard, for the appellant.

A. E. Ryves, (Government Advocate), for the Crown.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—In this case Gauri Shankar Bhat, aged fifty-eight years, has been found guilty by the learned Sessions Judge of Cawnpore on a charge framed under section 302 of the Indian Penal Code, the case against him being that he caused the death of a little boy named Parmanand by arsenical poisoning. The record is before us for confirmation of the sentence of death and a petition of appeal has been presented by Gauri Shankar through the Superintendent of the Jail in which he is confined. We have also had the advantage of hearing the case argued on behalf of the appellant by a learned Advocate of this Court. The story for the prosecution is that, on the

23rd of September last, in the course of the forenoon, the accused asked two little boys, Parmanand and Durga, the sons of his neighbours Lala and Jawahir Kurmis, to come to him at a certain temple in order to study. The accused's own boys were there studying their books just outside the temple. It is alleged that Gauri Shankar offered some sugar to the boys, Parmanand and Durga, taking precautions at the same time that his own sons should not receive any share of it. The boys ate the sugar on the spot and, after some time, they were both taken ill with vomiting and purging. They were carried to the hospital and the first report was made at the police station of Derapur on the 24th of September at 1 p. m., that is to say, within about twenty-four hours of the occurrence. In this report Lala, the father of the boy Parmanand, plainly accused Gauri Shankar of having given the two boys some poisonous substance in sugar. He did this on the strength of the statements made to him by the boys themselves. The boys were treated at the hospital and it was apparent that the case of the younger of the two, Parmanand, who was only about nine years of age, was the more serious, and on the 24th of September, the statement of Parmanand was recorded by the Tahsildar Magistrate. It is to the effect already explained. It alleges that Durga and Parmanand had been sent to the temple by their mother at Gauri Shankar's instance, that they were given sugar to eat, that they complained at the time that it had a curious taste, but were encouraged by the accused to eat it, and that they were taken ill shortly afterwards. The parents of the two boys removed them from the hospital on the morning of the 25th of September, perhaps injudiciously so far as regards Parmanand. The result was that, while Durga recovered, Parmanand died on the 26th of September. The subsequent autopsy, taken in connection with the report of the Chemical Examiner, puts it beyond doubt that death was the result of arsenical poisoning. The hospital assistant who treated both the boys gives evidence to the same effect. The symptoms observed by him were those of arsenical poisoning and he suspected arsenic from the first.

The evidence on the record is not voluminous, but it seems straightforward and reliable as far as it goes. Musammat Jasoda is able to prove that Parmanand was sent to Gauri Shankar at the temple, at the latter's express request, and that when he returned home about noon he was vomiting and soon became seriously ill. The most important evidence in the case is the statement of the boy Durga. He says that he was given sugar by the accused at the temple along with Parmanand; that they both complained of the sugar tasting bitter, but the accused re-assured them, saying that there was pepper in it. There is one slight discrepancy between his statement and the dying declaration of Parmanand. According to the latter the boys were taken ill at the temple and had both of them vomited before they left it. According to

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Durga he was able to go away and visit his house and another place, and had also eaten two *puris*, before he was taken ill. On a consideration of the evidence given by Lala the father of Parmanand and by Jawahir the father of Durga it seems probable that some confusion of memory on the part of the boy Durga is responsible for the discrepancy. The evidence of Lala as to what he was told by Parmanand clearly supports the version in the dying declaration. The point however does not seem of material importance, whatever the explanation of the discrepancy may be.

There is clear evidence of motive, although it may fairly be argued on the accuseds' behalf that the motive is not a strong one for the commission of such an offence as murder. There was a criminal prosecution pending against Gauri Shankar and the case was down for hearing before the Tahsildar Magistrate on the 24th of September. Lala had been active in arranging for the prosecution and was the most important witness in the case. Jawahir, father of Durga, had also been summoned as a witness. In the result Lala was unable to attend because he was waiting upon his sick son, and the complaint was dismissed without any regular trial, the Magistrate apparently accepting a statement made to him by Gauri Shanker and not considering himself called upon to make further enquiry in the absence of the principal witness for the prosecution.

The accused sets up no defence worthy of consideration, either in the court below or in the petition of appeal which he has addressed to us. He denies all the facts alleged against him. He says he was not in the village at all on the 23rd of September and that the boys never came to him at the temple. In his petition of appeal to this Court he goes so far as to suggest that the parents of the two boys were so seriously at enmity with him that they administered poison to their own children in order to get him into trouble. A defence of the sort certainly does not help the accused. The assessors, as well as the learned Sessions Judge, were satisfied that the prosecution evidence was reliable and that Gauri Shanker had certainly administered arsenic to these two boys with the intention to make them ill. We have felt called upon to consider carefully the question as to the precise nature of the offence thereby committed by the accused. The learned Sessions Judge passes over the point somewhat lightly, with the remark that the accused must have known that he was likely to cause the death of Parmanand by giving him arsenic. The question requires to be considered somewhat more carefully with reference to the provisions of sections 299 and 300 of the Indian Penal Code. With regard to the former of these sections, we think there can be no doubt that Gauri Shankar intended to cause bodily injury to the two boys and that the bodily injury which he intended to cause by the administration of arsenic was of a kind likely to result in death, especially in the case of a little boy about nine

years of age. Further, we are quite prepared to hold that in administering arsenic to these boys he knew that he was likely thereby to cause death. When we come to consider the provisions of section 300 clause (2) it becomes evident that the present case is one which lies very much on the boundary line. Somewhat similar questions have had to be considered by this Court in cases of *dhatura* poisoning and there has been some conflict of authority, as may be seen from the following cases:—

Queen-Empress v. Tulsha (1), *King-Emperor v. Bhagwan Din* (2), *King-Emperor v. Gutali* (3).

Each case must of course be decided upon its own facts, but it seems a grave matter to hold that a man of the accused's age, administering a substance like arsenic, with the effects of which the agriculturist population of Northern India is well acquainted, to a boy of Parmanand's age, and actually causing his death thereby, is to be found guilty of any offence short of murder, even though his intention at the time may not have been (and probably was not) to cause the death of the child. Taking the provisions of the section in question as applicable to the facts of the case, we think we are bound to hold that Gauri Shankar, in committing the act proved against him, knew it to be so imminently dangerous that it must in all probability cause to the boys such bodily injury as is likely to cause death. The case therefore just falls within the definition of the offence of murder. Regarding it, however, as a case standing very much upon the border line, and accepting, as we do, the conclusion that the intention was not to cause the death of either of the boys, we do not think it necessary in this case to pass the severe sentence provided by law. We so far accept the appeal of Gauri Shankar that we set aside the sentence of death passed upon him, but affirm his conviction. We direct that he undergo transportation for life with effect from the 2nd of January, 1918, the date of his conviction in the Sessions Court.

Sentence reduced.

(1) [1897] I. L. R., 20 All., 143. (2) [1908] I. L. R., 30 All., 568.

(3) [1908] I. L. R., 31 All., 148.

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MUHAMMAD ISHAQ KHAN AND OTHERS (*Plaintiffs*)
versus
 MUHAMMAD RUSTAM ALI KHAN AND OTHERS (*Defendants*)*

Civil Procedure Code (Act V of 1908) section 11, Explanation V, Order 20, rule 12—Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred.

Notwithstanding the provisions of sections 13 and 43, Act No. XIV of 1882 a subsequent suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained when the court had omitted to adjudicate upon the claim in the suit for possession of immovable property and for mesne profits, past and future, and the changes in Act No. V of 1908 do not bar such a suit for the mesne profits accruing due after the institution of the former suit. The change embodied in Order 20, rule 12 of the present Code of Civil Procedure is that it is the court which hears the suit which is to ascertain the mesne profits whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to the date of the delivery of possession, and it is this Court which is to pass the *final* decree for mesne profits which has to be executed by the court executing the decree, and farther than this there is no alteration in the nature of the claim as to future mesne profits.

FIRST APPEAL from a decree of BABU MAN MOHAN SANYAL, Additional Subordinate Judge of Meerut.

The plaintiffs were trustees under a *wakfnamah* executed by Nawab Mohammed Azmat Ali Khan of Kurnal. On the death of the Nawab in 1908 the defendants, his step-brothers, entered into possession of the *wakf* properties. The plaintiffs instituted a suit against the defendants in 1912 for enforcement of the *wakf* and possession of the *wakf* properties. In the plaint the plaintiffs prayed for a decree for possession, and for the sum of Rs. 81,034-9 as past mesne profits. They also claimed *pendente lite* and future mesne profits till delivery of possession. The suit was after contest decreed by the court of first instance (the Additional Subordinate Judge of Meerut), and the decree was, on appeal, confirmed by the High Court. (For the judgment of the High Court see

Rustam Ali Khan v. Mushtaq Hussain, [1916] 14 A. L. J. R., 554.

Issue relating to mesne profits framed by the learned Subordinate Judge was as follows. "Are the plaintiffs entitled to *Wasilat*? If so, to what amount?" The court found that "Rs. 65,390-6-5 is the total of the profits for three years. "The operative portion of the

* F. A. No. 3 of 1917.

judgment ran as follows. "Ordered that plaintiff's claim for possession as trustees be decreed as prayed. The claim about the *Wasilat* up to the date of suit is decreed to the extent of Rs 57,564 and also for Rs. 1,227-4-4 amount of cash deposit. Remainder of the *Wasilat* and cash profits in deposit being not proved, claim about it is dismissed." The decree as drawn agreed with the judgment. The plaintiffs instituted the present suit to recover mesne profits from the date of the institution of the first suit till the date of delivery of possession by the defendants to the receiver appointed by the High Court. The defendants contended, *inter alia*, that mesne profits now in suit having been expressly claimed in the former suit and refused, the claim was *res judicata* and was, under section 11 Civil Procedure Code unsustainable. The lower court gave effect to this plea and dismissed the suit.

Tej Bahadur Sapru (with him *Kailas Nath Katju* and *Sheikh Abdullah*), for the appellants contended that the suit was maintainable and the claim as to future mesne profits not having been tried at all in the earlier suit, section 11 did not apply. The plaintiff could not in that suit claim any decree for *pendente lite* and future mesne profits as a matter of right, no cause of action having arisen for the same at the date of the institution of that suit. It was entirely in the discretion of the court to grant or to refuse relief as to future mesne profits. Non-exercise of the discretion in the plaintiff's favour would not take away his right to future mesne profits when they actually become due

Ram Dyal v. Madan Mohanlal, [1899] I. L. R., 21 All., 425 ;

Man Mohan Sirkar v. The Secretary of State for India, [1890] I. L. R., 17 Cal., 968.

The lower court is of opinion that by reason of some change in arrangement and phraseology there had been a change in the law and the decisions under the Old Code were no longer good law. This was not so. The language of sections 211 and 212 of the Old Code and Order 20, rule 12 of the present Code was substantially the same, and the two sections in the Old Code had now been amalgamated into one. It was a well-settled principle of construction that the Legislature was presumed to know not only the general principles of law but the construction which the courts had put upon particular statutes, and where a section of an Act which had received a judicial construction was re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction.

Ex-parte Campbell, [1870] 5 Ch. App., 703.

If the Legislature had intended to overrule the unanimous decisions of all the High Courts on the points it would have done so by the use of clear and apt language, and not indirectly and by mere

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implication. Under the present Code all matters and enquiries relating to mesne profits were to be decided in the suit itself and could not be relegated to the execution department. In that view the retention of clauses (1) and (2) and the proviso to section 244 of the Code of 1882 had become useless, and consequently no similar provisions were to be found in section 47 of the present Code which had been entirely recast. The insertion of the proviso to section 244 of the old Code under section 47 of the present Code would have been entirely meaningless and out of place and its omission therefore did not at all imply that a separate suit for future profits not dealt with by the decree would no longer lie. Reports of select committees were not admissible on questions of construction of statutes, and the lower court ought not to have referred to the report of 1903. But even if the report were looked at, it would favour the plaintiff's argument. The report of 1903 referred to by the lower court was appended to a bill which contained an express clause purporting to change the law and to overrule the previous decisions. But that bill had been withdrawn and in the report to the bill which was subsequently introduced and passed, there was no indication that any change in the law in that direction was ever contemplated, the lower court had relied upon the decision of the Madras High Court in

Ramasami Aiyar v. Srirangaraja, [1914] 26 I. C., 622;

but that case had been subsequently overruled by a Full Bench of the Madras High Court,

Doraisami Aiyar v. Subramania Aiyar, [1917] 33 Mad. L. J., 699.

Sir Sundar Lal (with him *A. E. Ryves*), for the respondents, submitted that, if it were open to him he was prepared to argue that the case of

Ramdyal v. Madan Mohanlal,

had been wrongly decided.

[RICHARDS, C. J.—We are bound by the decision of the Full Bench and must accept it as correct.]

In that case it was submitted that there had been a change in the law, and by the amalgamation of old sections 211 and 212 in one section in the present Code the Legislature had intended to place claims to all mesne profits (whether past or future) on an equal footing. The cause of action for recovery of immoveable property and its rents and mesne profits was one and indivisible, and the plaintiff having once claimed mesne profits, could not bring a fresh suit for the same purpose. On a proper construction of Order XX, rule 12 he could have insisted for a decree for future mesne profits. The omission of any provision in the present Code corresponding to the proviso to section 244 of the old Code was most significant and indicated that Explanation V, appended to section 11 of the present Code, would fully apply to the present case. He referred to section 34 of the present Code.

[RICHARDS, C. J.—Section 34 by implication supports the appellant's argument. There is an express prohibition regarding a suit for future interest; if the Legislature had intended to bar a suit for future mesne profits not dealt with by the decree, it would have also said so expressly].

Kailas Nath Katju, in reply, submitted that causes of action for recovery of immoveable property and for its mesne profits were separate and distinct.

Nandan Singh v. Ganga Parshad, [1913] I. L. R., 35 All. 512, at 517.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for mesne profits. A previous suit had been brought in which possession of the land had been claimed. A certain sum was also claimed as mesne profits for the period prior to the institution of the suit. There was a further claim for mesne profits during the pendency of the suit and after decree. The suit resulted in a decree for the plaintiffs for possession of the land and also a decree for a portion of the amount claimed by the plaintiffs for mesne profits. The rest of the plaintiff's claim was dismissed. On referring to the judgment it is quite clear that the court never dealt or purported to deal with the mesne profits during the pendency of the suit or after decree. In the present suit mesne profits are claimed from the date of the institution of the suit up to the date of delivery of possession. The defence is that the decree in the previous suit operates as *res-judicata* and reliance is placed upon the provisions of section 11, Explanation 5. Section 11 provides that "no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.....in a court competent to try such subsequent suit."

Explanation 5 provides that "any relief claimed in the plaint which is not expressly granted by the decree shall for the purposes of this section be deemed to have been refused." This explanation corresponds exactly with explanation 3 of section 13 of the old Code.

Reliance is also placed upon the provisions of Order 2, rule 2, which provides that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action."

The contention on behalf of the defendant is that the court in the previous suit not having granted mesne profits during the pendency of the suit and from the date of the decree up to the date of delivery of possession must be deemed to have refused it. Further the decree ought to be interpreted as having expressly dismissed the suit in respect of mesne profits save to the extent that mesne profits were

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granted. The very same question had frequently arisen in the High Courts in India before the coming into operation of the present Code of Civil Procedure. All the courts appear to have held that notwithstanding the provisions of the old Code a suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained. This was expressly held in the case of *Ram Dayal v. Madan Mohan Lal* ⁽¹⁾. In that case just like the present there had been in a previous suit a claim for mesne profits prior to the institution of the suit and also future mesne profits. Nevertheless the court held that the subsequent suit for mesne profits from the date of the institution of the suit upto delivery of possession could be maintained when the court in the previous suit had not decided the right of the plaintiff to these mesne profits. We think that we are bound to follow this decision unless it is shown that the legislature when enacting the present Code of Civil Procedure altered the law. It is a recognised rule that where there have been decided cases before an Act is amended, if the amendment does not expressly show that the law as interpreted by the decisions is altered the rule laid down by the decisions is to be adhered to.

We now propose to consider whether the provisions of the Code of Civil Procedure of 1908 altered the law in respect of the matter with which we are dealing. Section 211 of the Code of Civil Procedure of 1882 provided that in a "suit for the recovery of possession of immoveable property yielding rent or other profit, the court may provide in the decree for the payment of rent or mesne profits in respect of such property from the institution of the suit until the delivery of possession to the party in whose favour the decree was made."

It is to be noted that in this section there is no reference to a *claim* in the plaint being made for mesne profits. Section 212 provided that where the suit was a suit for "possession of immoveable property and for mesne profits which have accrued on the property during the period prior to the institution of the suit and the amount of such profits is disputed, the court may either determine the amount by the decree itself or may pass a decree for the property and direct an enquiry into the amount of mesne profits and dispose of the same on further orders."

The provisions of these two sections seem to have been amalgamated in the provisions of Order 20, rule 12 of the new Code. That order provides that "where there is a suit for the recovery of possession of immoveable property and for rent or mesne profits, the court may pass a decree (a) for possession of the property, (b) for the rent or mesne profits which have accrued on the property during the period prior to the institution of the suit or directing an enquiry as to such rent or mesne profits," and (c) directing an enquiry as to

(1) [1899] I. L. R., 21 All., 425, F. B.

the rent or mesne profits from the institution of the suit until (i) the delivery of possession to the decree-holder, (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court, or (iii) the expiration of three years from the date of the decree whichever event first happens." Clause 2 of this rule provides "where an enquiry is directed under clause (b) or clause (c) a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of the enquiry."

Under the old Code the practice was that excepting those cases in which the court had actually found a certain amount due for mesne profits, the court executing the decree used to be called upon to make an enquiry and to ascertain in execution the amount of mesne profits whether they were mesne profits which had accrued prior to the institution of the suit or mesne profits which had accrued between that date and the delivery of possession. The authority to make this enquiry was conferred on the court executing the decree by section 244 of the Code of Civil Procedure of 1882 to which we shall presently refer. It would seem therefore that the only substantial change that has been made in the law is that it is the court which hears the suit which is to ascertain the mesne profits, whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards upto the date of delivery of possession, and it is this Court which is to make the *final* decree for mesne profits which has to be executed by the court executing the decree. We do not think that any significance is to be attached to the fact that in section 211 of the old Code there is no reference to a claim for mesne profits or to the fact that Order 20, rule 12 purports to deal with suits in which mesne profits are claimed. Section 244 of the old Code dealt with certain matters which were to be determined by the court executing the decree and not by a separate suit, and amongst other questions the very first mentioned were questions regarding the amount of any mesne profits as to which the decree had directed an enquiry. There is a *proviso* at the end of the section in the following words "Nothing in this section shall be deemed to bar a separate suit for mesne profits accruing between the institution of the first suit and the execution of the decree therein where such profits are not dealt with by such decree." The corresponding section of the Code of 1908 is section 47. In this section reference to all questions of mesne profits is omitted and the *proviso* which we have quoted from section 244 is also omitted. The argument is that this last mentioned omission is most significant and that it demonstrates the intention of the Legislature, that suits for the recovery of mesne profits after a previous suit for possession cannot be maintained. A little consideration shows that this argument is not so forcible as might appear at first sight. The *proviso* to section 244 of the old Code seems to have presumed that there was nothing in the Code itself which would prevent a second suit for mesne profits but that it might be contended that the provisions of section 244

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would preclude a second suit and accordingly the words of the *proviso* are not that nothing "in the Code" shall be deemed to bar a separate suit for mesne profits but that nothing "in the section" shall be deemed to bar such a suit. It becomes apparent that the retention of this *proviso* in the new Code would have been altogether meaningless and out of place because in section 47 of the new Code there is no reference to enquiries as to mesne profits at all and Order 20, rule 12, to which we have already referred expressly takes away the jurisdiction of the court executing the decree to make any enquiry in respect of mesne profits. The learned Judge in the court below has referred to the report of the select committee on the provisions of the contemplated amendment of the Code of Civil Procedure. If it were permissible to consider the report at all the inference would seem to be rather against the respondent than in their favour. The quotation had reference to a Bill which was subsequently withdrawn. In this Bill there was a provision which would have made it quite clear that a second suit for mesne profits could not be maintained. This provision does not find a place in the measure which was actually enacted. If any legitimate inference could be drawn at all, it would seem, as if the Legislature knowing well the course of decisions in the Courts in India had come to the conclusion that it was best to maintain the rule of law as established by the cases. In this connection it may not be altogether out of place to suggest that there are some practical difficulties in the way of ascertaining mesne profits *pendente lite* and particularly future mesne profits in the original suit. Where there are more defendants than one their liability may not altogether be the same and the final ascertainment of the amount due for mesne profits from the date of the decree to the time of delivery of possession can never be made until possession is actually taken by relinquishment on the part of the defendants or through the court. We may mention here that the question recently arose in the Madras High Court in the case of *Doraisami Aiyar v. T. Subramania Aiyar* (1), in which the majority of a Full Bench of that court were of opinion that notwithstanding the provisions of the new Code a suit for mesne profits like the present could be maintained.

We allow the appeal, set aside the decree of the court below and remand the case to that court with directions to re-admit the suit in its original number and to proceed to hear and determine the same according to law. The appellants will have their costs of this appeal. Other costs will follow the event.

K. N. K.

Appeal decreed. Cause remanded.

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CRIMINAL

1918

January, 28.

WALSH, J.

Government of India Act, 1915, section 107—High Court's power of superintendence—Code of Criminal Procedure (Act V of 1898), sections 145, 435 (3).

Section 107 of the Government of India Act cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII of the Code of Criminal Procedure.

CRIMINAL REVISION from an order of PANDIT BISHESHWARI PRASAD, Magistrate, First Class of Gorakhpur.

Satya Chandra Mukerji, for the applicant.

The following judgment was delivered by

WALSH, J.—I have no power to send for the record in an application for revision relating to proceedings under Chapter XII. Subsection (3) of section 435, Criminal Procedure Code, absolutely prohibits that course. The law as laid down by the general current of authorities in this Province is that the superintendence section, which is now section 107 of the Government of India Act, cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII. It is well recognized that there is an irreconcilable difference of opinion on this point between some of the High Courts, notably two recent judgments, one delivered by my brother KNOX and one delivered in Patna by the former Chief Justice of the Patna High Court based upon the course of authorities. It is obvious that having regard to the view established in this Province it is difficult to question proceedings of this kind at all. It has been said that proceedings which purport to be under Chapter XII may be improperly taken, improperly brought, or conducted, and therefore may be treated as if they were no proceedings under the Chapter. This view is not a sound one and has been frequently dissented from—even by the Privy Council in cases of awards where the arbitrators so long as they act within their jurisdiction are masters of the situation. It has been sought by persons trying to get rid of an award to say that, if they have gone wrong either in law or procedure or something of that kind other than misconduct although there is no appeal, the award is bad and therefore no award at all. In the same way it is sought to argue that proceedings, under Chapter XII where, for example, all the proper parties are not required to attend court and so forth, being proceedings which are defective and therefore bad, may be treated as though

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they were no proceedings at all. I think it is impossible to give effect to this view and there is the further difficulty as pointed out by KNOX, J. that this cannot be determined without sending for the record. This is just what this Court cannot do.

On the other hand there is the difficulty in the other point of view, viz., that though the Legislature has vested in this Court a complete discretionary power of superintendence to check irregular proceedings of inferior courts which may result in serious injury or injustice, if the view which I have just stated is correct—the view with regard to the sending for record or otherwise enquiring into proceedings under Chapter XII,—the jurisdiction of this Court to superintend proceedings under Chapter XII may become a dead letter. I think that this is not necessarily so. There is at any rate one way in which it seems to me both views may be reconciled. If proceedings totally without legal foundation or legislative authority are taken by a Magistrate in the name of proceedings under Chapter XII but not seriously purporting to be taken under, or to comply with the provisions of that Chapter, and this Court is satisfied of that fact by reliable evidence, then I think there is clearly a case for interference. I myself interfered in one case which seemed to be a palpable and serious misunderstanding of the powers conferred by this section where the Magistrate had not even had a report at all which dealt with any question of the breach of peace so that the legal foundation for his authority had never been laid, and in interfering in that case I adopted the dictum of SIR JOHN STANLEY who seemed to think that the superintendence section could be applied to any circumstances to which revision would apply if it had not been expressly excluded.

Somehow or other in that case, I do not know how, the circumstances were before me, because the record had been sent for and the application had been admitted. It is always open to a party in such a case as this to satisfy the High Court that the property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the court, but I do not think he can ask this Court to interfere in revision or to send for the record, merely by showing that on the face of the judgment the Magistrate has neglected or misinterpreted some of the provisions of the Chapter.

The application is rejected.

Application rejected.

MUSAMMAT BHANA AND ANOTHER (*Petitioners*)*versus*GUMAN SINGH AND OTHERS (*Opposite-parties*).*

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February, 5.

TUDBALL, J.
RAFIQ, J.

**Registration Act* (XVI of 1908), section 17—*Reversioner—Agreement to forego right to sue for declaration in court—Document not compulsorily registrable.*

Certain reversioners executed an agreement whereby they agreed to forego their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after her death:—*Held* that the document did not convey any right, title or interest nor did it purport or operate to extinguish any right *etc.*, and therefore was not compulsorily registrable within the meaning of section 17 of the Indian Registration Act.

CIVIL MISCELLANEOUS REFERENCE from A. G. SHIRREFF, Esq., under Secretary to Government, United Provinces to this Court.

Lakshmi Narain, for the petitioners.

Damodar Das, for the opposite-parties.

The judgment of the Court was delivered by

TUDBALL, J.—This is a reference under Rule 17 of the Rules and Orders relating to the Kumaun Division of 1894. The facts are simple. Musammat Bhana, a Hindu widow, having a widow's estate executed a deed of gift in favour of her husband's sister's sons. The plaintiffs are the presumptive reversioners. After the deed of gift had been executed they were preparing to bring a suit for a declaration that the deed of gift was not binding upon them. The donees and the plaintiffs came to terms. The plaintiffs executed an agreement in favour of the donees under which they agreed not to enforce their right to the declaration which they were about to seek in consideration of the donees transferring to them half of the property and also undertaking to support Musammat Bhana for the rest of her life and to pay off her debts. The donees executed an agreement at the same time under which they agreed that they would transfer half the property to the plaintiffs and would support Musammat Bhana and pay her debts. In spite of this agreement the plaintiffs have brought the present suit in which they ask for a declaration that they are heirs to the property and that the deed of gift should be set aside as against them. The court of first instance held that in view of the agreement the plaintiffs' suit was barred and dismissed it, the

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defendants being fully willing to carry out their terms of the contract. The plaintiffs appealed. The appellate court held that the agreement ought to have been registered under section 17 of the Registration Act and as it had not been registered it was not admissible in evidence and this evidence having vanished, it gave the plaintiffs a declaration that the deed of gift was not binding upon them. We are asked our opinion as to whether the decree passed by the Commissioner was correct, and if not what decree should have been passed in the case. We have examined the agreement. In our opinion it was not compulsorily registrable under section 17 of the Registration Act. It conveyed no right, title or interest nor did it purport or operate to extinguish any right, title or interest vested or contingent in immoveable property of the value of Rs. 100. All that the plaintiffs agreed to do was to forego their right to sue for a declaration for a certain consideration. As reversioners they had no transferable right, title or interest in the property nor did they purport to transfer any such right. They simply agreed not to sue for the declaration for which they have now sought by this suit in court. The document was clearly admissible in evidence. In the circumstances of the case as stated above we think that the plaintiffs' suit was rightly dismissed by the court of first instance. It is nowhere alleged that the defendants have refused to carry out their agreement. In the course of the suit the defendants expressed their willingness to be faithful to their word. There was consideration for the agreement and we think that the plaintiffs were bound thereby. In our opinion the decree of the appellate court should be set aside and that of the court of first instance should be restored and that the defendants should have their costs in all courts including the costs of this reference. The costs in this Court will include Rs. 50 pleader's fees of the defendants.

Appeal decreed.

FULL BENCH.

BHARATH SINGH (*Plaintiff*)

versus

TEJ SINGH AND ANOTHER (*Defendants*)*

Agra Tenancy Act (No. 11 of 1901), section 164—Suit for profits against lambardar—Death of lambardar during pendency of suit—Suit continued against representative of lambardar—Liability of such representative—Construction of statute.

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Dec. 11.

BANERJI, J.
PIGGOTT, J.
WALSH, J.

The word 'defendant' in sub-section (2) of section 164 of the Agra Tenancy Act contemplates the original defendant to a suit, and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is, of the lambardar. In view of the provisions of section 164, the question of gross negligence or misconduct of the original lambardar would have to be gone into and if such negligence or misconduct was shown, his representative would be liable to the extent of the assets of the deceased which came into his hands. The liability, however, of the representative of the lambardar would not be a personal liability. The assets of a deceased lambardar should not escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct, happened to die after the expiry of the year during which the collections had to be made.

A suit for profits actually collected and also such as remained uncollected owing to his gross negligence and gross misconduct was brought against a lambardar. He died during the pendency of the suit and his legal representative was made defendant in his place. He contended that he would not be liable for such sums as were left uncollected owing to the negligence and misconduct of the original defendant:—*Held* that he would be liable for such sums, the decree being confined to the assets of the deceased lambardar in his hands.

SECOND APPEAL from a decree of PANDIT DURGA DUTT JOSHI, First Additional Judge of Aligarh, reversing a decree of R. D. W. D. MAOLEOD Esq., Assistant Collector, First Class.

The facts of the case fully appear from the following extracts from the referring order.

WALSH, J.—This is a suit under section 164 of the Tenancy Act of 1901. The suit was brought by the plaintiff, a co-sharer, against

* S. A. No. 795 of 1916.

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Kundan Singh, the then lambardar and another defendant, the vendor of the plaintiff, whose position is immaterial to the question raised in this appeal. The claim made was for the plaintiff's share of the profits which Kundan Singh had actually collected and also for such sums as owing to his negligence or misconduct he had failed to collect. During the suit and before the date of hearing Kundan Singh died and the present defendant Tej Singh the son and heir was brought on the record as his personal representative, and the suit proceeded against the defendant, the personal representative, as such, in respect of the liability of his deceased father which had accrued before the death of the father to the extent of the assets which came into the hands of the defendant as his father's representative. The son is not sued in his personal capacity, nor does the action relate to any failure to carry out the duty of lambardar, or misfeasance in carrying out the duty, after the death of Kundan Singh. The sole questions therefore in the suit are what would have been the liability of Kundan Singh under section 164 if he had lived, and what is the liability of his estate now that he is dead. The lower court has held that the son is not liable for the misconduct and negligence of his father and from that decision this appeal is brought. In the sense that a son is not liable for the torts of his deceased father, it is an accurate expression of the law, but in my opinion the negligence or misconduct mentioned in section 164 is not a tort at all. It is the breach or neglect of an obligation of a *quasi* contractual nature arising out of an agency or trust undertaken by the lambardar by the acceptance of the post and imposed upon him by statute *viz.*, section 164.

There is a considerable body of authority that the liability for sums remaining uncollected does not survive under this section after the death of the lambardar. By that authority I am bound and therefore I must either dismiss the appeal or refer the matter to the Chief Justice for further consideration by a Full Court.

"The general rule" says Williams on Executors Volume II of the 10th Edition, page 1346, "has been established from very early times with respect to such personal claims as are founded upon any obligation, contract debt, covenant or other duty that the right of action on which the testator or intestate might have been sued in his life-time survives his death and is enforceable against his executor or administrator. Therefore it is clear that executors or administrators are answerable, as far as they have assets, for debts of every description due from the deceased." Again, on page 1353, after pointing out that in cases of tort, if the person, by whom the injury was committed, dies, no action of that kind can be brought against his executor or administrator, the author goes on "But the case is different where the act is not a mere tort but is a breach of a *quasi* contract where the claim is founded on a breach of fiduciary relation or on failure to perform a duty." I take it to be impossible to deny that the duty of a lambardar imposed upon him by this section, to take reasonable

care to collect the profits and to hand over what he has collected, comes within the definition which I have read and the liability survives after death.

An examination of the section shows that it contains nothing to the contrary. Sub-section 1 provides that a co-sharer may sue the lambardar for his share of the profits. By section 166 the word lambardar there includes heirs and legal representatives. Sub-section 2 provides that in any such suit the court may award to the plaintiff sums remaining uncollected owing to the negligence or misconduct of the defendant. Plaintiff in sub-section 2 means co-sharer and defendant means lambardar. They are merely synonymous. Apart from authority, therefore, having regard to the common law and sections 164 and 166 I find considerable difficulty in seeing what defence a son has in respect of assets in his hands, to an action brought against his father under section 164 during his father's life-time. With great diffidence I think that the authorities to the contrary are not satisfactory. In this case the defendant was the lambardar when the suit was instituted and the cause of action must be determined at the time of the commencement of the suit, and therefore there is a distinction between this and the case reported in I. L. R., 29 Allahabad, 15. I think the matter is one which I ought to refer to the acting Chief Justice with a view to having the question re-considered by a Full Bench.

Surendra Nath Sen, for the appellant.—In a suit instituted against a lambardar under section 164 of the Tenancy Act, if the lambardar dies in the course of the suit, what is the measure of the liability of his legal representative who is brought on the record? That is the question for determination in this appeal. The enforcement of the liability will, of course, be limited by the amount of the assets of the deceased lambardar in the hands of his legal representative; the question is, what is the extent of the liability? If the lambardar had not died *pendente lite* the plaintiff would unquestionably be entitled, under clause (2) of section 164, to get profits not only on the collections actually made by the defendant, lambardar, but also on sums left uncollected owing to his negligence or misconduct. The mere fact that the original defendant died during the pendency of the suit would not alter the rights of the plaintiff or affect the suit in any way, and the liability of the original defendant would attach unaltered to his assets in the hands of his legal representatives. In other words, the right of suit survives in its entirety against them; the same cause of action, and the same suit, continues against them. This is made clear from a comparison of the language of the present Act and of that of Act XII of 1831. In section 164 cl. (2) of the present Act the word "defendant" has been substituted for the word "lambardar" in section 209 of the former Act, and a new provision introduced by section 166. By this change the Legislature has made it quite clear that a suit brought against the

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lambardar can be continued unchanged against his legal representatives.

A consideration of general principles, apart from the enactment, also points the same way. The liability of a lambardar in respect of the payment of profits to the co-sharers is not of the nature of a personal tort but is a *quasi* contractual liability. His position is like that of a trustee or agent of the whole body of co-sharers. Having regard to the nature of his position, the obligation is not merely personal but *quasi* contractual. That being the case, the liability is not altered by the mere fact of his death during the pendency of the suit and the substitution of his heirs on the record.

The word "defendant" in section 164 cl (2) means the original defendant to the suit, who, in the present case, was the lambardar himself. The case of

Dip Singh v. Ram Charan, [1906] I. L. R., 29 All., 15,

is distinguishable. There the suit was brought *after* the death of the lambardar, against his legal representatives. The other cases mentioned in the referring order were decided under the former Act XII of 1881. Moreover, the decisions were based on the view that the liability of a lambardar was a personal liability only. The case in the Allahabad Weekly Notes for 1886, at page 32 was, again, a case in which the suit was instituted against the heir of the deceased lambardar.

Peary Lal Banerji, for the respondents.—In order to ascertain the basis of a lambardar's liability it is necessary to consider his position. He is not a trespasser or a person in wrongful possession, and cannot, like them, be made liable for mesne profits which he has not collected. But for section 164 (2) he cannot be made liable for what he has not collected, *i. e.*, liable by way of damages. Although his liability is statutory, in character it is really based upon a liability for damages. A lambardar makes no contract whatsoever with the co-sharers. He may, at the outside, be regarded as making a contract with the Collector.

Negligence or misconduct in the performance of a duty is always a tort. In confining the lambardar's liability in respect of sums left uncollected to those sums which are proved to have been uncollected owing to his negligence or misconduct, the Legislature clearly shows that it regards his liability as being based on tort.

This liability, being a personal one, based on tort, cannot be enforced against his legal representatives. Where the estate of a tort-feasor has not been enriched, the estate as such is not liable, but the tort-feasor is only personally liable in damages. The leading case on the subject of liability of representatives is that of

Phillips v. Homfray, [1883] 24 Ch. D., 439.

I am also supported by

Williams : Law of Executors : Tenth Edition, pp. 1352, 1356.

The following cases also support the view that the liability of a lambardar in respect of non-collections is a personal one, based on tort, and cannot be enforced against his heirs and legal representatives:

Gulab v Fateh Chand, [1886] 6 A. W. N., 32;

Murad-un-nissa v. Ghulam Sajjad, [1897] I. L. R., 20 All., 73 ;

Bir Narain v. Girdhar Lal, [1897] I. L. R., 20 All., 74 F. N.

The next question is, whether there are sufficient grounds for supposing that the Legislature in the present Act altered its view of the character of this liability and regarded it as resting on some other basis. The alterations made by the present Act are the enactment of section 166 and the change of the word "lambardar" to the word "defendant" in section 164 (2). By the first, suits were allowed to be brought in the Revenue Courts against the heirs of a lambardar, whereas the former Act XII of 1881 allowed suits only against the lambardar himself. Under that Act, however, a suit which had been brought against the lambardar could, on his death, be continued against his heirs who were brought on the record; as happened in both the cases in I. L. R., 20 All., cited above. The continuation of the suit against the heirs is not a new feature introduced by the present Act, and there has been no change of policy so far as suits instituted against a lambardar, who happens to die *pendente lite*, are concerned.

The second alteration, namely that of the word "lambardar" to the word "defendant," was necessitated by the fact that under the present Act a suit could be brought against the heir of a deceased lambardar. By this alteration the Legislature clearly indicated an intention that the heirs of a deceased lambardar were not to be made liable for the non-collections of the lambardar. If the word "lambardar" had continued to stand as it was, then in a suit instituted against the heirs of a lambardar a decree would be passed against them in respect of the sums left uncollected through the negligence or misconduct of the deceased lambardar. In keeping with the view that the liability for non-collections was personal to the lambardar, and to prevent the liability from being enforced against his heirs, the Legislature altered the word "lambardar" to "defendant."

Further, clause (2) of section 164 deals with the powers of the court in passing a decree; it fixes the limits of the decree to be passed. It is reasonable, therefore, to construe the word "defendant" as meaning the defendant against whom the court is going to pass a decree. Clause (2) has reference to the time at which the court's award or decree is to be made. If at that time there is before the court a person answering to the description of a defendant through whose negligence or misconduct sums have remained uncollected,

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then the court can pass a decree in respect of those sums against him. In the present case the defendant against whom the decree was to be passed was, obviously, not a person guilty of any such negligence or misconduct.

It is quite clear from the use of the word "defendant" in cl. (2) that where the suit is instituted against the heir he cannot be made liable for the negligence of the deceased lambardar. It would be a recognition of the same principle to hold the same where the lambardar was sued in the first instance but died after the institution of the suit.

Surendra Nath Sen, was not heard in reply.

The following judgments were delivered.

Banerji, J.

BANERJI, J.—This appeal arises out of a suit brought for the recovery of the share of profits of a co-sharer for the year 1318 Fasli. The plaintiff is the assignee of the profits from the co-sharer who is the second defendant in the suit. The suit was brought against Kundan Singh who was the lambardar in the year in question. The plaintiff claimed a share not only of the profits actually realised but also of the profits, which according to him, had not been realised by the lambardar through gross negligence and misconduct. During the pendency of the suit the lambardar died and his legal representative Tej Singh was brought upon the record. He contended that he was not liable for amounts which his predecessor-in-title, namely, Kundan Singh, had neglected to collect. The court of first instance repelled this contention and made a decree for what it held to be the total amount shown in the rent roll and other sums which had not been shown in the rent roll but which the lambardar must be taken to have realized. Upon appeal by the defendant, the legal representative of the lambardar, the lower appellate court dismissed the suit holding that the representative of the lambardar could not be held liable for amounts which the lambardar had through misconduct and negligence not collected, and as the amount actually collected fell short of the Government revenue and cesses paid by him, the plaintiff was not entitled to recover anything from the defendant. From this decision of the learned Judge of the lower appellate court the present appeal has been filed. The question we have to determine is whether in the circumstances of the present case, the contention of the defendant is a valid contention. It seems to me that the decision of the case turns upon the construction of section 164 of the Agra Tenancy Act under which the suit was brought. That section provides that "a co-sharer may sue the lambardar for his share of the profits of a mahal or of any part thereof. In any such suit the court may award to the plaintiff not only a share of the profits actually collected, but also of such sums as the plaintiff may prove to have remained uncollected owing to the negligence or misconduct of the defendant." What we have

to consider what is the scope of this section. The test for answering the question is whether by the word "defendant" the Legislature meant the original defendant to the suit or the person who was in the array of defendants at the time the decree was passed. By section 166, a 'lambardar' includes the heirs, legal representatives, executors, administrators and assignees of a lambardar. The present suit was not brought against a representative of the lambardar but against the lambardar himself. Sub-section (2) seems to me to refer to the case of a person who was sued as the original lambardar and in that view the misconduct or negligence which would entitle the plaintiff to recover a share of the amount which remained uncollected, would be the misconduct or negligence of the defendant who was sued, namely (as in the present case) the original lambardar. If the person who was sued was the representative of the lambardar, he would be the defendant in the suit and he would not be liable according to the language of the section, as the misconduct or negligence could not be his misconduct or negligence. However, we are not called upon to decide that question in this case. In the present case, the original lambardar who made the collections in the year in question, was sued and it was after his death that his representative was brought upon the record. The word "defendant" in sub-section (2) of section 164 contemplates, in my opinion, the original defendant to the suit and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is of the lambardar. This may create an anomaly but we have to construe the section as it stands. The case of *Murad-un-nissa v. Ghulam Sajjad* (1), to which reference was made, was a case under Act XII of 1881. Section 209 of that Act provided that in a suit brought against a lambardar for a share of profits, the plaintiff would be entitled to a sum equal to the plaintiff's share in the profits which through gross negligence or misconduct the lambardar had omitted to collect. That was a suit in which the heir of the lambardar was subsequently brought upon the record on the death of the lambardar. Having regard to the provisions of section 209 the liability of the lambardar would be for amounts which he had not collected. The word "lambardar" in Act XII of 1881 did not include the legal representative of a lambardar and therefore having regard to the fact that the word "lambardar" was used in that section, the heir of a lambardar could not be held liable. That case therefore does not seem to have any bearing upon the question we have to decide with reference to the language used in section 164 and the addition of section 166 to the present Tenancy Act. The case of *Dip Singh v. Ram Charan* (2), was a suit against the heir of a deceased lambardar and was brought under the present Tenancy Act. In that case it was held that having regard to the use of the word "defendant" in the section, the heir who was the defendant, could

(1) [1897] I. L. R., 20 All., 73. (2) [1906] I. L. R., 29 All., 15.

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not be held liable, as the negligence or misconduct referred to in the section was not his negligence or misconduct. That case therefore does not help us in the decision of the present suit. In my opinion, in view of the provisions of section 164, the question of gross negligence or misconduct of the original lambardar against whom a suit was brought, would have to be gone into and if such negligence or misconduct was shown his representative would be liable to the extent of the assets of the deceased which came into his hands. In any case the liability of the representative of the lambardar would not be a personal liability. On principle it does not seem that the assets of the deceased lambardar should escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct happened to die after the expiry of the year during which the collections had to be made. In my opinion no question of tort or of *quasi* contract arises under the circumstances mentioned above. The case, as I have already said, depends upon the construction of section 164 and I would construe the section in the manner I have stated above. In my opinion the decision of the lower appellate court ought to be reversed and the case remanded to that court.

Piggott, J.

PIGGOTT, J.—I concur both in the proposed order and in the reasons given for the same. I only wish to refer to the provisions of Order 22, rule 4 of the Code of Civil Procedure as further strengthening the position taken up. When the suit was instituted the original defendant Kundan Singh, was under a liability to the plaintiffs, by reason of the provisions of clause (2) of section 164, of the Tenancy Act. On his death his son Tej Singh was brought on the record as his legal representative. It was then open to Tej Singh to make any defence appropriate to his character as a legal representative of Kundan Singh deceased. If Tej Singh had been sued as an original defendant after the death of his father it would no doubt have been open to him to say that, under the statute, the negligence or misconduct on which a certain liability was imposed must be that of the defendant in the suit, and that he himself could not be held liable for any negligence or misconduct on the part of his father; but such a defence is, in my opinion, inappropriate to the character of Tej Singh as a legal representative of a deceased defendant brought upon the record under Order 22, rule 4 of the Code of Civil Procedure. This was a case in which it could not be pleaded that the right to sue did not survive, within the meaning of the rule in question; and if the right to sue survives it must do so against the legal representative of a deceased defendant in the same manner as against that defendant himself. In my opinion on the wording of sections 164 and 166 of the Tenancy Act, the plaintiff's claim, based upon the second clause of section 164, was maintainable against the legal representative of Kundan Singh after the death of Kundan Singh.

WALSH, J.—I agree.

BY THE COURT.—The order of the court is that the appeal is allowed, the decree of the court below is set aside and the case is remanded to that court with directions to re-admit it under its original number in the register, and to try and determine the other questions which arise in the case. Costs here and hitherto will be costs in the cause.

B. K. M.

Appeal allowed.

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Penal Code (Act XLV of 1860), section 499—Defamation—Witness—Evidence—How far witness protected—Indian Evidence Act (I of 1872), section 132—“Compelled,” meaning of.

January, 5.

PIGGOTT, J.

The ninth exception to section 499 of the Indian Penal Code is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily the first exception would apply to statements made by witnesses in the course of judicial proceedings, provided those statements are true; and if the statements are true in fact, and relevant to the matter under investigation, it is obviously for the public good that they should be made. If section 499 were the only provision, the position of a witness would be a difficult one, but under section 132 of the Evidence Act if a witness “is compelled” to make a defamatory statement a prosecution will not lie. The protection afforded by section 132 of the Evidence Act must be claimed expressly by a witness before he makes the statement.

CRIMINAL REVISION from an order of F. D. SIMPSON ESQ., Sessions Judge of Allahabad.

The facts of the case fully appear from the following judgment of the Sessions Judge.

This is an application in revision. It raises a point of law of very considerable difficulty. One Sarju made a report to the police in which he charged one Sital with theft. The case was investigated and Sarju's report was found to be false. Sarju was prosecuted under section 132 for his report, and Sital was examined as a witness. His deposition is in the usual narrative form. The questions are not recorded. The relevant portion of it is as follows:—“I did not steal the Ex. C. Sarju bears enmity to me because we had a quarrel with each other about the middle common wall

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of the courtyard. I had illicit connection with Surja's aunt Musammat Chhotki. The accused and Mukhiya Sita Ram when they came to know of it they were grieved. Sita Ram has come to court to-day and is outside. Sita Ram is a *biradri* of the accused and he, therefore, told me not to go to Musammat Chhotki. I listened to him and gave up visiting Musammat Chhotki. Even then he was not pleased with me as I had secret connection with Chhotki. "The fact that Sital had made these statements about himself and Musammat Chhotki, became known to the *biradri*. The parties are *Kachhis* and a *panchayat* was called in which Sital was asked whether he had made these statements in court, to which he replied that he had and whether they were true, to which he replied that they were true. Kallu, the husband of Chhotki, then made a complaint against Sarju for defamation. The learned Magistrate took the evidence for the prosecution and then discharged the accused. Kallu has made the present application in revision against that order of discharge.

The first question is whether a witness can be prosecuted at all for a defamatory statements, which he makes in court. It is settled law in England that he cannot. But the Indian Law on the subject is contained in the Penal Code. Section 499 lays down a law of defamation which differs on many important points from the English Law on the subject. It was framed with great care and no less than ten exceptions are enumerated. It seems quite plain that if the Legislature had intended to embody the English Law on the subject, they would have done so in a special exception to section 499. For this Court, the matter is concluded by authority in *Ganga Pershad's* case (I. L. R., 29 All., 686). It was held by two Judges against the third that such a prosecution lies. The decisions to the contrary were considered and dissented from. Therefore the present prosecution lies.

The next question is whether Sital is entitled to plead the bar of section 132 of the Evidence Act. Section 132 runs as follows:—"A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any Civil or Criminal proceeding, upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate such witness, or that it will expose or tend, directly or indirectly, to expose, such witness to a penalty or forfeiture of any kind.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer." The meaning of the word 'compelled' has been the subject of some difference of opinion.

But it was held in *Moss's* case, I. L. R., 16 All., 88 at page 100, that "compelled only applies where the court has compelled a witness to answer a question, and not to a case in which the witness has not asked to be excused from answering a question, but gives his answer without any claim to have himself excused." This was the decision of an High Court Judge. So far as I know it has not been overruled. In the present case the witness did not object the question. So section 132 will not avail him.

I now reach the difficult point in the case. If section 499 applies to witnesses, then a witness can only defend himself by bringing himself within one of the exceptions and the exception pleaded in the present case is the 9th. This will, as a rule, be the section which the witness will have to set up. "It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it, or of any other person or for the public good."

Now the person who pleads an exception has thrown on him the burden of bringing himself within it. This is laid down in section 105 of the Evidence Act. "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exceptions or proviso contained in any other part of the same Code, or in Law defining the offence, is upon him, and the court shall presume the absence of such circumstances." Therefore it is necessary for a witness to prove that he made the imputation in good faith. Now in such a case as the present, it is clear that there can be no good faith unless the imputation is true. It might appear, therefore, at first sight that it is thrown on the witness to prove that the imputation is true. But this cannot be the intention of the Legislature. It would throw an intolerable burden on witnesses. A witness is brought to court on summons, possibly against his will. He is then compelled to take an oath that he will speak the truth and the whole truth. Then a question is put to him. Let us say, that the question is, "Have you had illicit intercourse with B's wife?" He replies truly that he has. B proceeds to prosecute him and it is thrown affirmatively on the witness to prove to the satisfaction of the court that he has had intercourse with B's wife. It may be quite impossible for him to do so. B's wife may not choose to admit her own dishonour. The witness may have taken particular pains that there should be no evidence in existence of the intrigue. Therefore I am prepared to hold that a person accused of an offence under section 499 who proves affirmatively that the imputation was made in the course of a deposition in court and that it was relevant to matter in hand, has proved enough. The court will then go on and presume that the imputation was made in good faith, although it will not make the same presumption when the imputation was made out of court. It will then be for the other side to prove that the statement was untrue and therefore could not have been made in good faith. I have been able to find no authority for this proposition. But I think the language of the Code will bear such a construction and that the result of the opposite view is a *reductio ad absurdum*. If this principle is applied the order of discharge appears to be right. The prosecution has not proved that the statement of Sital Din was false, and therefore I presume that it was made in good faith. It was certainly relevant to the case and made in protection of his interest. The subsequent statement made before the *panchayat* was a necessary result of the deposition. He was asked if he had made the deposition. He could not but admit that he had. He was asked if it was true. He could not but say it was. The application in revision is therefore dismissed.

The complainant Kallu applied in revision to the High Court.

Peary Lal Banerji, for the applicant.

R. K. Sorabji, for the opposite party.

The following judgment was delivered by

Piggott, J.—The circumstances out of which this application for revision arises are as follows. One Sarju made a report to the police in which he alleged that Sital, who is the respondent to the present application, had committed theft. Upon investigation this report was found to be false and a prosecution was instituted against Sarju, under section 182 of the Indian Penal Code, for having given false information to a public servant. Sital appeared as a witness for the prosecution in this case. He began by deposing that he had

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not committed the theft of which Sarju had accused him. The next question put to him must have been, "why then did Sarju make this false report against you"? He replied that Sarju bore him enmity and went on to explain the grounds of that enmity. He said, first, that there had been a quarrel between them about a partition-wall between their courtyards. Apparently he felt it necessary to explain further, though it is impossible to say whether or not this explanation was added in reply to a direct question. He said that there had been for some time an intrigue between himself and an aunt of Sarju named Musammat Chhotki. It appears that this Chhotki is a married woman, and the result of the statement made by Sital in court was to bring social discredit on Kallu, the husband of the said Chhotki. It is in evidence that proceedings were taken by a *panchayat* of the brotherhood to which Kallu and Sital both belonged. It is quite clear therefore, and is not denied, that Sital's statement with regard to his intrigue with Musammat Chhotki was defamatory of Kallu within the meaning of section 499 of the Indian Penal Code. It is also quite impossible to hold that at the time when he made this statement Sital had no reason to believe that this imputation would be harmful to the reputation of Kallu. It may be that, before this matter can be completely disposed of, the trial court will have to direct its mind to the question whether Sital made this statement intending to harm Kallu's reputation, or whether the harm thus resulting to Kallu's reputation was present to his mind when he made the statement so that he could be said to have made the same "knowing that it was likely" to do harm. These considerations would be relevant on the question of sentence. But at the very lowest it cannot be denied that Sital had reason to believe that the imputation would do harm. If Kallu had believed the assertion made by Sital as to the unchastity of Musammat Chhotki to be true, he could have prosecuted him on his own admission for having committed an offence punishable under section 497 of the Indian Penal Code. Apparently Kallu believes that imputation to be false; he has accordingly instituted a prosecution against Sital for the offence of defamation punishable under section 499 of the Indian Penal Code. The Magistrate who tried the case seems to have thought that he had only to consider whether the imputation made by Sital against the chastity of Kallu's wife had been made maliciously and, as he says, "merely with a view to disgrace Kallu," or whether it was made as a necessary part of the narrative which Sital had to lay before the court in the course of his deposition. Holding it not to be proved that the imputation had been made "with intent to cause disgrace," the Magistrate passed an order of discharge. Kallu brought the matter before the Sessions Judge, asking that court to set aside the order of discharge and to direct further enquiry. The learned Sessions Judge has disposed of the matter in an elaborate order, in which he has discussed the previous decisions of this Court bearing on the questions of law involved. The

conclusion which he comes to is that, if a witness makes a statement in the course of a deposition in court, and the statement is one relevant to the matter in hand, the court will presume the said statement "to have been made in good faith for the protection of the interests of the person making it," within the meaning of Exception 9 to section 499 of the Indian Penal Code. I do not myself think that this is a sound proposition of law, and I am quite certain that it is not to be reconciled with the decision of the majority of a Full Bench of this Court in the case of *Emperor v. Ganga Prasad* (1). I do not altogether agree with the learned Sessions Judge when he says that the ninth Exception to section 499 of the Indian Penal Code is the only one to which a witness could apply for protection in respect of a defamatory statement made by him under the sanction of the oath in the course of a judicial proceeding. The ninth Exception is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily, the first Exception would apply to statements made by witnesses in the course of judicial proceedings, provided those statements are true. They must be true in fact in order to come under the first Exception at all; and if they are true in fact, and also relevant to the matter under investigation, it is obviously for the public good that they should be made. In the present case these considerations are not of great importance; because as the learned Sessions Judge himself rightly points out, Sital's allegation against the chastity of Musammat Chhotki could not have been made in good faith unless it was in fact true. If there were no other provision of the law to be considered except section 499 of the Indian Penal Code, the position of a witness in respect of offences under that section would be a difficult one. He would be liable to prosecution with regard to any statement made by him of a defamatory nature and, on such prosecution being instituted, the provisions of section 105 of the Indian Evidence Act would throw upon him the burden of proving that the statements were in fact true. The Legislature, however, seems to me to have fully realised this difficulty and to have made adequate provision for the same by means of section 132 of the Indian Evidence Act. To my mind the real question in this case is one of the interpretation of that section and its application to the facts of this case. A witness giving evidence in a judicial proceeding is under an obligation by law to state nothing which is not true and, by reason of the oath or solemn affirmation taken by him in the presence of the court, to state, not merely the truth, but the whole truth touching the matter in question before the court. Now under section 134 of the Indian Evidence Act no answer which a witness is compelled to give, when giving evidence as to any matter relevant to the matter in issue in

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any suit, or in any Civil or Criminal proceeding, can subject him to any arrest or prosecution, or be proved against him in any Criminal proceeding, except on a prosecution for giving false evidence by such answer. A witness who has made a statement in the course of his deposition defamatory of another person, if he can claim the protection of this section, is absolutely safe so long as he has told the truth. If he has said what is not true, he can be prosecuted for giving false evidence; and even as regards the institution of such prosecution he is under the protection of the court before which his evidence was given. He cannot be prosecuted without the sanction of that court. Now, if it could be argued that the defamatory statement in this case was one which Sital "was compelled" to make, within the meaning of section 132 of the Indian Evidence Act, the present prosecution would necessarily fail, and the order of discharge passed by the Magistrate would be perfectly correct. The question of the meaning of the words "no such answer which a witness is compelled to give," in the latter part of the aforesaid section 132, was considered by a Full Bench of the Madras High Court in the *Queen v. Gopal Das and others* (1) and also by the Chief Justice of this Court in the case of *Queen Empress v. Moss and others* (2). In both these cases it was laid down that the protection afforded by section 132 of the Indian Evidence Act must be claimed by the witness before he makes the statement in respect of which a question is subsequently raised. Obviously no form of words can be prescribed in which this claim is to be made; and I conceive that cases may arise in which the courts will be compelled to hold that the claim has been made by implication, or that the witness was placed under practical compulsion to answer certain questions by the mere fact of his appearance in the witness box. Whether this be so or not, I think the principle laid down in these rulings fully applies to the facts of the present case. After Sital had stated that the charge brought against him by Sarju was false and made because of antecedent enmity existing between them, and that this enmity resulted from a quarrel about the partition-wall, he should either have contented himself with that statement, or have claimed protection of the court. It is not obvious on the face of the record as it stands that Sital was under any real necessity to go further. It has been brought to my notice that Kallu was one of the witnesses summoned for the defence in the case in which Sarju was on his trial, and it is open to argument whether Sital's conduct in alleging the existence of an intrigue between himself and Musammat Chhotki may not have been, in part at any rate, intended to discount beforehand the value of any evidence which Kallu might give in Sarju's defence. If he really felt that the court could not otherwise properly appreciate the nature of the grudge borne him by Sarju, and the strength of the motives which impelled Sarju to make a false report to his disadvantage, he ought to have claimed the protection of the court. The

(1) [1880] J. L. R., 3 Mad., 271.

(2) [1893] J. L. R., 16 All., 88.

statement which he proceeded to make was one against the character of a woman. It was seriously injurious to that woman's husband, who was not a party to the proceedings then before the court; and one cannot help remarking that it was a statement which a man with any sentiment of honour would have been very reluctant to make. Assuming in Sital's favour that this particular defamatory statement was extracted from him by some further question, I cannot avoid the feeling that it is a statement which he should naturally have shrunk from making. It would have been easy for him to reply that the quarrel about the partition-wall was connected with another matter, in respect of which he could not lay the entire facts before the court without making a statement which would criminate him or expose him to prosecution or other penalty. It seems to me at least possible that, if he had said this, the court would not have compelled him to answer the question, unless such answer had been pressed for by Sarju himself in the exercise of his rights as an accused person; and, of course, if Sarju had chosen to press the question, the responsibility for the answer would have rested largely upon him and the witness would have been completely protected by the provisions of the statute law. In my opinion the order of discharge in this case cannot be supported on legal grounds, nor am I prepared to allow that the case is one in which the technicalities of the law should be regarded as bearing hardly upon the accused person. I set aside the order of discharge in this case and send the case back, through the Sessions Judge, to the trial court, directing the Magistrate to proceed with the trial of the case and to dispose of it in the light of the principles which I have taken it upon me to lay down. In reply to a suggestion made to me on behalf of the applicant that the case is one which might be more efficiently tried by a Magistrate with a knowledge of the English language, I think it sufficient to say that, while it seems to me right and proper that the case should be sent back to the Magistrate who passed the order of discharge, my order is not to be interpreted as precluding the District Magistrate from exercising his power of transferring the case, if he should see adequate reason to do so.

Order set aside.

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February, 2.

PIGGOTT, J.

INDAR AND OTHERS

versus

EMPEROR*

Criminal Procedure Code (Act V of 1898), section 110—Security for good behaviour—Offence alleged must be proved by relevant evidence—Evidence of general repute not sufficient.

In a proceeding under section 110 of the Code of Criminal Procedure any particular offence alleged against the person or persons called upon to furnish security must be proved by relevant evidence and not by evidence of general repute that he or they are habitual offenders.

CRIMINAL REVISION, from an order of C. L. ALEXANDER ESQR., District Magistrate of Farrukhabad.

A. H. C. Hamilton, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—In this case Indar, Jhabbu Lal and Bhopal, a father and two sons, have been required by a Sub-Divisional Magistrate to give security to be of good behaviour for a period of one year under the provisions of section 110 of the Code of Criminal Procedure. An appeal against that order has been dismissed by the District Magistrate. The case is before me on an application for revision in respect of these two orders. I have been through the record and I am quite satisfied that the orders complained of are illegal, on more than one ground, and cannot be affirmed. The order of the District Magistrate is perfectly clear and straight-forward and shows beyond possible doubt the grounds upon which the prosecution of these men for bad livelihood has proceeded and the order against them passed. There was a dacoity at the house of one Ram Dayal, in the course of which the said Ram Dayal was murdered. Information was forthcoming to the effect that this dacoity had been organised by Indar, and that he and his sons, Jhabbu Lal and Bhopal, had taken part in it. The three men were placed on their trial along with others, charged with having taken part in this dacoity and in the murder of Ram Dayal. They were acquitted by the Sessions Court. The present proceedings are an attempt to prove by hearsay evidence what the prosecution were unable to prove by direct evidence at the Sessions trial. The learned District Magistrate says quite frankly that he is satisfied by the evidence on the record that Indar, Bhopal and Jhabbu Lal had got up the dacoity at the house of Ram Dayal. There is practically no legal evidence to this effect on the record. If

* Cr. Rev. No. 795 of 1917.

it is alleged against a person, even in a proceeding under section 110 of the Code of Criminal Procedure, that he on a certain occasion committed a particular offence, that fact must be proved by relevant evidence. It is not at all the same thing as proving by evidence of general repute that a man is a habitual offender. Moreover, in the present case the preliminary order drawn up by the Magistrate shows clearly that the prosecution were not prepared to undertake to prove, by evidence of general repute or otherwise, that these men were habitual robbers or habitual receivers of stolen property. The case against them was that they were so desperate and dangerous as to render their being allowed without security hazardous to the community. This is not a fact which under section 117 of the Code of Criminal Procedure can be proved by evidence of general repute. I do not say that in a proceeding of this sort evidence of general repute may not be offered in support of an allegation that a person against whom proceedings have been taken is habitually a robber or habitually commits extortion, and that the court may not be asked at the same time to consider whether this evidence of the man's general repute, read in connection with direct evidence establishing definite facts against him, may not justify a conclusion that he is a desperate and dangerous character and within the scope of clause (f) of section 110 of the Code of Criminal Procedure. If however it is intended to conduct a prosecution on these lines, the accused should have fair notice of the fact in the preliminary order drawn up against him. The form of the preliminary order passed in this case clearly shows that those responsible for the conduct of the prosecution were not prepared to ask the court to find that these men were habitual robbers or habitual receivers of stolen property. For all these reasons I am quite satisfied that the orders complained of cannot be sustained. I set aside the order of the Sub-Divisional Magistrate and discharge Inlar, Bhopal and Jhabbu Lal. If they have furnished the securities required, their sureties will be discharged and their own recognizances cancelled. If they are in custody for failure to furnish security, they must be at once released.

Order set aside.

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January 29.

TUDBALL, J.

LACHHMI NARAIN

versus

BINDRABAN *

Code of Criminal Procedure (Act V of 1898), section 439—Order refusing to grant sanction—Appeal to District Magistrate against order—Appeal temporarily dismissed—District Magistrate setting aside the order refusing sanction after dismissal of appeal—Order illegal—Revision.

One *L* filed a complaint against *B* under section 403 of the Indian Penal Code. It was dismissed by a Bench of Honorary Magistrates. *B* applied to them for sanction to prosecute *L* which application was refused. In the meantime *L* sued *B* to recover the money in respect of which he had complained against *B*. During the pendency of the suit *B* appealed to the District Magistrate against the order refusing to grant sanction. The District Magistrate dismissed the appeal till the suit was decided. When the Civil Court decided the suit against *L*, *B* again moved the District Magistrate who granted the sanction sought for and set aside the lower court's order:—*Held*, on revision that the order was illegal, the District Magistrate having become *functus officio* with respect to the appeal when he dismissed it. Temporary dismissals of appeals are unknown to the law.

CRIMINAL REVISION from an order of F. F. SLADEN Esq., District Magistrate of Bareilly.

Sital Prasad Ghosh, for the applicant.

M. L. Agarwala, for the opposite party.

The following judgment was delivered by

Tudball, J.

TUDBALL, J.—The applicant in this case on the first of September, 1916, preferred a charge under section 406 of the Indian Penal Code against Bindraban in a criminal court. He was given sufficient opportunity of producing preliminary evidence but he failed to do so and finally in the beginning of January the complaint was dismissed. He at once put in a fresh complaint and finally the case was tried by a Bench of Honorary Magistrates who dismissed it again in the presence of the accused. Bindraban then applied to the Bench for sanction to prosecute Lachhmi Narain for the offence of perjury. The Bench of Magistrates did not think it advisable to grant sanction and rejected the application. In the meantime Lachhmi Narain had brought a suit in the Civil Court to recover the sum of money in respect of which he had preferred the charge in the Criminal Court. That suit was pending when Bindraban appealed to the

District Magistrate against the order of the Bench refusing sanction to prosecute. The District Magistrate wrote a strange order. It runs as follows :—“The appellant admits that the respondent has got a civil suit now pending to recover the money, he alleges, he paid to appellant, about which he filed his complaint, under section 406 of the Indian Penal Code, which was dismissed. It would be obviously improper to grant sanction to a prosecution for a false case at this stage. If, when the civil suit is finished, the appellant still thinks that he has good ground for asking for a prosecution, he can apply again to this Court for a revision of the lower court's order. Till that time this appeal stands dismissed.” On the 14th of September 1917, Bindraban again applied to the District Magistrate, the civil suit in the meantime having come to an end. It had been dismissed and he furnished the court with copies of the judgments of the first court and the appellate court in that suit. Notice was issued by the District Magistrate to Lachhmi Narain and then the District Magistrate passed the following order :—“Having now seen the judgments of the lower and appellate Civil Courts in this matter in both of which courts the respondent in this case entirely failed to substantiate his claim, I think this is a proper case in which to grant sanction to prosecute, as apart from the personal enmities between the parties, the interest of the state demands that such prosecutions, on biased and unreliable evidence, should be stopped. I set aside the order of the lower court and grant the sanction asked for.” Lachhmi Narain has come to this Court in revision against this latter order. Such things as temporary dismissals of appeals are unknown to law and so far as the appeal is concerned practically the District Magistrate was *functus officio* when he passed his order of the 22nd of September. His proper course would have been to have postponed the decision of the appeal until the decision of the civil suit. The case however “*appears to be*” one in which some action might be taken as regards Lachhmi Narain and his witnesses but in which the prosecution should not be left in the hands of a private person, as it would simply be used as a weapon of extortion. I therefore allow this application, and set aside the order of the District Magistrate of the 22nd of September, 1917. I direct the record to be returned to the Magistrate with direction that, *if he thinks fit*, he may take up the case *suo motu* and issue notice and if necessary direct the prosecution of Lachhmi Narain and his witnesses so as not to leave the prosecution in the hands of a private person. The District Magistrate will understand that I do not seek to fetter his discretion in any way.

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Order set aside.

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January, 19.

PIGGOTT, J.
WALSH, J.JAHANGIRA (*Defendant*)

versus

KARRAR HUSAIN (*Plaintiff*)*

Agra Tenancy Act (II of 1901), section 10—Proprietor of mahal making usufructuary mortgage of his share—Ex-proprietary tenancy of sir and khudkasht—Agreement with mortgagees to pay a certain rent for such land—Whether suit by mortgagees alone for such rent maintainable—Estoppel—Scope of section 10 whether law forbids that an agreement between parties to pay certain rent should not be taken into account by Assistant Collector.

The defendant was a proprietor in a certain mahal. He had in his possession lands of three descriptions namely, *sir*, properly so-called, *khudkasht*, cultivated as such for over 12 years and having all the incidents of *sir* though not so recorded and *khudkasht* of less than 12 years. He made a usufructuary mortgage of his share to the plaintiff and entered into a contract with him to the effect that he would hold all the lands of each of the three descriptions as tenant of the plaintiff at a certain specified rent for each class of land. Plaintiff brought three suits for arrears of rent. The defendant, *inter alia*, contended (1) that the plaintiff was not entitled to sue alone, the right to collect the rents of these lands being vested in the entire body of the co-sharers of the mahal; and (2) that the rent agreement between the parties was unenforceable being in contravention of section 10 of the Tenancy Act:—*Held* (1) that the defendant was estopped from raising the first plea inasmuch as he had entered into a rent-agreement with the plaintiff in respect of these particular lands; and (2) that the Revenue Court was not precluded from accepting an agreement whereby the defendant undertook to pay to the plaintiff a certain rent for the ex-proprietary holdings.

The provisions of section 10 of the Tenancy Act fix a maximum rent, but the parties are not thereby prevented either from contracting for the payment of a lower rate of rent, or from coming to a conclusion with reference to section 10 as to what rent is likely to be fair and they may agree to pay the same. Such an agreement is not enforceable in itself; what is wanted is an order under section 10, clause 5, fixing the rent to be paid by an ex-proprietary tenant; but the law does not lay down that this order cannot be based upon an agreement come to between the parties or that its terms cannot be taken into account.

SECOND APPEAL from a decree of L. JOHNSTON Esq., District Judge of Meerut, reversing a decree of C. H. Webster Esq., Assistant Collector, First Class.

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—

Bhagwati Shankar, for the appellant.

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c.
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Sital Prasad Ghosh, for the respondent.

The following judgments were delivered.

PIGGOTT, J.—These are three connected appeals by a defendant in three connected suits for arrears of rent. It appears that the defendant, being a proprietor in a mahal, mortgaged his entire share with possession to the plaintiff. At the time of the mortgage the defendant was personally occupying certain plots of land in the mahal as his *sir* or *khudkash*. The land so occupied by him fell naturally into three classes. There were the *sir* lands strictly so-called, there were *khudkash* lands which the defendant had held for the full statutory period of twelve years, and to which therefore in law all the incidents of *sir* attached although they were not yet recorded as such, and finally there were *khudkash* lands which the defendant had occupied for less than the statutory period. Having mortgaged his share with possession the defendant entered into a contract of lease with the plaintiff. By this contract he undertook to hold all the lands of each of the three descriptions referred to above as tenant of the plaintiff at a certain specified rent for each class of land. The present suit is to enforce the terms of that agreement. It has been resisted on a variety of grounds; but we are concerned only with the points raised by the petitions of appeal before us. One of the pleas taken is that the decrees of the lower appellate court are not in accordance with the judgment, inasmuch as the total sum decreed in favour of the plaintiff in the three decrees is in excess of the total of Rs. 165, awarded by the judgment. We have looked into this point and are satisfied that there is no force in it. The judgment clearly intended to award interest, at least up to the date of the institution of the suit, at the statutory rate of twelve per cent per annum on the sum of Rs. 165 and this interest is sufficient to account for the difference between Rs. 165 and Rs. 196-1-0, which is the total of the three decrees, including interest to date. Two other points have been argued in this case: one is that the plaintiff is not entitled to sue at all, because the right to collect the rents of these lands is not vested in the plaintiff alone but in the entire body of co-sharers in the mahal to which the lands in suit appertain. In our opinion the defendant is estopped from raising this plea. He entered into a rent-agreement with the plaintiff in respect to these particular lands. If the plaintiff in enforcing his rights under that agreement is trenching on the rights of the other proprietors in the mahal, the latter have their remedy, either by way of a suit for settlement of accounts or by way of an application

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for partition. At any rate this defendant has admitted this plaintiff to have held these particular lands in severalty and has covenanted to occupy them as his tenant and to pay him rent therefor. The defence that other co-sharers should have joined in this suit is not open to him. The next point argued, although it is not easy to see how it is raised by any specific plea taken in the petition of appeal to this Court, has been that the rent agreement between the parties is unenforceable, being in contravention of the provisions of section 10 of the Local Tenancy Act (No II of 1901). This contention of course affects two of the suits only, namely those in which rent is claimed in respect of the *sir* and of the *khudkash* of twelve years standing or over. Under the provisions of section 10 aforesaid the defendant became an ex-proprietary tenant of these lands and entitled to the privileges of such tenant. The law required that his rent should be fixed by the Collector under section 36 of the N - W. P. and Oudh Land Revenue Act of 1901. When these appellants were first before this Court the facts were not as clear as they should have been made, but they are established now by the findings which have been returned on the issues remitted by this Court. It is certain that there was a proceeding purporting to be under section 36 aforesaid by which the rent payable by the defendant to the plaintiff for these particular lands was fixed at the amounts specified in the agreement come to by the parties themselves. There is nothing in law to prevent the Revenue Court from accepting such an agreement. No doubt it is the duty of the Revenue Courts—and the reported decisions of the Board of Revenue show that that duty is jealously performed—to see that the provisions of section 10 of the Tenancy Act (No. II of 1901) are not evaded and that a reckless and improvident proprietor is not permitted to contract himself out of them. At the same time all that the law has said on this subject of rent is that the ex-proprietary tenant is entitled to hold at a rate which shall be four annas in the rupee less than the rate generally payable by the non-occupancy tenants for lands of similar quality and with similar advantages in the neighbourhood. To begin with, it is obvious enough that these provisions fix a maximum rent, and there is nothing to prevent the parties concerned from contracting for the payment of a lower rate. Then again, there is nothing in law to prevent the parties from coming to an understanding amongst themselves as to what the prevailing rates of rent are and what advantages the ex-proprietary tenant is likely to get under the statutory provisions in question. They may come to a conclusion of their own as to what a fair rent, fixed with regard to the provisions of section 10 aforesaid, is likely to be, and the law certainly does not forbid an agreement to pay the same. Such agreement is not enforceable in itself and could not be sued upon as it stands. What is wanted is an order under section 10, clause 5 aforesaid, fixing the rent to be paid by the ex-proprietary tenant; but the law does not lay down that this order cannot lawfully be based upon an agreement

come to by the parties, still less that in passing it the Collector must not take into account the terms of such an agreement. The contention before us, after the findings have been returned on the remanded issues, has been that the proceedings which terminated in the order fixing the rent under section 36 of the Land Revenue Act were irregular and that there was nothing to show that the question as to whether the agreement came to by the parties had given due effect to the provisions of section 10 of the Tenancy Act in favour of the ex-proprietary tenant, was present to the mind of the Collector or Assistant Collector and duly considered by him. On this there are two things to be said. One is that the presumption of law is in favour of validity and regularity in the proceedings of a court of justice, and not the contrary. We know that the Assistant Collector acted upon a report of the Tahsildar. That report is not before us; but there is no reason why we should presume that it did not contain an expression of the Tahsildar's opinion as to the suitability and propriety of the rent agreed upon between the parties. In the next place, it is at least open to argument whether in a suit like the present the court can enquire into the materials upon which the Collector or the Assistant Collector proceeded when he passed his order fixing the rent under section 36 of the Land Revenue Act.

It so happens, however, that we are able to clinch this matter in the most satisfactory manner possible. The enquiry made under the orders of this Court shows that the rent agreed to be paid for the *sir* and *khudkasht* lands was a favourable rent and gave to the ex-proprietary tenant the full benefit of the statutory provisions. The court below in enquiring into this point found that it was useless to take as exemplars the plots of land actually held by the few non-occupancy tenants (strictly so-called) in this village, the fact being that all the best lands were included in the *sir* or *khudkasht*. It was inevitable therefore that the court should enquire into the prevailing rates of rent paid for lands of similar quality and with similar advantages to those in suit, by a sub-tenant taking a lease of the same from the holder of the *sir* or the *khudkasht* rights. It has found that such lands are ordinarily let out for a rate of about Rs. 12 per *pucca bigha* and that the rent which the defendant covenanted to pay does not quite amount to Rs. 8 per *pucca bigha*. It is true that, when formally recording his finding on the issue remitted to him, the learned District Judge has expressed himself very clumsily and has fallen into what we have no reason to doubt is a clerical error. He says that the rent fixed on the defendant's *sir* and *khudkasht* land was "nearly equal" to that payable by other tenants for lands of similar quality and with similar advantages. If this finding be read in connection with the reasoning on which it proceeds, it is fairly clear that the court intended to find that the rent so fixed was nearly equal, after the deduction of the statutory

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25 per cent. It may be that in the absence of a petition of objections we might have felt compelled to hold the parties bound by the finding as recorded, if the case had turned upon this single point, but the really decisive issue in the case is the second issue as to the order of the Assistant Collector fixing the rent. And when we are asked to consider whether there is any ground for presuming that in passing that order the Collector had overlooked the provisions of section 10 of the Tenancy Act and had not allowed the ex-proprietary tenant the advantages secured to him by that section, we are clearly entitled to take into consideration, not merely the finding actually recorded on the first issue, but the reasoning upon which that finding proceeds and the conclusions actually arrived at by the court below on the evidence considered by it. The result is that there is really no force either in law or in equity in any of these appeals and we dismiss them accordingly with costs.

WALSH, J —I agree.

BY THE COURT.—The order of the Court is that this and the two connected appeals are dismissed with costs.

Appeal dismissed.

RAM DASS
versus
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January, 11.

PIGGOTT J.
WATSH, J

- *Criminal Procedure Code (Act V of 1898), section 350—Ceases to exercise jurisdiction therein—Transfer—Magistrates—Case transferred from one Magistrate to another—De novo trial.*

Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.

Maresh Chandra Saha v. Emperor, I. L. R., 35 Cal, 457; *Kudrut-ulla v. Emperor*, I. L. R., 39 Cal., 781; and *Palaniandy Goundan v. Emperor*, I. L. R., 32 Mad. 218 followed.

CRIMINAL REFERENCE made by G. C. BADIWAR Esq., Sessions Judge of Ghazipur.

One Ram Das was charged with an offence under section 323, Indian Penal Code, and tried by an Honorary Magistrate exercising second class powers. After the whole of the prosecution evidence and a portion of the defence evidence had been recorded, Ram Das applied to the District Magistrate to have the case transferred to some other court, and gave an undertaking that he would not ask for the re-hearing of the entire evidence *de novo*, but would be satisfied if the court to which the case might be transferred proceeded to hear the rest of the defence evidence and to pronounce judgment on the whole of the record before it. The District Magistrate transferred the case to the court of a Deputy Magistrate of the First Class and directed him to proceed with the trial from the stage to which it had reached in the court of the Honorary Magistrate. Ram Das abided by his undertaking; and the Deputy Magistrate, after taking the remaining evidence for the defence, convicted Ram Das under section 323, Indian Penal Code, and sentenced him to one month's rigorous imprisonment. The Sessions Judge, before whom the matter came in revision, referred the case to the High Court under section 438, Criminal Procedure Code, with a recommendation that the conviction be quashed as illegal.

Peary Lal Banerji, (with him *K. N. Laghate*, *Janki Prasad* and *Kamla Kant Varma*), for the applicant.—It is a well-recognized principle of Criminal law that a Judge or Magistrate can convict

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only on evidence heard by himself. Except in so far as this principle is modified by statute, a Judge or Magistrate has no jurisdiction to act upon evidence a part of which only has been recorded by himself and another part by another officer. And, except where the law expressly sanctions waiver, no consent or undertaking given by the accused in respect of an illegal procedure can confer jurisdiction; his rights are not lost by reason of his consent.

King-Emperor v. Sakharan Pandurang, [1901] I. L. R., 26 Bom., 50;
The Deputy Legal Remembrancer etc. v. Upendra Kumar Ghose, [1906] 12 C. W. N., 140.

The only modification of the principle mentioned above is to be found in section 350 of the Code of Criminal Procedure, and the question is as to the true scope of that section. That section applies only to cases where there is a change in the *personnel* of the court, or *forum*, which remains the same; it does not apply where a case is transferred from one court to another. If the case itself remains where it was, but the individual Magistrate is succeeded by another incumbent of the same post, section 350 applies. But if the Magistrates remain where they were, and the case itself is removed from one court to another, the section does not apply. This construction of the section was accepted in the following cases.

Queen-Empress v. Radhe, [1889] I. L. R., 12 All., 66;
Queen-Empress v. Angmu, [1889] 9 A. W. N., 130;
Queen-Empress v. Bashir Khan, [1892] I. L. R., 14 All., 346;
The Deputy Legal Remembrancer etc. v. Upendra Kumar Ghose, [1906] 12 C. W. N., 140.

A different view was taken in the recent case of

King-Emperor v. Nanhua, [1914] 12 A. L. J. R., 467

That case, however, as well as one of the cases which it followed, namely

Palaniandy Goundan v. Emperor, [1908] I. L. R., 32 Mad., 218,

were distinguishable on the ground that there the proceedings in respect of which the question arose were only preliminary inquiries and not regular trials. The decisions in those cases not only recognised, but were influenced by, that distinction. In the case of an "inquiry" no consideration of possible prejudice to the accused can arise, and the matter stands on an entirely different footing from that of a trial.

The cases of

Mohesh Chandra v. Emperor, [1908] I. L. R., 35 Cal., 457;

Kudrutulla v. Emperor, [1912] I. L. R., 39 Cal., 781,

are at variance with the former case, already cited, in 12 C. W. N., 140. In the second of these cases, the cross-examination of the witnesses for the prosecution, as well as the whole of the evidence

for the defence, were heard by the Magistrate who convicted the accused; so, there could be no prejudice.

In the present case the question of prejudice may fairly be said to arise. The order of transfer required the Magistrate to whose court the case was transferred to hear the remaining witnesses for the defence, without giving him any option to re-hear the witnesses who had been heard by the other Magistrate. There was no room left for the accused to exercise his privilege if he wanted to; and the discretion of the Magistrate was absolutely fettered. There was only the 'anticipatory' consent which had been given by the accused before his right of option had even accrued.

Further, the sentence is too severe.

Uma Shankar Bajpai, for the opposite party, was not called upon.

The following judgments were delivered.

PIGGOTT, J.—The case before us is a reference by the learned Sessions Judge of Ghazipore, recommending that the conviction of one Ram Das on a charge under section 323 of the Indian Penal Code and the sentence of rigorous imprisonment for one month passed on him be set aside, on the ground that the trial in the Magistrate's court was vitiated by illegality. It appears that the complaint filed against Ram Das was referred for trial to the court of an Honorary Magistrate, exercising the powers of a Magistrate of the second class. This court recorded the whole of the evidence for the prosecution and a portion of the evidence for the defence. When it had reached this stage, Ram Das applied to the District Magistrate to have the case transferred to some other court. He gave an undertaking that, in the event of such transfer, he would not ask the court to which the transfer was made to re-hear the entire evidence *de novo*, but would be satisfied if that court proceeded to call and examine the remainder of the defence witnesses and pronounce judgment on the materials then before it. The case was then transferred by the District Magistrate to the court of a stipendiary Magistrate of the 1st class. Ram Das made no attempt to evade the undertaking which he had given to the District Magistrate; that is to say, he did not demand that the witnesses, or any of them, who had been already examined by the original trial court should be re-summoned and re-heard. The first class Magistrate accordingly heard and examined the remainder of the defence witnesses named on behalf of Ram Das, convicted him on the charge as framed under section 323 of the Indian Penal Code and sentenced him to rigorous imprisonment for one month. The learned Sessions Judge has referred the case to this Court on the ground that the provisions of section 350 of the Criminal Procedure Code do not apply to cases which are transferred from one court to another, and that the first class Magistrate on receiving this case for trial was bound to commence the trial *de novo* by the examination

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of all the prosecution witnesses. There is authority for this proposition in one single case of this Court, *Queen-Empress v. Angnu* (1). That case was decided by a single Judge upon a reference by a Sessions Judge. The case was not argued and the judgment is of the briefest. We can only take it that in the opinion of the learned Judge of this Court who disposed of that reference the provisions of section 350 of the Criminal Procedure Code were not intended to apply to cases of transfer. There was a suggestion in the referring order in that case that the accused had been prejudiced by the course adopted. Apparently there had been some complaint on his part against the manner in which the evidence had been recorded by the original trial court. We do not know how far the learned Judge of this Court was affected by this consideration in passing the order which he did. The learned Sessions Judge has referred to another decision of this Court, *Queen-Empress v. Bashir Khan* (2). He is entitled to rely upon the opinion, expressed by the learned Judge who disposed of this case, by way of *obiter dictum*; but the actual point for decision was different. On the facts of that case, even assuming that the provisions of section 350, Criminal Procedure Code, did apply, those provisions had been contravened and the order quashing the proceedings was obviously right on this ground alone. In a recent case, *King-Emperor v. Nanhua* (3), one of us has committed himself to a contrary view. Some stress was laid in deciding that case on the fact that the proceedings transferred from one court to another were only an enquiry preliminary to commitment, and no doubt the question of possible prejudice to the accused person would require to be more carefully considered in the case of the transfer of a trial than in the case of an enquiry preliminary to commitment. At the same time it is quite clear that either the provisions of section 350, Criminal Procedure Code, do not apply at all to cases of transfer, or they apply to trials just as much as to preliminary enquiries. This decision is based on certain recent pronouncements of the Calcutta and Madras High Courts. It is sufficient to refer to the cases of *Moresh Chandra Saha v. Emperor* (4), *Kudratulla v. Emperor* (5), and *Palaniandy Goundan v. Emperor* (6). The last of these cases was also a case of an enquiry preliminary to commitment; but in this case, as well as in the two Calcutta cases, the principle was most clearly affirmed that section 350 of the Criminal Procedure Code applied as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned, by reason of its transfer to another court, as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. It has been shown to us that the two Calcutta cases are not entirely consistent with certain prior decisions of that court, but they do

(1) [1889] A. W. N., 130

(2) [1892] I. L. R., 14 All., 846.

(3) [1914] 12 A. L. J. R., 467.

(4) [1908] I. L. R., 35 Cal., 457.

(5) [1912] I. L. R., 39 Cal., 781.

(6) [1908] I. L. R., 32 Mad., 218.

represent the latest views of that court on the question for determination before us. On the wording of the section itself it seems impossible to deny that the words used are wide enough to cover cases of transfer, as well as those cases in which the court remains the same, but the person of the presiding officer is changed. As the learned Judges of the Madras High Court have pointed out, the words "ceases to exercise jurisdiction *therein*" must be given their appropriate meaning; and certainly a Magistrate who takes cognisance of a case on the passing of an order of transfer by a competent court has jurisdiction "*therein*," that is to say in the said case, by reason of the order of transfer.

On the ground of public convenience there seems to be no good reason why the words of the section should not receive a liberal interpretation, provided such interpretation is not inconsistent with the words themselves.

It seems to us that there is no good reason why the practice of this Court should not be brought into conformity with that of the High Courts of Calcutta and Madras, and we are prepared to hold that the provisions of section 350, Criminal Procedure Code, do apply under the circumstances of the case now before us.

It has been further suggested that we ought to interfere on the ground that Ram Das was prejudiced in his defence by the form of the order of transfer passed by the District Magistrate. The learned District Magistrate would have been better advised if he had contended himself with calling attention to the fact that his order was made largely on an undertaking by Ram Das that he would not claim his right to have all the witnesses re-summoned and re-heard. He went a little further than this, and by his order of transfer purported to direct the first class Magistrate to whose court he transferred the case to proceed with the trial from the stage which it had reached in the court of the Honorary Magistrate. If the applicant Ram Das had come before the first class Magistrate and had repudiated the undertaking which he had given to the District Magistrate, and offered some explanation of his conduct in doing so, and had definitely claimed the right conferred by proviso (a) of clause (1) of section 350 of the Criminal Procedure Code, it may well be that other considerations would arise. Certainly the Magistrate who decided this case could not be bound in his judicial capacity by any direction in the order of transfer. It would have been his duty to consider the application and give such effect to it as he thought just and lawful. The fact remains however, that Ram Das did not demand that any of the witnesses should be re-summoned and re-heard. Proviso (a) to clause (1) of section 350 of the Criminal Procedure Code, has no application to the facts before us and cannot be relied on in support of the application.

Something has been said as regards the severity of the sentence. This point was not taken in the application to the Sessions Judge

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and we are not prepared to interfere on this ground, as the judgment convicting Ram Das seems to be a just and a proper one. We decline to accept the reference and order the record to be returned, the conviction and sentence to stand. If Ram Das has been released pending this reference he must surrender to his bail and undergo the unexpired portion of his sentence.

WALSH, J.—I entirely agree. Apart from authority, I think the section is clear and too strong for the argument of the applicant in this case. Criticism has been made upon the construction of the section but it seems to me a simple and compendious statement to cover all cases thus —“Whenever any Magistrate ceases to exercise jurisdiction in a case and he is succeeded by another Magistrate having such jurisdiction,” (that may occur by death, promotion, retirement or transfer by a superior authority) “the Magistrate so succeeding may act on the materials already before him.”

Lest it should be supposed that the accused is caught by a strict application of the technical provisions of the statute, I want to draw attention to one or two matters, to which my brother has not referred. The appellant asks for reduction of sentence, on the ground that it was too severe. He called a number of witnesses to allege that he was not there at all and on the other hand he brought a cross charge against a prosecution witness for assaulting him at the place in question. Under these circumstances having a reasonable apprehension that he was going to be convicted he applied for transfer. In my judgment the accused, Ram Das, got a very favourable order out of the District Magistrate and he is the one person who has no right to complain. I should want to hear considerable argument before deciding that under such circumstances in acting upon the evidence already recorded the Magistrate committed any irregularity which could not be cured by section 537 in the absence of circumstances showing a failure of justice. I entirely agree with my learned brother in the order that this reference must be rejected.

B. K. M.

Reference rejected.

TILAK RAM
versus
DALIP SINGH.*

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Criminal Procedure Code (Act V of 1898), section 195—Sanction—Refusal by appellate court to revoke it—Computation of six months' period—Starting point—Date of original sanction. January, 25

RICHARDS,
C. J.
BANKERJI, J.

Held that the period of six months during which a sanction granted under section 195 of the Code of Criminal Procedure remains in force is to be computed from the date of sanction "given" by the court who first granted it and not from the date of the order of the court refusing to revoke it.

In re Muthukudam Pillai, I. L. R., 26 Mad., 190, followed.

CRIMINAL REVISION from an order of E. R. NEAVE ESQ., Additional Sessions Judge of Meerut.

A. H. C. Hamilton, for the applicant

Nehal Chand, for the opposite-party.

The judgment of the Court was delivered by

RICHARDS, C. J.—In this case it appears that sanction was granted to a litigant in the Revenue Court to prosecute the opposite-party for alleged offences under section 471 and other sections of the Indian Penal Code. The sanction was granted on the 1st of November, 1915, by an Assistant Collector. On the 11th of May, 1916, this sanction was set aside on the technical ground that the Assistant Collector who had granted sanction had no jurisdiction to do so. The High Court held that the Additional District Judge was wrong and sent the case back, with the result that the Additional District Judge held that a *prima facie* case had been made out why the opposite-party should be prosecuted and he accordingly refused the application to revoke the sanction given by the Assistant Collector. A considerable time had elapsed in the meantime and in July, 1917, a criminal complaint was lodged. This was met with the objection that the sanction was out of date and that therefore the court could not take cognizance of the offence. This objection found favour with the court before whom the complaint was filed but the Sessions Judge held that the sanction was still in force. Whereupon the opposite-party applied in revision to this Court. A learned Judge considering the matter of some importance has referred the question to a Bench of two Judges.

Richards,
C. J.

Section 195 of the Code of Criminal Procedure provides that no court shall take cognizance of certain offences committed under certain circumstances without the previous sanction therein referred

* Cr. Rev. No. 1022 of 1917.

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to. Clause (6) is as follows:—"Any sanction given or refused under this section may be revoked or granted by any authority to which the authority giving or refusing it is subordinate and no sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may for good cause shown, extend the time." In the present case the High Court has never been asked, nor has it granted any extension of time. The question which we have to decide is whether under the circumstances of the present case it can be said that the sanction was still in force. If we hold that the sanction was "given" on the 1st of November, 1915, it is clearly long since out of date. On the other hand if we hold that the sanction was "given" after the case had gone back to the Additional District Judge and he had refused the application to revoke the sanction granted by the Assistant Collector, then the prosecution was begun within time. We think it is impossible to hold on the clear meaning of the words of clause (6) of section 195 that the sanction can possibly be said to have been "given" by the Additional District Judge. The application before him simply was an application to revoke sanction which had been previously granted and his order was to refuse to revoke that sanction. It may be said that an opposite party by taking proceedings can always use up the whole six months in applications to the court and thus make the sanction of no avail. There are two answers to this. In the first place if a party to whom sanction has been given chooses to take advantage of that sanction and lodges his complaint then he will be able to continue the prosecution notwithstanding any applications that the other side may make. It is possible that the court might stay the prosecution pending the decision of an application to revoke the sanction but the prosecution would nevertheless have been begun within time. In the second place there is an express power given to the High Court to extend the time for good cause shown. Our attention has been called to two cases of the Madras High Court. In *In re Muthukudam Pillai*(¹), a Bench of two Judges expressly held that the sanction in a case like the present is "given" by the court who first granted it and not by the court who subsequently refused to revoke the sanction. A different view was taken by a Bench of the same High Court in *Muthusami Mudali v. Veeni Chetti*(²), and in a more recent case, *the Public Prosecutor v. Raner Muthiari; Maunatter Vithil v. Ambumayar*(³). We prefer to follow the earlier ruling of two Judges. The result is that we allow the application, set aside the order of the Sessions Judge and restore that of the court of first instance.

Application allowed.

(1) [1902] I. L. R., 26 Mad., 190. (2) [1907] I. L. R., 20 Mad., 382.

(3) [1914] 20 Mad. L. J., 511.

KAILLU (*Plaintiff*)

versus

SITAL (*Defendant*)*

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January, 16.

PIGGOTT, J.
WALSH, J.

Agra Tenancy Act (II of 1901), section 20—Transfer—Occupancy tenancy acquired by a member of joint Hindu family—Profits thrown into common stock—Whether such property may be joint family property—Personal law of the parties inapplicable.

A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters

Hence, where a zamindar granted the lease of certain land to M who formed with certain other persons a joint Hindu family and it was found that M threw the profits derived from this land into the common stock of the joint family, held that the tenancy did not become part of the assets of the joint family, inasmuch as its doing so would amount to the Court sanctioning the transfer of a tenancy otherwise than under section 20 of the Tenancy Act.

SECOND APPEAL against the decree of AUSTIN KENDALL Esq, District Judge of Cawnpore, reversing the decree of Mohammed Junaid Esq, Munsiff of Fatehpur.

Suit for declaration of right to joint possession of certain occupancy holdings. The facts of the case are shortly as follows:—The plaintiff's father, Ganga, and the defendant's father, Matola, were first cousins. The holding in suit was acquired by Matola, in his own name under a lease from the zamindar in 1864. Ever since the name of Matola, and on his death the name of the defendant, had been recorded in the revenue papers as the occupancy tenant of the holding. The plaintiff's name was recorded as a sub-tenant in respect of half of the holding on a rent which was precisely half of that payable to the zamindar. The defendant sued the plaintiff in the Revenue Court for ejectment as a sub tenant. On the plaintiff's pleading that he was not a sub-tenant but was an occupancy tenant in his own right the Revenue Court referred the plaintiff to the Civil Court under section 199 of the Tenancy Act. The plaintiff thereupon brought the present suit for a declaration that he was joint with the defendant in cultivation of one-half of the land in dispute. His case was that the occupancy holding was the joint ancestral property of the parties. Formerly the family was in joint possession but some year back there had been a partition of it and the holding had

* S. A. No. 417 of 1916.

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been equally divided between the parties, and they were in possession of their half shares separately. The defendant denied the plaintiff's allegation as to jointness, and urged that the occupancy holding was a self-acquisition of his father, Matola, and had on the latter's death descended to his sons, and the plaintiff was in possession of half of the holding as a sub-tenant. The court of first instance found the facts in favour of the plaintiff and decreed the suit. On appeal the District Judge (Mr. Kendall) held that as the occupancy holding had been acquired in the name of Matola alone it was immaterial to consider whether Matola was a member of a joint Hindu family along with the plaintiff and his father. He further held that by allowing the plaintiff to cultivate half of the holding on payment of half of the head-rent the defendant had never intended to give up his occupancy rights, nor had the plaintiff been recognized as an occupancy tenant by the zamindar. The suit was accordingly dismissed.

The plaintiff appealed to the High Court, the appeal came on for hearing before WALSH, J., who remitted the following issues to the lower appellate court.

1. Whether Matola, at the time when he acquired the occupancy tenancy in question, was or was not a member of a joint Hindu family?

2. If the answer to No. 1 is in the affirmative, whether the occupancy tenancy in question, so acquired by him, was self-acquired and if so, how?

3. Whether in any partition the tenancy in question was allotted wholly to the defendant as part of his share?

4. Whether the plaintiff is holding the half portion in question as a sub-tenant of the defendant, and if so under what contract express or implied, or under what circumstances did he become the sub-tenant or whether the plaintiff is holding as tenant-in-chief in his own right.

The findings returned on these issues by the District Judge (Mr. Ashworth) were as follows.

1. Yes.

2. Yes, as the letting was to him as an individual and not as representing the family.

3. No.

4. The plaintiff must be deemed to be holding as a sub-tenant of the defendant by reason of the following facts, namely, that the tenancy arose by reason of a transfer by the zamindar in favour of Matola alone and that the plaintiff's right of occupation is derived from Matola's son and not from the zamindar.

In his reasons for the findings on issues 1 and 3 the learned District Judge observed that "the holding was originally considered a joint one and has subsequently been partitioned" and he

went on to say that "it appears to me that Matola—although he took the tenancy (so far as zamindar was concerned) as an individual—regarded the property held by him as a part of the property of the joint family. It was for this reason that it was partitioned and half of it was given to the plaintiff, certainly if there was ever any partition the land in question was allotted to the plaintiff and not to the defendant." On issue 2, the learned Judge said that "the sole question is, was the contract of transfer between the zamindar and Matola a contract by the zamindar in favour of Matola as an individual on his own behalf or with Matola as a member and representative of the joint Hindu family? There is no evidence on this point except the fact that Matola has always been entered in the papers as a tenant in his own right and not as the representative of the joint Hindu family. Matola also alone is entered as tenant in the Patta (*i. e.*, acknowledgment of rent and area) given by the zamindar in 1864. Any way in the absence of evidence to show that he took the property in a representative capacity the plaintiff on whom the burden falls of proving the fact must fail. It may also be mentioned that a zamindar would be very unlikely to deal with a person acting on behalf of an instable and fluctuating a body like a joint Hindu family."

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The plaintiff preferred objections to the findings.

On the hearing after remand WALSH, J., referred the case to a Bench of two Judges.

Peary Lal Banerji, for the appellant, submitted that on the findings that Matola was a member of a joint Hindu family, and the profits arising from the holding had been thrown into the joint stock, the holding was the property of the joint Hindu family and the plaintiff should be held to be in possession in his own right and not as a sub-tenant of the defendant. The mere fact that the name of Matola alone appeared on the revenue papers did not show that the holding belonged to him exclusively. Having regard to the state of the family and the dealings with the holding, it was clear that it never belonged to Matola alone and in any case he himself had treated the holding as a part of the joint family property. The burden of proving self-acquisition lay upon the defendant, and in the absence of any evidence on the point, the plaintiff ought to succeed. The findings of the lower appellate court were inconsistent, and so far as they were against the appellant, they were arrived at by the Judge misdirecting himself and cannot be binding in this case.

An occupancy holding is property and like any other property (*e g.*, a mortgage) can be acquired by an individual member on behalf of the joint family. There is nothing in the tenancy law to modify the well established rules of Hindu Law relating to joint families. He cited and discussed the case of

Mahabir Singh v. Bhagwant, [1916] 14 A. L. J. R., 278.

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Kailas Nath Katju, for the respondent, submitted that there was evidence on the record to support the finding that the holding had been acquired by Matola for his own benefit. The Patta stood in his name, and his name and after his death his son's name had been continuously recorded in the revenue papers. They had been throughout paying rent direct to the zamindar, and the plaintiff's name had never appeared as a co-sharer in the tenancy. If the holding was a self-acquisition of Matola he was under the law incompetent to transfer it to any body whether members of his joint family or not. Such transfer was prohibited by law. Throwing by an individual member of his self-acquisition into the joint stock was but a mode of transfer and would be as illegal as any other. The plaintiff was never recognized as a tenant-in-chief by the zamindar who had always regarded the defendant as the sole tenant. The plaintiff having acquired his interest in the holding, through the defendant, must, having regard to the definition of the word "sub-tenant" in the Tenancy Act be deemed to be a sub-tenant. A person did not cease to be a sub-tenant though he paid a rent which did not exceed or even was less than the head-rent. The lower appellate court had found that the plaintiff was in possession of half of the holding under a private arrangement made at the time of partition of the joint family property between the parties whereby the plaintiff had been allowed to have half of the holding on payment of half of the rent to the plaintiff. There was no privity of contract between the zamindar and the plaintiff, and the defendant having acquired the holding from the defendant was in law, his sub-tenant. He referred to sections 20, 21 and 22 of the Agra Tenancy Act, 1901.

Peary Lal Banerji, in reply, referred to

Babu Hiradas v. Pandit Sheo Dat Tewari, Select Decisions of the Board of Revenue, No. 19 of 1912;

Parmanand Singh v. Mahant Ramanand Gur, [1913] I L. R., 35 All., 474

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—In this case the plaintiff Kallu and the defendant Sital are related in this way, that their paternal grandfathers were own brothers. Sital is the recorded tenant of a certain occupancy holding. Kallu is actually cultivating certain plots of land, making up one-half of the area of the holding, and is paying for the use and occupation of these plots approximately one-half of the rent recorded as payable by Sital to the zamindar. Sital took proceedings in a Revenue Court to eject Kallu on the allegation that the latter was holding as his sub-tenant. Kallu replied that he was a joint tenant with Sital of the entire holding, that they had apportioned the fields between them merely for convenience of enjoyment and that the half share of the rent payable by him was paid to the zamindar and not to Sital. On this the Revenue Court directed Kallu to establish

his title as co-tenant of the holding by a suit in the Civil Court. This order purports to have been passed under section 199 of the Tenancy Act (No. II of 1901). The propriety of the order is not in question before us, and I merely mention this in order that I may not be regarded as committed to the view that this section was really applicable to the facts above set forth. Kallu's suit for a declaration of his title as joint tenant of the holding to the extent of an undivided half share was decreed by the court of first instance and dismissed by the District Judge in first appeal. On a second appeal filed in this Court by Kallu certain issues of fact were remitted for trial to the lower appellate court and findings have been received. The third issue as drafted would seem only to arise in the event of the findings on the first and second issues being other than they were, and therefore need not be considered. On the first two issues remitted the findings are that this occupancy holding was acquired by Matola, father of Sital; that Matola was at that time a member of a joint undivided Hindu family along with the descendant or descendants of his paternal uncle Dariyao. The letting was to Matola alone and not to Matola as representing the joint family. On the fourth issue a finding was returned that the tenancy enjoyed by Kallu was the result of a contract between himself and Sital, to which the zamindar was no party, and that it amounted in law to a sub-letting by Sital in favour of Kallu of the particular plots occupied by the latter. In a petition of objections presented to this Court under Order 41, rule 26, the plaintiff-appellant has challenged the finding on the second issue, but curiously enough has not challenged the finding upon the fourth issue. In argument before us it has been contended that the reasoning upon which the learned District Judge has arrived at his finding on the second issue remitted to him is defective, that it proceeds upon an error of law and that it has been arrived at by mislaying the burden of proof. With regard to the abstract question of law sought to be raised on this appeal, I can only say that I could wish it had arisen in a case in which its consideration was not complicated by other circumstances. However, the position, as I understand it, taken up by the learned District Judge, seems to me substantially correct. It was proved that the letting of the land in question by the zamindar to Matola had taken place many years ago. There was a lease granted as long ago as the year 1864, which is one of the exhibits in the case. Matola, according to the District Judge, was at that time living as a member of a joint Hindu family along with his uncle Dariyao, or his first cousin, Ganga, or both. He took this land on lease from the zamindar and he threw the profits derived from the land into the common stock of the joint family of which he was a member. The District Judge says that no such action on the part of Matola could have the effect in law of changing the tenancy from a tenancy in favour of Matola to a tenancy in favour of the entire joint family of which Matola was a member. The interest of a non-occupancy

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tenant or of an occupancy tenant is not transferable except under the restrictions laid down by section 20 of the Tenancy Act (No. II of 1901). If it were held that the conduct ascribed by the District Judge to Matola in the present case amounted to throwing his rights as occupancy tenant into the common stock of the joint family, and thereby under the Hindu Law making those rights part of the joint assets of that family, it seems to me that the court would in effect be sanctioning a transfer of the holding by Matola to a body of persons, namely the members of the joint family to which Matola at that time belonged. A special statute like the Local Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters. The scheme of inheritance laid down by section 22 of that Act is other than that prescribed by the ordinary rules of Hindu Law and no one denies that, within the scope of its operation, section 22 aforesaid overrides and prevails against the ordinary Hindu Law of inheritance. It seems to me that by a parity of reasoning it follows that, when the zamindar concerned accepted Matola as his tenant, he could not be compelled by reason of any action taken by Matola to accept the entire joint family as his tenant. Our attention has been drawn in argument to one or two reported decisions of this Court. One of these clearly recognises the fact that a Hindu joint family as such may in its corporate capacity be the tenant of a holding. This proposition I have no desire to dispute. A tenancy of this sort might easily come into existence in favour of the sons of the tenant who originally acquired occupancy rights. And I see nothing in the Tenancy Act to conflict with the view that, if those sons lived together as members of a joint Hindu family, the family as such could be regarded as in possession of the tenancy. In the present case, apart from the abstract question of law involved, we have to meet this difficulty. The findings returned by the learned District Judge are clear and explicit and the objections taken to them are objections against the train of reasoning by which the District Judge has arrived at those findings. That is what I mean by saying that the question of law involved arises in this case in a complicated form. For the purpose of deciding this case it seems to me sufficient to say that the finding of the learned District Judge on the second of the two issues remitted to him is not inconsistent with his finding on any of the other issues, and is not shown to be vitiated by any error of law. There remains also the finding of the District Judge on the fourth issue. I understand the finding to be in substance this. The joint family has now admittedly been broken up, and apparently this separation took place between Kallu and Sital. At that time Sital recognised that Kallu had a claim upon him in respect of the profits enjoyed by him from this holding, by reason of the fact that Matola had always thrown those profits into the common stock of the joint family. He therefore entered into an arrangement by which he gave Kallu the right to cultivate certain specific plots, making up

one-half of the area of the holding, and undertook not to demand from Kallu more rent than he would himself have to pay to the zamindar on account of this one-half of the entire holding. The rent to the zamindar continued to be paid by Sital and receipts were made out in his name. In the absence of any plea in the appellant's petition before us, presented under Order 41, rule 26, against the finding on the fourth issue, I am not sure that the appellant is entitled to ask us to hold that that finding proceeds upon an error of law. Assuming that point, however, in his favour, it seems to me that the reasoning of the District Judge is correct. For the sake of argument, take the case of an ordinary creditor of an occupancy tenant. That creditor is pressing for payment and is willing to take in satisfaction of his claim such profits as he may be able to make out of one-half of the occupancy holding. The tenant is forbidden by law to transfer his interests as such tenant; but he can sub-let, or he can make an assignment of the profits from year to year. Suppose that he gives his creditor the right to occupy and cultivate for his own benefit certain specific plots, forming part of his holding, and agrees only to take in the way of rent the same sum which he will himself have to pay to the landlord on account of those plots. The transaction amounts virtually to a sub-letting in favour of the creditor. The creditor thereby acquires no rights as against the zamindar, and his rights as against the occupancy tenant are limited by the terms of the contract between them. I think therefore that the findings of the District Judge on the fourth issue remitted to him is correct in law and is decisive of the appeal now before us. I would therefore dismiss the appeal with costs.

WALSH, J.—I agree.

BY THE COURT.—The order of the court is that the appeal is dismissed with costs.

K. N. K.

Appeal dismissed.

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KIRPA DEVI (*Plaintiff*)

versus

RAM CHANDAR SARUP (*Defendant*): *

Agra Tenancy Act (II of 1901), sections. 175, 177, 193, scope of—Order staying or refusing to stay a suit pending in Revenue Court—Whether appeal lies to Civil Court from such order.

Section 175 of the Agra Tenancy Act applies to all appeals, whether these be appeals to the Revenue Court itself or to the Civil Court. Section 177 deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree," and then only in certain class of cases. No appeal is given against an "order."

* F. A. F. O. No. 42 of 1917.

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Consequently an order staying a suit in the Revenue or an order refusing to stay such suit is not a "decree" within the meaning of section 177 of the Tenancy Act, and no appeal lies to the High Court against such an order. Section 198 of the Act by incorporating the Civil Procedure Code gives an appeal to the Revenue Court and not to the Civil Court.

FIRST APPEAL from an order of BADU JAI NARAIN, Assistant Collector, first class of Meerut.

The facts and arguments appear sufficiently from the judgment.

Surendra Nath Sen, for the appellant.

Nihal Chand, for the respondent.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This and the connected appeal No. 18 of 1917 arise out of two suits which were instituted in the Revenue Court by the same plaintiff against the same defendant. The suits were suits for profits. The amounts in dispute were such that if decrees had been made appeals would have lain to the Civil Court. During the pendency of the suits it is alleged that the matters in dispute were referred to arbitration. One of the suits was pending in the Revenue Court at Meerut and the other suit was pending in the Revenue Court at Bulandshahr. An application was made by the defendant at Meerut to stay the suit pending the arbitration under Schedule 2, paragraph 18 of the Code of Civil Procedure. The Meerut court granted a stay. An exactly similar application was made to the Bulandshahr Revenue Court. That court took an exactly opposite view to that taken by the Meerut court and refused to stay the suit. This was a most unfortunate situation for all concerned and will work great hardship and lead to prolong a useless litigation. The plaintiff appealed against the decision of the Meerut court whilst the defendant appealed against the decision of the Bulandshahr court. The defendant raises a preliminary objection against the plaintiff's appeal that no appeal lies. In the connected appeal an exactly similar preliminary objection is taken by the plaintiff. We think that the preliminary objection has force. Section 175 of the Tenancy Act expressly provides that no appeal shall lie from any decree or order passed by any court under this Act except as hereinafter provided. This section obviously applies to all appeals, whether they be appeals to the Revenue Court itself or to the Civil Court. Section 177 deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree" and then only in certain class of cases. No appeal is given against an order. It seems to us clear that neither the order staying the suit in the Revenue Court at Meerut nor the order refusing to stay the suit in Bulandshahr is a "decree" within the meaning of section

177. It is contended on behalf of the appellant that section 193 of the Tenancy Act incorporates the Code of Civil Procedure and in the present Code of Civil Procedure it is provided that an appeal shall lie against an order staying or refusing to stay proceedings (Schedule 2, paragraph 18). We do not think that this argument has force. At most it would mean that by incorporating the Code of Civil Procedure an appeal is given in the Revenue Court. It certainly cannot mean that an appeal is given to the Civil Court. We have been invited to say whether or not an appeal lies in the Revenue Court. We do not think that this Court ought to take upon itself to decide this matter which is not before it, if we did decide the matter the Revenue Court would not be bound by our decision. The result is that we allow the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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MUHAMMAD NIAZ KHAN AND OTHERS (*Plaintiffs*)

versus

MUHAMMAD IDREES KHAN AND ANOTHER (*Defendants*)*

Mohammedan Law—Pre-emption—Talabs—Custom arising on sale—Transaction in the form of a lease—Issues to be decided.

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TUDBALL, J.

Where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to the Mohammedan Law.

Where therefore a small piece of land was transferred, the transfer being in the form of a perpetual lease the premium being Rs. 250 and the annual rent being two annas, and pre-emption was claimed in respect of the land, under the Mohammedan Law, on the ground that the transaction was really a sale in the garb of a lease made to defeat pre-emption:—*Held* that on the issue as to the nature of the transaction being raised by the plaintiff, the court was bound to determine its real nature, and if after considering all the circumstances, namely, sum which was paid down, the smallness of the rent, and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were performed or not.

SECOND APPEAL, from a decree of Babu RAM PRASAD, District Judge of Ghazipur, reversing a decree of Muhammad Muzaffer Imam, Munsif.

* S. A. No. 1280 of 1915.

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Suit for pre-emption under the Mohammedan Law.* A plot of land in the town of Zamania in the district of Ghazipur was transferred by a deed dated 21st July, 1913, purporting to be a perpetual lease, under the terms of which Rs. 250 was paid as a premium and annas two was reserved as rent per year. The plaintiffs sued for pre-emption, alleging that the transaction was in fact a sale. The court of first instance decided in favour of the plaintiff's contentions. The lower appellate court was of opinion that even if it were taken for granted that the real object was to sell the land and that the lease was executed to avoid a pre-emption suit, the point for determination was whether or not the execution of a lease could be held to be a legal device (*heelah sharai*) under the Mohammedan Law to defeat the right of pre-emption. The court held that under the Mohammedan Law such a device could defeat the right of pre-emption, and dismissed the suit without deciding any other point.

The plaintiffs appealed.

M. Ishaq Khan, for the appellants.—The court below is wrong in holding that such a device is allowed under the Mohammedan Law for the purpose of defeating a right of pre-emption. In the following cases pre-emption was allowed notwithstanding the adoption of such or similar devices; for example, where no sale deed was executed, or where the deed was ostensible a mortgage or a perpetual lease reserving a nominal rent.

Janki v. Girjadat, [1885] I. L. R., 7 All., 482. F. B.;

Begam v. Muhammad Yakub, [1894] I. L. R., 16 All., 344. F. B.;

Tara Chand v. Baldeo, [1890] 117 P. R., 1890. F. B.;

Purma Nand v. Airapat Ram, [1899] 20 P. R., 1899.;

Muhammad Umar v. Kirpal, [1904] 78 P. R., 1904.;

Anwar Hasan v. Umatul Karim, [1906] 145 P. R., 1906.;

Amar Singh v. Sadhu Singh, 23 I. C., 970, (Punj).;

Lalji Misr v. Jaggu Tiwari, [1910] I. L. R., 33 All., 104.

S. M. Sulaiman, (with him *Iqbal Ahmad*), for the respondents.—The lower appellate court has in effect found that the transaction was not a sale but really a perpetual lease. Upon that finding the claim for pre-emption must fail. It has been held that under the Mohammedan Law no right of pre-emption arises in respect of perpetual leases, however small the rent reserved may be.

Mooolool Ram v. Baboo Huree Ram, [1867] 8 W. R., 106.;

Baboo Ram Golam v. Nursing Sahoy, [1875] 25 W. R., 43.;

Devanuttallah v. Kazem Molla, [1887] I. L. R., 15 Cal., 184.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit brought for pre-emption under the Mohammedan Law. The property transferred is a small piece of land in the town of Zamania. The transfer was made in the form of a perpetual lease. The amount paid down was

the sum of Rs. 250 and a nominal rent of two annas per annum was reserved. The court of first instance decreed the suit holding that there was a sale, and that the plaintiff had a right. The lower appellate court held that pre-emption under the Mohammedan Law did not apply to the case of leases. Accordingly without deciding the other issues the lower appellate court reversed the decree of the court of first instance and dismissed the suit. We think, reading the judgment of the lower appellate court, that the learned District Judge never intended to overrule the finding of the court of first instance that the transaction though carried out in the form of a lease was in reality a sale. We think that he intended to decide that a Mohammedan could make the transfer *in the form of a lease* notwithstanding that the real intention of the parties was a sale and so to defeat pre-emption, in other words that such devices are not unknown in the Mohammedan Law and are legitimate. In our opinion the court was entitled and bound on the issue being raised to consider at the instance of the plaintiff claiming pre-emption what was the real nature of the transaction. It was entitled to consider the sum which was paid down, the smallness of the rent, and the value of the property; and if after considering all these matters it came to the conclusion that the transaction was in truth and fact a sale, it should hold that the right of pre-emption arose, and proceed to consider whether the plaintiff by due observance of the requirements of the Mohammedan Law was entitled to get the property. If the court come to the conclusion that in truth and substance and not merely in form the transaction was a lease then the suit should be dismissed on the ground that the Mohammedan Law does not apply to transfers by way of leases. It has been more than once decided in this Court that where a custom of pre-emption prevails upon sale the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same thing has been held in the Punjab where apparently the right of pre-emption is regulated by Act. We can see no good reason why the same principle should not apply to cases where the right is one under the Mohammedan Law. It is clear that the case must go back to the lower appellate court. We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same according to law, regard being had to what we have stated. Costs here and heretofore will be costs in the cause.

B K M.

Appeal decreed. Cause remanded.

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WALSH, J.GIRDHAR DAS AND OTHERS (*Defendants*)*versus*

SIDHESHWARI PRASAD

NARAIN SINGH AND OTHERS (*Plaintiffs*) *

Code of Civil Procedure (Act V of 1908), Order XXI, rule 93—Execution of decree—Sale in execution—Property sold by auction a second time after a previous sale—Suit by purchaser for refund of purchase money—Maintainability of suit.

Where on the date of an auction sale held under the Code of Civil Procedure of 1882 the judgment-debtor had no saleable interest in the property by reason of the fact that the property had been previously sold by auction the purchasers at the second sale acquired no interest by their purchase and became entitled to maintain a suit for the refund of the money paid by them into court.

FIRST APPEAL, from a decree of Babu UDIT NARAIN SINGH, Subordinate Judge of Benares.

Jawahirlal Nehru and Harnandan Prasad, for the appellants.

Brij Nath Vyas and Kanhya Lal, for the respondents. •

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT J.—The essential point raised by this first appeal is quite a simple one. Certain house property situated within the city of Benares belonged to one Rajendradhari Singh, who seems to have been heavily in debt. There were two auction sales of the house property in question: One on the 15th of February, 1906, resulting in a purchase by Ram Prasad Singh, and another on the 18th of March 1907, resulting in a purchase by the present plaintiffs respondents. The latter paid their purchase money into court and that money passed under the orders of the court into the hands of a large number of creditors of Rajendradhari Singh, who had applied for rateable distribution in respect of any money which might be realised by the auction sale. Subsequently Ram Prasad Singh brought a suit, in which he impleaded the judgment-creditor on whose application the attachment resulting in the sale of March the 18th, 1907, had been made, and also the present plaintiffs, the auction purchasers at the said sale. The result of that suit was a decision, between these parties, that the same property had been sold twice over, first to Ram Prasad Singh in February 1906, and then to the plaintiffs in March 1907. It followed as a necessary consequence that on the date of the latter sale the judgment-debtor Rajendradhari Singh had no saleable interest in the property purchased by the plaintiffs. The latter had therefore obtained nothing by their purchase and became entitled to maintain a suit against all the judgment-creditors of Rajendradhari Singh to whom payments were made out of the money which the plaintiffs had paid into court. The law on this point is clearly settled,

* F. A. No. 86 of 1913.

as may be seen by referring to the cases of *Kishen Lal v. Muhammad Safdar Ali Khan*(¹) and *Mahammad Najibullah v. Jai Narain*(²). The court below has accordingly decreed the plaintiff's claim against a large number of defendants, in accordance with the sums found to be respectively due from each defendant, or group of defendants. The appeal now before us is by five of the defendants only. The question as to the maintainability of the suit must be decided against the appellants in accordance with the rulings above referred to. The question whether the present suit was or was not within limitation has already been up to this Court in appeal and has been decided in the plaintiff's favour. The report may be found in I. L. R., 35 All., 419.

There are pleas taken in the memorandum of appeal before us which are apparently intended to suggest that the decision in the suit brought by Ram Prasad Singh has in some way been used against the present defendants improperly in this litigation. The plaintiffs were obviously entitled to prove that they had lost the benefit of their auction purchase by reason of the fact that Ram Prasad Singh had succeeded in proving that he had himself purchased identically the same property at the auction sale of February 1906. This fact could most readily be proved by the record of the suit in which Ram Prasad Singh was the plaintiff and the present plaintiffs, along with the attaching creditor of Rajendradhari Singh, were the defendants. Beyond this I do not think that the court below has made any use of the record of this previous litigation. The contesting defendants, other than original attaching creditor, were allowed to raise every question of fact which could have been raised by them if they had been defendants in the suit brought by Ram Prasad Singh. They could not as a matter of fact have been made defendants in that suit, because it had been instituted before the order for rateable distribution of the sale proceeds of the sale of March 1907, had been passed. This, however, I only mention incidentally. The questions of fact requiring determination at this trial were the identity or otherwise of the property purchased at the two sales of February, 1906, and March, 1907, and secondly the validity or otherwise of the plea taken by these defendants that Ram Prasad Singh was merely a *benami* purchaser for the benefit of the judgment-debtor, Rajendradhari Singh. The identity of the properties sold at the two auction sales has been established by abundant evidence and the point scarcely admits of argument. The truth of the matter is that Rajendradhari Singh had purchased a number of contiguous houses in the city of Benares and had then built himself a residence, with suitable out-houses and other appurtenances, situated within one single enclosure covering the sites of the various houses purchased by him. At both the auction sales everything within

(1) [1891] I. L. R., 13 All., 383.

(2) [1914] I. L. R., 36 All., 529.

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the enclosure, the boundaries of which were clearly specified in the sale proclamation, was put up for sale and was purchased by Ram Prasad Singh in February 1906, and by the present plaintiffs in March 1907. There is no force in the contention that different house-numbers were mentioned in the sale proclamations of the two years. The identity of the property sold is sufficiently established by the sale proclamations and by the evidence of the court official who conducted the sales. Ram Prasad Singh was at any rate the ostensible purchaser at the sale of February 1906. The evidence by which the defendants in this suit have sought to show that he was a *benami-dar* for Rajendradhari Singh is of very little substance. Certain evidence has been produced tending to show that Rajendradhari Singh was in funds in the month of February 1906, so that he could have made this purchase if he wanted to do so. The case for the defendants can scarcely be said to go beyond this. It is true that Ram Prasad Singh does not appear to have taken as yet effective possession of the whole of the property sold to him; but the evidence on the record supplies abundant explanation of this fact. When the time for delivery of possession came, Rajendradhari Singh was lying seriously ill inside the house, and it would seem that he died there shortly afterwards. The evidence for the defendants does not carry us beyond the fact that Ram Prasad Singh has not hitherto taken steps to evict Rajendradhari Singh's widow from the premises. This may be due to sympathetic consideration on his part, or it may be that he does not desire to contest the possible question of the widow's right of residence. Moreover, it must be remembered that Ram Prasad Singh's position has been complicated by the subsequent auction sale of 1907 and by the litigation in which he has been involved in order to enforce his title. The decision of the High Court in his favour was not pronounced until the month of November 1909. On the whole there seems no valid basis for a finding that the purchase effected by Ram Prasad Singh at the auction sale of February 1906, was *benami* on behalf of the judgment-debtor, or was anything but a *bona fide* purchase for his own benefit. The defendants have further raised another very curious plea, suggesting that the auction purchase by the plaintiffs themselves in the month of March 1907, was also *benami*, on behalf and for the benefit of Rajendradhari Singh or his heirs. In fact this seems to have been treated as the main issue in the case. We have been taken through the evidence on the point, and it is really unnecessary for us to say more than that we find no reason for dissenting from the opinion formed by the trial court regarding that evidence. We can find no real reason for doubting, that the purchase money paid in connection with the auction sale of March 1907, was found by the plaintiffs themselves and that the purchase was effected on behalf of the plaintiffs, for their benefit, by their agent, Sheodhar Prasad.

The only remaining plea in the memorandum of appeal before us is that Ram Prasad Singh's decree invalidating the sale of March

1907, and affirming the validity of his own purchase at the sale of February 1906, was obtained by some sort of fraudulent collusion between himself and the then defendants. There is no basis for that contention, beyond the fact that the present plaintiffs did not choose to appeal against Ram Prasad Singh's decree; but the matter was fully fought out by the principal defendant, the attaching judgment-creditor, and the essential issues of fact were found in favour of Ram Prasad Singh after contest, as they have again been found in his favour after contest in the present litigation. There is therefore no force in this appeal. We dismiss it with costs.

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Piggott, J.

Appeal dismissed.

[See, however, *Nammul v. Bhagvan Das*, I. L. R., 39 All., 114, which does not seem to have been cited—Ed.]

HAR PRASAD (*Petitioner*)

versus

TAJAMMUL HUSAIN AND OTHERS (*Opposite parties*)*

Agra Tenancy Act (II of 1901), sections 177, 198—Suit in ejectment in Revenue Court—Defendant denying tenancy from plaintiff—Allegation of lease from other persons—Question proprietary title in issue in court of first instance—Appeal—Jurisdiction of Civil Court.

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BANERJI, J.
TUDBALL, J.

Where in a suit for ejectment instituted in the Revenue Court the defendants pleaded that they were not the plaintiff's tenants but that they were leasees from other persons and the plaintiff had no right to sue them, held that this was a question of proprietary title which was in issue in the court of first instance and was in issue in the appeal, hence an appeal lay to the Civil Court.

CIVIL MISCELLANEOUS REFERENCE from W. H. WEBB Esq., Commissioner, Rohilkhand Division.

Surendra Nath Sen, for the petitioner.

Raza Ali, for the opposite parties.

The judgment of the Court was delivered by

BANERJI, J.—This is a reference under section 195 of the Agra Tenancy Act. The point for consideration is whether an appeal in the case lay to the District Judge or to the Commissioner. The suit was one for ejectment on the allegation that the defendants were

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the plaintiff's tenants without rights of occupancy. The defendants denied the title of the plaintiff and asserted that the relation of landlord and tenant did not subsist between the plaintiff and themselves. The court of first instance dismissed the suit holding that the plaintiff was not entitled to maintain it in view of certain orders passed by the Revenue Court. An appeal was preferred to the District Judge, but he was of opinion that the appeal lay to the Commissioner. The petition of appeal was returned and was presented in the court of the Commissioner. The learned Commissioner has referred the case to this Court for determination of the question whether the appeal lay to the Judge or to the Commissioner. We are clearly of opinion that the appeal lay to the District Judge. Section 177 of the Tenancy Act provides that an appeal shall lie to the District Judge from the decree of an Assistant Collector of the first class in all suits in which a question of proprietary title has been in issue in the court of first instance, and is a matter in issue in the appeal. There can be no doubt that in this case a question of proprietary title was in issue in the court of first instance and was also a matter in issue in the appeal. The act itself indicates what is meant by a question of proprietary title. Section 198 occurs under the heading of questions of proprietary title in Revenue Courts and deals with a case in which the defendant pleads that the relation of land-holder and tenant does not exist between the plaintiff and himself on the ground that he actually and in good faith pays the rent of his holding to some third person. In the present case the plea of the defendants was that the relation of landlord and tenant did not exist between the plaintiff and them. They alleged that they were lessees from other persons and that the plaintiff had no right to sue them. This was clearly a question of proprietary title and as it was in issue in the court of first instance and was also a matter in issue in the appeal, the appeal lay to the District Judge under the provisions of section 177. We express no opinion on the merits of the case but we think that the appeal ought to have been entertained by the District Judge and the memorandum of appeal ought not to have been returned. We accordingly direct that the District Judge do receive the memorandum of appeal which was originally presented to him by the appellant and dispose of the appeal according to law. The costs of this reference will abide the result.

Order reversed.

PRIVY COUNCIL.

BHAGWANDASP ARASRAM (*Plaintiff*)*versus*BURJORJI RUTLONJI BOMANJI (*Defendant*)

Contract Act (I of 1872), section 30—Wagering contract—Common intention to wager essential—Speculation not equivalent to wagering—Bombay Act III of 1865, sections 1, 2—Pukka-Adatias—Their position.

Speculation does not necessarily involve a contract by way of wager. To constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for.

APPEAL from a decree of the Bombay High Court, dated March 28, 1913, reversing a decree of BEAMAN, J.

The facts appear from their Lordships' judgment and from the reports in I. L. R., 37 Bom., 347 and 38 Bom., 204.

Sir W. Garth, for the appellant.—The appellate court have erred in holding that the contracts sued on are wagering contracts. This Board have held that the law as to wagers formerly in force in India has been superseded by section 30 of the Indian Contract Act, which in Bombay is supplemented by Bombay Act III of 1865, sections 1, 2. The appellant firm were *pukka-adatias*. A *pukka-adatia* can accept the contract himself, or he can pass it on, in either case he guarantees the price and gets a commission. What the *pukka-adatia* does with the contract does not concern the principal at all. As to the custom of *pukki-adat*, I would refer to

Bhagvandas Narotamdas v. Kanji Deoji, [1905] I. L. R., 30 Bom., 205, 210, 215,

the authority of which has been accepted by both the lower courts.

The appellate court, though not suggesting that we ourselves could win or lose by the rise or fall of the market, have held that we were gambling ourselves with reference to the sub-contracts into which we entered. The only points they rely on are (1) a conversation with our *Gomasta* who is reported to have said that 300 tons of linseed were bought by us "for court purposes." Our representative was not even cross-examined as to this. (2)

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LORD
BUCK-
MASTER,
SIR JOHN
EDGE,
SIR WALTER
PHILLIMORE,
BART.
SIR
LAWRENCE
JENKINS.

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—

BHAQWAN-
DAS
PARASRAM
v.

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RUTLONJI
BOMANJI.

the fact that in all the sub-contracts delivery to a particular Marwari firm was barred. This, the High Court say, was because that firm might require delivery, but of this there is no proof. These points were not raised in the pleadings. •The *onus* of proof on these two matters is on defendant-respondent, and he has altogether failed to discharge it.

[LORD BUCKMASTER.—The central point in the case is, was there or was there not a stipulation, a term in the contract, express or implied, by which you were never to ask for delivery ?]

Appellants here were mere Commission Agents, entitled to remuneration and reimbursement of expenses, but they took no risks. It is the essence of a wager that each side should stand to win or lose according to the result of the event as to which a risk is taken :—

Sassoon v. Tokersy Jadhawjee, [1904] I. L. R. 28 Bom., 616, (24, 625.

• Their Lordships' judgment was delivered by

Sir
Lawrence
Jenkins.

SIR LAWRENCE JENKINS.—This appeal arises out of a suit for the recovery of money. Many defences have been pleaded, but only one need now be noticed ; it is that the transactions on which the claim rests were agreements by way of wager. At the trial several issues were framed, and the third was in these terms :—

“ Whether the transactions mentioned in the plaint are not wagering transactions and whether the plaintiff's were not aware of the defendant's intention to deal in differences only ?”

The Trial Judge, sitting on the original side of the High Court at Bombay, found all the issues in the plaintiffs' favour, and passed a decree for the amount claimed.

On appeal the appellate bench of the High Court agreed with the findings of the Trial Judge on all the issues but the third. On that it held in favour of the defendant, and dismissed the suit.

It is from that decree that this appeal has been preferred by the plaintiffs, and the only question is whether the plea that the transactions were by way of wager has been established.

At the date of these transactions the plaintiffs were a firm carrying on a large mercantile business at Bombay, and, as a branch of it, they were in the habit of acting as *Pakka-Adatias*. The defendant, on the other hand, was a young man without any regular business, who, with the aid of winnings in a lottery, engaged in speculative transactions on the Bombay market.

In June and July 1910, he instructed the plaintiffs to sell for him three several lots of linseed amounting in all to 4,000 tons for September delivery.

On the strength of this order the plaintiffs sold linseed to this amount by separate contracts to thirty-nine buyers. Though the transactions took the form of sales by the defendant to the plaintiffs, followed by re-sales by the plaintiffs to thirty-nine buyers, the plaintiffs acted throughout as *Pakka-Adatias*, and, to secure them against loss, sums amounting in the aggregate to 61,000 rupees, were deposited with them by the defendant as margin money.

The market went against the defendant, and at the end of August the plaintiffs asked him either to give delivery of the linseed, or to authorise them to purchase linseed on his behalf. The defendant, however, did neither the one nor the other, and so the plaintiffs, acting within their rights, discharged their obligation to the thirty-nine buyers by delivering 300 tons, and by making cross contracts, and paying differences as to the balance of the linseed. The result was, that after giving the defendant credit for the 61,000 rupees deposited as margin money, and a sum of Rs. 5,804-2-3 due to him on another account, there was due to the plaintiffs Rs. 90,763-14-6, unless the plea of wagering is an answer to their claim. To determine whether this plea is applicable, it is necessary to consider the real nature of the relations between the parties to the transactions. The case has proceeded in both the courts on the footing that the plaintiffs were employed by the defendant, and acted as *Pakka-Adatias*, and the description in *Bhagwandas v. Canji* (1), of the customary incidents of such an employment was applicable to the circumstances of this case, though it is to be noted that the defendant was not an up-country constituent.

The plaintiffs, therefore, acted in conformity with the terms of their employment when they made the contracts with the thirty-nine buyers.

And as they made these contracts in exercise of the authority conferred upon them and became liable for their performance, they also became entitled to be indemnified by their employer, the defendant, against the consequences of the acts done by them unless those acts were unlawful. There is no suggestion that the acts of a *Pakka-Adatia* as such are unlawful; on the contrary, *Pakki-Adat* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market.

No doubt the contract of a *Pakka-Adatia*, as that of anyone else, may be by way of wager; but can it be said that the employment of the plaintiffs by the defendant was of this description?

It has not been shown that there was any bargain or understanding between the parties, either express or implied, that linseed was not to be delivered, nor was it a term, of the employment that the plaintiffs should protect the defendant from liability to make delivery.

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Sir

Lawrence

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(1) [1905] I. L. R., 30 Bom., 205.

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DAS
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Sir
Lawrence
Jenkins.

It may well be, as suggested in the evidence of Hargopal, that the defendant was a speculator, who never intended to give delivery; and even that the plaintiffs did not expect him to deliver; but that would not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential.

No such intention has been proved.

Under the sales to the thirty-nine buyers it was the right of each buyer to call for delivery, but as the plaintiffs had carried through the transaction as *Pakka-Adalias* of the defendant the rise or fall of the market was a matter of no concern to them, except so far as it might enhance the risk of recovering complete indemnity from their employer. Their right was to their commission and to an indemnity against loss as incidents of their employment.

The mere fact that as to the greater part of the linseed there was no delivery, but an adjustment of claims cannot alone vitiate the transactions.

The learned Judges in appeal were evidently impressed by the statement ascribed to the plaintiffs' *Munim* that the delivery of 300 tons was made for the purpose of court proceedings and by the clause in the contracts forbidding delivery to Messrs. Narandas Rajaram and Co. Their Lordships, however, attribute no importance to either of these matters. Even if the *Munim's* statement be regarded as proved—a point on which their Lordships are, in the circumstances, far from satisfied—it would mean no more than that the plaintiffs fancied an actual delivery would tend to allay such doubts as the court might otherwise have as to the reality of the transactions. But this was in no sense inconsistent with this reality. At the same time the clauses forbidding delivery to Messrs. Narandas Rajaram clearly cannot be regarded as throwing any doubt on the transactions. No such suggestion seems to have been made at the trial in the court of first instance, and it does not appear to their Lordships to be reasonably susceptible of the significance ascribed to it.

Their Lordships, therefore, hold there was no ground for setting aside the decree of the court of first instance, and they will, therefore, humbly advise His Majesty to restore it and to reverse the decree of the High Court on appeal, ordering instead of it that the appeal to it be dismissed with costs. As the defendant Burjorji has died during the pendency of the appeal, and the present respondent has been appointed at the instance of the appellants to represent him for the purpose of this appeal alone, there will be no order as to the costs of this appeal.

A. P. P.

Appeal allowed.

Ashurst Morris Crisp & Co:—Solicitors for the appellant.

ANANT RAM AND OTHERS (*Plaintiffs*)
versus
 THE COLLECTOR OF ETAH AND OTHERS (*Defendants*).

Hindu Law—Mitakshara—Legal necessity—Mortgage of joint property by manager, who is not the father—Burden of proving necessity—Whether a mortgage without necessity binds mortgagor's own share.

The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed, if it can be shown, that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made by a widow who has only a similar limited power of disposition.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage.

Narain Prasad v Sarnam Singh, [1917] 44 I. A., 163, followed.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a joint family, mortgaged three joint villages for Rs. 3,000 to pay the Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance.

Held, that the mortgage was enforceable to the extent of Rs. 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound.

APPEAL from a decree of the Allahabad High Court, dated May 11, 1911, varying a decree of the Subordinate Judge of Aligarh.

The facts of the case are sufficiently set out in their Lordships' judgment.

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October, 20.

LORD
 BUCK-
 MASTER,
 SIR JOHN
 EDGE,
 SIR WALTER
 PHILLIMORE,
 BART,
 SIR
 LAWRENCE
 JENKINS.

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B. Dube, for the appellants, submitted that the lender in these cases is not bound to see to the application of the money. Here proper enquiry was made by the lender as to the existence of legal necessity. The recital of such necessity in the mortgage deed is sufficient.

Banga Chundra Dhur Biswas v. Jagat Kishore Chowdhuri, [1916] 43 I. A., 249, 252.

[SIR W. PHILLIMORE.—All that case decided was what was evidence of necessity, not that enquiry would supply the absence of necessity].

My case is that the whole of the Rs. 3,000 was wanted for revenue.

[SIR W. PHILLIMORE—You have not shown that the balance over and above 1,698 was even due].

My case is that a representation was made that the money was due for Government revenue, and on that representation we acted.

The respondents did not appear.

Their Lordships' judgment was delivered by

Lord
Buckmaster.

LOBD BUCKMASTER.—The question raised in this appeal is as to the rights of certain mortgagees under and in respect of a mortgage which was dated the 4th September, 1894. That mortgage was executed by one Raja Sheoraj Singh, the manager of certain joint property held by himself and his brother, Maharaj Singh, and governed by the Mitakshara law. The mortgage was for the sum of 3,000 rupees with interest at the rate of 1 rupee 2 annas *per cent*, *per month*, with compound interest and half-yearly rests. The mortgage affects three villages, and on the face of it there is a recital that the money was lent in order that the mortgagor might pay the Government revenue. The original mortgagee is dead and his representatives instituted the proceedings out of which this appeal has arisen for the purpose of enforcing their rights under the mortgage deed. A considerable number of defences were raised by the different parties who were made defendants to those proceedings, but for the purpose of the present appeal only one of those defences needs consideration. That defence is this:—that the property that was mortgaged being joint property, a mortgage could only be operative to the extent to which the mortgage-money was needed for the necessities of the joint estate. The learned Judge before whom the case was heard allowed the whole of the original mortgage debt to stand, but reduced the rate of interest. The High Court, to whom an appeal was brought, has allowed the mortgage for part only of the

original sum, namely, for the sum of 1,698 rupees 5 annas, and has restored the full rights of interest which the mortgagee possessed under the deed on that sum.

The appeal from that judgment has been brought under an order made by the High Court, who thought that the appeal gave rise to two questions of importance, the first being :—"Whether the burden lies upon a mortgagee who takes a mortgage from the manager of a joint Hindu family governed by the Mitakshara law to prove that the debt was incurred for family necessity;" and the second : "Whether, if the debt was not so incurred, the interest of the manager of the family, that is, of the mortgagor, in the mortgaged property could be sold in enforcement of the mortgage." It is to be observed that the grounds upon which the appeal was permitted do not include the question of considering whether, in point of fact, more than the amount allowed by the High Court had in fact been raised by way of necessity; but this point has been argued and considered by their Lordships.

As to the first of these two questions their Lordships entertain no doubt. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith (section 38, Transfer of Property Act). In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made for example, by a widow who has only a similar limited power of disposition. In the case of *Banga Chandra Dhur Biswas v Jagat Kishore Chowdhuri* (1), following previous decisions to the same effect, it was stated in perfectly clear and unambiguous terms that the burden of proving that such dispositions were lawful rests upon the persons who seek to claim benefits under them. The question, therefore, which the High Court thought needed consideration, so far as the burden of proof is concerned, must be decided against the appellants.

As to the second point, that question, so far as it covers mortgages in the same province as the province from which this appeal has been brought, has also been decided since the judgment of the High Court adverse to the appellants' contention in a case to which their Lordships' attention was called—*Narain Prasad v. Sarnam Singh* (2).

There remains only the point as to whether in this case the High Court were right in thinking that the mortgagee had only discharged

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(1) [1916] 48 I. A., 249.

(2) [1917] 44 I. A., 168.

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Buckmaster.

the burden thrown upon him of proving necessity for the deed to the limited extent of the 1,698 rupees. Now the facts with regard to that matter are these :—There were three villages that were the subject of the mortgage. The statement in the deed was that the money was needed to pay the Government revenue. What payments were made in respect of that revenue could easily be established by calling the proper witnesses, and, indeed, one such witness was called for the purpose of proving payments in respect of two of the villages, and he showed payments to the amount for which the High Court has allowed the mortgage to stand. The mortgagee cannot allege that the witnesses who could prove the necessity, on the existence of which his security depends, are inaccessible, or cannot now be obtained through lapse of time or for other good reason. The proof could have been and ought to have been laid before the court by the appellants, on whom the burden rests. That burden they have failed to discharge, and in their Lordships' opinion the High Court was perfectly right in deciding that the security stood to the limited extent only of the necessity proved. They will, therefore, humbly advise His Majesty that this appeal should be dismissed.

Barrow Rogers and Nevill :—Solicitors for the appellant.

A. P. P.

Appeal dismissed.

HIGH COURT.

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1918

January, 10

PIGGOTT, J.
WALSH, JJAGARDEO SINGH (*Defendant*)*versus*ALI HAMMAD AND OTHERS (*Plaintiffs*)

Agra Tenancy Act (II of 1901), section 34—Person occupying land without consent of landlord—Ejectment decrees in Revenue Court—Usufructuary mortgage of sir before Tenancy Act—Mortgagee in possession—Dispossession by person owning equity of redemption—Status of such owner.

Plaintiffs were in possession of certain plots of sir land under a usufructuary mortgage made prior to the passing of the Agra Tenancy Act. Defendants who had acquired a part of the equity of redemption managed to get into possession of these plots, whereupon the plaintiffs sued to eject them in the Revenue Court. The defendants denied the relationship of landlord and tenant and also raised other pleas. They were referred by the Revenue Court to the Civil Court. The Civil Court held that the plaintiffs were entitled to remain in exclusive possession as mortgagees and that the defendants had acquired a share in the equity of redemption. In accordance with this decision the Assistant Collector held that the defendants were non-occupancy tenants and he decreed their ejectment:—*Held* that the defendants had been properly ejected under section 34 of the Tenancy Act.

Per WALSH, J.—The words “a person occupying land without the consent of the landlord” (in section 34 of the Tenancy Act) mean one who enters into occupation without express consent or without any previous arrangement.

Balli v. Naubat, [1912] 9 A. L. J. R., 771, followed.

SECOND APPEAL from a decree of PANDIT DURGA DATTA JOSHI, District Judge of Azamgarh, confirming a decree of Pandit Govind Atma Ram Dhaneli, Assistant Collector, First Class.

Under an usufructuary mortgage executed before the present Tenancy Act the plaintiffs were in possession of certain sir plots as mortgagees. The defendant acquired a share in the mahal in which the plots were situate and thus became the owner of a portion of the equity of redemption. Subsequently the defendant took possession of some of the sir plots. The plaintiffs sued in the Revenue Court

• S. A. No. 118 of 1915,

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for ejectment of the defendant as a non-occupancy tenant. The defendant pleaded that there was no contract of tenancy between the parties and that he was in proprietary possession as a co-sharer in the mahal. The Revenue Court, acting under section 199 (1) (a) of the Tenancy Act, referred the defendant to the Civil Court. The final decision of the Civil Court was to the effect that these plaintiffs were entitled to exclusive possession of the plots as usufructuary mortgagees, and that the defendant by becoming a co-sharer in the mahal had acquired a share in the equity of redemption. Following this decision the Assistant Collector decreed the ejectment suit on the ground that the status of the defendant could only be deemed to be that of a non-occupancy tenant. The defendant appealed to the Commissioner, who held that a question of proprietary title was still in issue between the parties and that the appeal lay to the District Judge. The defendant then appealed to the District Judge, who held that no such question was any longer open between the parties as it had been finally determined by the Civil Court and that the appeal therefore did not lie to him. Against this decision the defendant appealed to the High Court. After some of the facts stated above had been found upon a remand by the single Judge who first heard the appeal, the case was referred by him to a Division Bench.

Iqbal Ahmad, for the appellant.—The District Judge was wrong in holding that the appeal did not lie to him. The finding of the Assistant Collector that the defendant was a non-occupancy tenant of the plaintiffs was challenged in the appeal on the ground that the defendant was a proprietor and nobody's tenant. So, a question of proprietary title was still a matter in issue in the appeal, and under section 177(e) of the Tenancy Act the appeal lay to the District Judge.

[WALSH, J.—The question of title has been finally determined by the Civil Court. All the facts of the case are now fully ascertained, and both the Civil and the Revenue Courts have found that the defendant has no title to possession. Why should we not give immediate effect to that finding now, particularly as the case has been dragging along for such a length of time and through so many courts?]

The plaintiffs came to the Revenue Court on the allegation that the defendant was their tenant. Upon the facts ascertained, the defendant is not their tenant. Taking it that he is a trespasser without title, the plaintiffs cannot in this suit turn round and claim to eject him as a trespasser. The Revenue Court cannot entertain a suit to eject a mere trespasser. The plaintiffs came to court with wrong allegations and they have themselves to thank if after a protracted course of trial they find that the suit must be dismissed.

If in the present case the suit were decreed on the ground that the defendant was a trespasser, the result would be that zemindars need never go to the Civil Court to eject trespassers pure and simple; they would sue in the Revenue Court on an allegation of tenancy, and when the allegation was found against them, would claim a decree on the ground that the defendant was a trespasser. The jurisdiction of the Civil Court would thereby be effectively ousted. It is significant that the court-fee payable for a suit under section 58 of the Tenancy Act is different from that for a suit in the Civil Court for ejectment of a trespasser.

[PIGGOTT, J., referred to I. L. R., 25 All., 498.]

There, the suit was instituted in a court which could properly pass a decree for ejectment on the facts *as found*. The difficulty in the present case is that the Revenue Court was not the proper court to eject a mere trespasser; the suit should have been brought in the Civil Court.

[WALSH, J.—Was not that defect removed when the case came in appeal before the District Judge?]

Sections 196 and 197 of the Tenancy Act apply only to cases in which the appeal would in any event lie to the District Judge, although the suit was instituted in the wrong court. They are not applicable here, for an appeal from a suit under section 58 of the Tenancy Act ordinarily lies to the Commissioner.

Bechu Sahu v. Nandram Das, [1914] 12 A. L. J. R., 902.

S. M. Yusuf Hasan, for the respondents.—On the facts found it is clear that the defendant has no right to remain in possession of the plots in dispute. Apart from technicalities, that is the real question between the parties, namely whether the defendant should be ejected, that has to be determined by the court now. The defendant is a mere trespasser, and the Civil Court has an inherent jurisdiction, notwithstanding technicalities and formal defects, if any, in the suit as instituted, to pass a decree for ejectment in accordance with the rights of the parties. Sections 151 and 153 of the Code of Civil Procedure are intended to meet the requirements of a case like the present, and give very wide powers.

If the court now decreed the defendant's ejectment, he could have no ground for saying that he had been taken by surprise or been prejudiced in any way. For, in the civil suit between the parties, which was instituted in accordance with section 199 (1) (a) of the Tenancy Act, the defendant had an ample opportunity of raising all the pleas which he could possibly have raised by way of defence if the plaintiffs had originally sued for ejectment in the Civil Court.

Technically, also, there is nothing against the passing of a decree for ejectment in the present suit as brought. It has been held that

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the provisions of section 34 of the Tenancy Act point to the conclusion that a trespasser who is in cultivatory occupation of land without the consent of the zemindar can be ejected by the Revenue Court as a non-occupancy tenant.

Balli v. Naubat Singh, [1912] 9 A.L. J. R., 771.

Iqbal Ahmad, in reply.—Sections 151 and 153 of the Code of Civil Procedure do not apply to suits instituted in the Revenue Courts; *vide* section 193 of the Tenancy Act.

The case relied on by the respondents was not correctly decided. Section 34 finds a place in Chapter IV of the Tenancy Act, which chapter deals only with “determination *etc.*,” of rent; there is no corresponding provision in Chapter V, which is the chapter dealing with ejectment by the Revenue Courts. That shows that the Legislature intended that though a trespasser could be sued in the Revenue Court for rent he could not be ejected by that court. Sections 57 and 58 of the Tenancy Act are exhaustive of the grounds on which a person can be ejected by the Revenue Court, and a trespasser does not come within those sections. The latter portion of section 34 emphasizes that a trespasser does not become a tenant until he pays rent.

The Full Bench case of

Nandan Singh v. Ganga Prasad, [1913] I. L. R., 35 All., 612, & B.,

considered the provisions of section 34 and doubted whether the Revenue Court could eject unless the relationship of landlord and tenant existed between the parties.

The following judgments were delivered.

Piggott, J.

PIGGOTT, J.—These are four connected appeals which have come before us under the following circumstances:—

The plaintiffs instituted, in the court of the Assistant Collector, Azamgarh, four suits, for the ejectment of the defendant from certain specified plots of land, in each case with the allegation that they themselves were mortgagees in possession of the proprietary rights over the said plots, and the defendant was a non-occupancy tenant of the same. The defendant replied that there was no contract of tenancy between himself and the plaintiffs; that his possession was proprietary in its nature and that he was in possession as of right; because he was a co-sharer in the proprietary rights of the particular sub-division of a *Mahal* to which the land in suit appertained. On this the learned Assistant Collector took action under section 199 of Act II of 1901, requiring the defendant to file a suit in the Civil Court for the determination of the question of title in issue between himself and the plaintiffs. The court of first instance determined the question in favour of the present defendant who was, of course, the plaintiff in the Civil

Court. On appeal, however, this decision was reversed. The controversy in this case has been very largely as to the meaning and effect of the appellate court's decision in this litigation. The decision fairly considered amounts to this, that the plaintiffs respondents (the defendants in the Civil Court) held a usufructuary mortgage in respect of the plots of land in suit and were entitled to the exclusive possession of the same as such mortgagees; but the present defendant had acquired a share in the proprietary rights, that is to say, in the equity of redemption, in respect of the mortgage held by the opposite party. The case came again before the Assistant Collector, who was bound to dispose of the ejectment suit then pending before him in accordance with the final decision of the Civil Court. He passed a brief order to the effect that in view of the decision of the Civil Court, the defendant could only be regarded as in possession of the land in suit as a sub-tenant, that is to say, a non-occupancy tenant (the land in question being *Sir land*) from the plaintiffs. He ordered the defendant to be ejected accordingly. The defendant filed an appeal in the Commissioner's court, who refused to entertain it, holding that a question of proprietary title was still in issue as between the parties. The defendant then went before the District Judge in appeal, who dismissed the appeal holding that the question of proprietary title, originally in issue, had been finally and completely disposed of in the suit already referred to, and that there was no question left for determination in the case which was not exclusively cognisable by the Revenue Courts. Against this decision four second appeals have been filed. When the case originally came up for hearing, the facts were not as clear as they are now, and an order was passed directing the District Judge to entertain the defendant's appeal and to determine certain issues of fact.

We have now before us the findings arrived at by the District Judge on the issues remanded, and as a matter of fact his findings proceed on admissions made by the parties. The mortgage under which the present plaintiffs respondents now hold, and have been holding since 1902, was a mortgage of the specific plots of *Sir land* which are now in suit. The mortgage itself had been contracted prior to the passing of the present Tenancy Act; so no question of ex-proprietary rights arises. On the terms of the mortgage the plaintiffs, as transferees of the mortgagee rights, were entitled from 1902 and onwards to actual possession and enjoyment in respect of the land in suit.

The defendant having acquired a part of the equity of redemption asserted a right to take possession of some of the *Sir lands*, without tendering the mortgage money. In prosecution of this claim he somehow succeeded in obtaining possession of the plots of land now in suit. The question specifically raised by these appeals is whether the learned District Judge was right or wrong

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in holding that no appeal lay to his court. I should be prepared to hold that that decision was correct, but the matter has now gone somewhat further. After the order of remand and the ascertainment of the facts, the real question before us is whether the Assistant Collector was right in ordering ejectment of the appellant. On the principles laid down by a learned Judge of this Court in *Balli v. Naubat Singh*⁽¹⁾, the Assistant Collector was clearly right. It has been suggested, on the other side, that this decision was doubted in a Full Bench decision of this Court, in the later case of *Nandan Singh v. Ganga Prasad*⁽²⁾ (See specially the remarks at page 516). As a matter of fact the decision reported in 9 A. L. J. B., page 771, was not specifically considered or in terms overruled, though it is open for the appellant to contend that remarks of the learned Chief Justice, when delivering the judgment of the Full Bench suggest that he was not prepared to accept the correctness of that ruling. We find, however, that the principle laid down in *Balli v. Naubat Singh*⁽¹⁾, has been in substance accepted and followed by the Revenue Court since that decision was pronounced. Reference may be made to the notes by Mr. M. L. Agarwala in his valuable commentary on the N.-W. P. Tenancy Act, fifth edition, at pages 40 *et seqq.*, of that edition. Moreover, there is a decision of the Board of Revenue, *Champa Kunwar v. Pati Ram*⁽³⁾, which deals with the position of a squatter occupying agricultural land for cultivating purposes, and which adopts the principle of the case of *Balli v. Naubat Singh*⁽¹⁾, to its fullest extent. In this state of authorities I should be prepared personally to stand by the reported decisions directly bearing on the question before us. Moreover I think that, there being nothing in favour of the defendant on the merits, it is not incumbent on us to go out of our way to insist upon any legal technicalities for the sake of enabling the defendant to prolong this litigation. The decision in the case of *Champa Kunwar v. Pati Ram*⁽³⁾, is by the Senior Member of the present Board of Revenue; and it is quite clear that if the defendant had got what he asked for, namely, a re-consideration of the Assistant Collector's order by the higher Revenue Courts, the result would have been to affirm his ejectment.

So far as the Civil Courts are concerned they have already decided in favour of the plaintiffs-respondents, and, if the present matter could rightly be taken cognisance of by the Civil Courts, they could not have come to a different decision from that arrived at by the Assistant Collector.

The defendant's possession is wholly unlawful and the order of ejectment a proper order on the merits. There are thus abundant reasons for dismissing these appeals.

(1) [1912] 9 A. L. J. R., 771. (2) [1913] L. L. R., 35 All., 512, 516.

(3) [1916] 33 L. C., 70.

WALSH, J.—I agree; particularly I accept the cases of *Balli v. Naubat* (1), and *Champa Kumwar v. Pati Ram* (2), as the correct expression of the law. I am not satisfied that in *Nandan Singh v. Gaya Prasad* (3), the Full Bench intended to dissent from the case of *Balli v. Naubat* (1), which was relied on by the appellant who succeeded; but I think the *dictum* at the foot of page 515 in 35 All., requires further consideration. Apparently the Chief Justice thought that section 34 of Act II of 1901 could only be made to work so long as the person was occupying the land "without permission" of the landlord. The words in the section are not "without permission." I am satisfied that the words "a person occupying land without the consent of the landlord" mean one who enters into occupation without express consent or without any previous arrangement with him. Two reasons seemed to me very strong to show this. If section 34 can be worked only against a person who having entered as a trespasser continues in possession "without permission" of the landlord it is difficult to see how the landlord is to get rent from a person who does remain in possession with his permission. Secondly such a person is said by the section not to be deemed to hold the land within the meaning of section 11 of the *Agra Tenancy Act* until he begins to pay rent. Section 11 deals only with tenants and I cannot see how such a person could be deemed to be a tenant within section 11 so as to make it necessary for the Legislature to exclude him from the operation of section 11 unless he was occupying with the permission of the landlord. I think this consideration lends additional weight to the view of SER GEORGE KNOX and of the Senior Member of the Board and I agree with my learned brother that the defendant is liable to be ejected by the Revenue Courts.

By the Court.—We dismiss this appeal with costs.

B. K. M.

Appeal dismissed.

(1) [1912] 9 A. L. J. R., 771.

(2) [1916] 33 F. C., 70.

(3) [1913] I. L. R., 35 All., 512.

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GOKUL (*Plaintiff*)
versus
 MOHRI BIBI (*Defendant*).*

Code of Civil Procedure (Act V of 1908), Order 21, rule 58—No suit brought within one year from such dismissal—Order conclusive—Decree, execution of—Objection to attachment and sale—Claimant's objection dismissed for want of evidence.

Where an objection under Order 21, rule 58, of the Code of Civil Procedure was dismissed because the objector failed to produce any evidence, and no suit was brought to challenge the validity of that order within one year from the date of the order under Article 11 of Schedule II to the Limitation Act, *held* that the order had become conclusive.

The only order under Order 21, rule 58 of the Code of Civil Procedure, upon which the character of finality is impressed is an order made after enquiry. It does not follow, however, that because a claimant does not adduce evidence or is absent, there are no materials before the court to enable it to enquire into it.

SECOND APPEAL from a decree of E. BENNET, Esq., Subordinate Judge of Mirzapur, confirming a decree of Babu Shibendra Nath Banerji, Munsif.

The facts of the case are fully set forth in the judgment. Briefly stated for the purpose of this report, they were as follows:—In execution of a simple money decree in favour of Basant Lal against Jageshur, a certain fixed-rate holding was attached as being the property of Jageshur. Thereupon an objection under section 278 of the Code of Civil Procedure of 1882 was filed by Gokul, minor, through his next friend, his mother, claiming that a portion of the holding belonged to him and not to Jageshur and was, therefore, not liable to be attached and sold in execution of the decree. On 15th June, 1901, the date fixed for hearing of the objection, an application was made by the objector's pleader praying for an adjournment on the ground that information of the date of hearing had reached the minor's guardian too late to take steps for summoning witnesses. This application was rejected, and the objection was dismissed by the following order:—"This is an objection under section 278, Civil Procedure Code. The correctness of it is disputed by the decree-holder. The objector has produced no evidence to make out the truth of his claim and it is disallowed with costs."

* S. A. No. 51 of 1916.

The attached property was thereafter put up to auction sale and purchased by the decree-holder, who obtained actual possession on 23rd February, 1904. On 20th June, 1914, Gokul instituted a suit against Basant Lal's widow for possession of his share of the holding. He stated that he had attained majority in June, 1912. The defendant pleaded *inter alia* that the suit having been brought more than a year after the dismissal of the objection under section 278 was barred by limitation under Article 11 of the Limitation Act. This plea was upheld and the suit dismissed by both the lower courts. The plaintiff filed a second appeal in the High Court.

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S. A. Haidar, for the appellant.—The cause of action for the suit is the dispossession of the plaintiff on 23rd February, 1904, and the suit being brought within 12 years thereof is not barred by limitation. The lower courts have misapplied Article 11 of the Limitation Act. The order of 15th June, 1901, dismissing the objection under section 278 of the former Code was not of such a character as to be conclusive on failure of the objector to bring a suit within one year. It has been laid down that unless the investigation which is clearly contemplated by section 278 has been made and the matter has been judicially determined by the court, the order passed by it cannot be regarded as one made under section 281. The only order upon which the character of finality is impressed by section 283 is an order properly made under section 281, *i. e.*, after investigation and enquiry.

Kallar Singh v. Toril Mahton, [1895] 1 C. W. N., 24 ;

Kunj Behari Lal v. Kandh Prasad, [1907] 6 C. L. J., 362 ;

Savala Subba Rau v. Kamsala Timmayya, [1907] 1 L. R., 31 Mad., 5 ;

Sajan Ram v. Rathi Rattan, [1904] 87 P. R., 1904.

In these cases the order disallowing the claim was passed in default of appearance, and it was held that as there had been no investigation whatever on the merits the order was not conclusive, and Article 11 of the Limitation Act was not applicable to the suit subsequently instituted by the claimant. In the present case, too, there was no enquiry into the merits. Although on the date fixed the pleader for the objector put in an application for adjournment on the ground that witnesses could not be summoned, still that fact alone would not make the dismissal other than a dismissal for default of appearance.

Latta Prasad v. Nand Kishore, [1899] 1 L. R., 22 All., 66, F. R.

There are some cases of the Allahabad High Court which may be cited against me, but they are distinguishable. The case of

Lachmi Narain v. H. C. Martindell, [1897] 1 L. R., 19 All., 253, was decided under the former Rent Act XII of 1881 and not under the Code of Civil Procedure. Having regard to the fact that the

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scheme and object of that Act are different from those of the Code of Civil Procedure, that case has no bearing here. In the case of

Shagun Chand v. Shibbi. [1911] 8 A. L. J. R., 626,

the claimant's pleader stated, on the date fixed, that his client did not wish to adduce any evidence. That was, practically, an admission that he could not substantiate his claim, and the order of dismissal under those circumstances was virtually a judgment that the claim was without merits; in a sense there was the best investigation possible under the circumstances. The matter is very different in the present case, in which the claimant was anxious to adduce evidence, and what he prayed for was an opportunity to produce that evidence. The refusal of the prayer for adjournment shut out the claimant from substantiating his claim on the merits, so that there was no investigation of those merits. A similar case was that of

Chandi Prasad v. Nand Kishore, [1913] 20 I. C., 369 (All.),

in which the claimant had summoned his witnesses but deliberately abstained from producing them. In the case of

Rahim Bux v. Abdul Kadir. [1904] I. L. R., 32 Cal., 537,

a list of witnesses desired to be summoned had been put in, but the necessary process fees were not paid. By his own conduct the claimant had put it beyond his power to prove his case. The circumstances of the present case are quite different. The correctness of the decision in the last mentioned case was doubted in

Sarat Chandra v. Tarini Prasad, [1907] I. L. R., 34 Cal., 491,

which is entirely in my favour.

[The argument then proceeded to deal with another point.]

Surendra Nath Sen, for the respondent, was not called upon.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—The facts which have given rise to this appeal are as follows:—

There were three brothers, Kauleshar, Chandu and Jageshar, who owned a fixed-rate holding of seven bighas and five biswas. According to the plaint the three brothers separated and the holding was privately divided amongst them. On the 9th of January, 1900, the name of Jageshar was entered in respect of two bighas and five biswas and the rest, five bighas, stood in the name of the two brothers, Kauleshar and Chandu. Kauleshar died leaving him surviving his son, Gokul. Chandu died leaving him surviving a widow only and no issue. One Basant Lal obtained a simple money decree against Jageshar, one of the brothers mentioned above, and against Govind, a third party. In execution of his decree Basant Lal

attached the whole of the holding, namely, the fixed-rate holding of seven bighas and five biswas. At the time of the attachment the two widows of Kauleshar and Chandu were alive, as also the son of Kauleshar, called Gokul, who was a minor at the time. On the 27th of March, 1901, Gokul filed an objection through his mother as guardian, objecting to the attachment, presumably on the ground that his father and uncle, Chandu, were separate from Jageshar and their property was not liable to sale and attachment in the decree of Basant. On the 5th of June, 1901, the date fixed for hearing the objections, an application was presented to the court on behalf of the guardian of the minor praying for an adjournment, on the ground that the information of the date of hearing had reached the guardian too late to take steps for production of evidence. The learned Subordinate Judge rejected the application for adjournment and proceeded to dispose of the objections. The order, he made on the objections, is as follows:—“This is an objection under section 278 of the Civil Procedure Code. The correctness of it is disputed by the defendants. The objector has produced no evidence to make out the truth of his claim and it is dismissed with costs.” After the rejection of the objection the entire holding of seven bighas and five biswas was put up to auction and purchased by Basant Lal, the decree-holder. On the 21st of June, 1902, the Amin, who was deputed to deliver possession to the purchaser reported that the widows of Kauleshar and Chandu had obstructed him in his duties. The purchaser having taken no steps, his application for delivery of possession was rejected on the 5th of July, 1902. On the 19th of July, 1903, he again applied for delivery of possession and succeeded in getting it on the 23rd of February, 1904. On the 20th of June, 1914, Gokul, the plaintiff-appellant, instituted the suit out of which this appeal has arisen, for possession of five bighas of the fixed-rate holding on the allegation that the said land was not liable to attachment and sale in execution of the decree of Basant Lal against Jageshar. Gokul further stated in his plaint that his father Kauleshar and his two uncles Jageshar and Chandu had separated long prior to the decree of Basant and had divided the holding equally amongst themselves. After the separation each brother was in possession of his own share. Basant Lal, the decree-holder, could only sell the share of Jageshar. At the time of the execution of the decree of Basant Lal he, the plaintiff, was a minor and was entitled to object as regards the share of the holding that belonged to his father only. Chandu's widow, Musammât Kutwari, was alive at the time of the attachment and the sale of the holding. She died some years after. On her death the share of Chandu came to the plaintiff as the reversionary heir. He attained majority in June, 1912, hence the suit was brought for recovery of the possession of that portion of the holding which belonged to his father and his uncle, Chandu. The claim was resisted on various pleas. It was urged on behalf of the defendant that the three brothers were joint and had never separated and that

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the decree against Jageshar had been passed in the capacity of the *Karta* of the family. It was therefore binding on all the three brothers and their legal representatives. The plea of limitation was urged in respect of the entire claim on the basis of the plaintiff's objections, dated the 27th of May, 1901. The learned Munsif in whose court the suit was filed held that the three brothers were joint and therefore the decree of Basant Lal was binding on the plaintiff. He further found that the objections, dated the 27th of May, 1901, made by the plaintiff through his mother related to the whole of five bighas, the alleged share of Chandu and Kauleshar, and the objections having been dismissed and the suit having been brought more than one year after the dismissal, the present claim was barred under Article 11 of Schedule I of the Limitation Act. The plaintiff preferred an appeal to the District Judge who disagreed with the first court as to the status of the family of the three brothers but agreed with it as to the plea of limitation. The learned District Judge held that the three brothers were separate but that the claim was obviously barred under Article 11 of Schedule I of the Limitation Act.

The plaintiff in his second appeal to this Court advances two contentions. He says that his claim is not barred under Article 11 of Schedule I of the Limitation Act, inasmuch as his objection was dismissed without any investigation and secondly, in any case his claim with regard to two bighas ten biswas of the holding, which he inherited from his uncle, Chandu, after the death of the latter's widow, cannot be said to be barred by limitation as the lady died after the dismissal of the objections and she had taken no objection to the attachment and sale of the holding. The second contention may be dismissed in a few words. There is a distinct finding of the learned Munsif that the objections of the plaintiff related to five bighas of the holding, that is, the share of his, *i. e.*, plaintiff's father and uncle. The plaintiff took no objection to this finding in his appeal to the District Judge. There is nothing on the record to make us come to a different conclusion and hold that the objections related only to the share of Kauleshar. In the plaint itself the plaintiff does not mention the fact of having made an objection in 1901 and there does not seem to be any replication or any statement by him in reply to the written statement that his claim was barred because it was brought a year after the order of the 5th of June, 1901. In support of the first contention a number of cases have been cited by the learned counsel for the plaintiff-appellant. The following cases have been relied upon by the plaintiff, namely, *Kallan Singh v. Toril Mahton*(¹), *Kunj Behari Lal v. Kandh Prasad Narain Singh* (²), *Sarat Chandra Basu v. Tarini Prasad Pal Chowdhry* (³), *Sarala Subha Ram v. Kamsala Timmayya* (⁴), and *Sujan*

(1) [1896] 1 C. W. N., 24.

(2) [1907] 6 C. L. J., 362.

(3) [1907] 12 L. R., 34 Cal., 491.

(4) [1906] 1 L. R., 31 Mad., 5.

Ram v. Ram Rattan (1). According to these cases an objection, made under section 278 of the old Code of Civil Procedure, corresponding to Order 21, rule 58 of the present Code, if dismissed without investigation would take the case of the objector out of the operation of one year's rule of limitation. But the question is what does the word "investigation" mean? There are cases which go to show that the circumstances under which the objections of the plaintiff were disposed of were not such as to warrant the conclusion that they were decided without investigation, *vide, Rahim Bax v. Abdul Kadir* (2), *Shagun Chand v. Shibbi* (3), and *Chandi Prasad v. Nand Kishore* (4). We would also refer to *Lachmi Narain v. Martindell* (5), for the principle according to which the limitation of one year should be enforced. Most of the case-law has been discussed by MR. JUSTICE MUKERJI in the case of *Kunj Behari Lal v. Kandh Prasad Narain Singh* (6), after the consideration of the case-law the learned Judge concludes thus:—"It is manifest, therefore, from the language of the Code itself, that the only order upon which the character of finality is impressed is an order made upon enquiry." He also remarks "It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the court to enable it to enquire into the matter." In the present case the learned Subordinate Judge dismissed the objections of the plaintiff, not in default, nor without any investigation. It is true that the plaintiff produced no evidence in support of his objections but it does not follow that there was no material on the record to enable the Judge to dispose of the objections. We think that the cases relied upon by the plaintiff-appellant are distinguishable from the case before us.

The appeal therefore fails and is dismissed with costs.

B. K. M.

Appeal dismissed.

(1) [1904] 87 P. R., 1904.

(2) [1905] I. L. R., 32 Cal., 537.

(3) [1910] 8 A. L. J. R., 626.

(4) [1903] 20 I. C., 369.

(5) [1897] I. L. R., 19 All., 253.

(6) [1907] 6 C. L. J., 362.

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TUDBALL, J.
RAFIQ, J.BASANTI (*Decree-holder*).*versus*KUNJ BIHARI LAL (*Judgment-debtor*)**Execution of decree—Mortgage—Misdescription of property in decree—Objector not deceived—Court has jurisdiction to correct error.*

In a decree for sale on a mortgage both the mortgage-deed and the decree misdescribed, the property mortgaged and ordered to be sold as *muafi*. The property as a matter of fact was assessed to revenue. When the mortgagee applied for execution of his decree, the objector, who had purchased the same property in execution of a simple money-decree pleaded that there was no *muafi*. The mortgagee's lien had been proclaimed at the time of his purchase. *Held* that the misdescription not having deceived the objector, when he purchased, the court was not debarred from doing what was right by correcting the error in the decree.

EXECUTION FIRST APPEAL, from a decree of BABU LALTA PRASAD JAUHARI, Subordinate Judge of Moradabad.

Narain Prasad Athana and Shiam Krishna Dar, for the appellant.

Surenbro Nath Sen, for the respondent.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—This appeal and execution first appeal No. 280 of 1917 cover the same point and are connected. One Jamil-ur-Rahman in the year 1910 borrowed Rs. 4,000 from Musammatt Basanti, the appellant, under a mortgage-deed and hypothecated certain property in two villages. The description of the property is as follows:—No. 1, Mauza Daranagar *muafi Mahal Mustahkam Rang Surkh*, three biswas, fifteen biswansis out of fifteen biswas, situate in pargana Hasanpur, district Moradabad, (the names of the villages on boundaries of the village are also given); No. 2, Mauza Walipore, *Mahal Sufaid muafi*, 2½ biswas out of 20 biswas, pargana Hasanpur, district Moradabad. In this case also the bounding villages were named. The description in the mortgage-deed contained one error. These properties were not revenue-free but actually were assessed to small sums of revenue. It is probable that they were commonly spoken of as revenue-free. The mortgagee sued upon the basis of the mortgage and obtained a decree. The preliminary decree and the final decree described the property as it is described in the mortgage-deed. In the meantime these properties had been attached in execution of a simple money decree against the mortgagor and were purchased in

* L. F. A. No. 279 of 1917.

case of one village by the respondent in the present appeal, Kunj Behari Lal, and in the other by the respondents, Muhammed Hashmat Ali *etc.* When proclaimed for sale the burden of the mortgagee's loan upon the property was duly notified. The mortgagee has now applied for execution of the decree by sale of the mortgaged property. The auction purchasers under the simple money decree have objected, that there is no *muafi* in these villages or mahals, that the property, that they have purchased, is not revenue-free property and is therefore not the property mortgaged. Inquiry has been made and it is established beyond all doubt whatsoever that these properties are not revenue-free and never have been; that the description "revenue-free" entered in the mortgage-deed was a mistake, though the properties may perchance have been locally spoken of as revenue-free but it is also equally clear that the property purchased by the respondents is the property that was mortgaged to the appellant. The court below has held that it is prevented by reason of the misdescription in the decree from putting this property to sale and has refused the decree-holder's application. It is not as if the opposite party had been in any way deceived when they purchased the property, for the burden upon it was clearly notified and we think it utterly unjust to allow a slight misdescription such as has crept in, in the present case, from preventing a court doing what is right. We allow the appeal. It is the court's duty to see that all errors are amended when there is no question of doubt. The court executing the decree is the court which passed the decree. We direct that the word "*muafi*" be struck out of the decree and direct that the court below proceed to put the property to sale in the manner laid down by law. The appellant will have her costs in both courts.

Appeal allowed.

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Tudball, J.

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EMPEROR*

Criminal Procedure Code (Act V of 1898), section 110—Person ordered to produce sureties—Sureties not residents of the same police district and who helped accused in his defence—Sureties not improper.

The mere fact that a person ordered to produce sureties under section 110 of the Criminal Procedure Code gives as security two persons who are residents of a different police district and who helped him in his defence will not make them improper as sureties and the Magistrate should not refuse to accept them.

* Cr. Rev. No 1028 of 1917.

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Feb. 27.

RICHARDS,
C J

CRIMINAL

1918

GOBARDHAN

v.
EMPERORRichards,
C. J.

CRIMINAL REVISION from an order of PATESH I PRATAP SINGH, ESQ., Officiating District Magistrate of Etawah.

Satya Chandra Mukerji and Brij Mohan Vyas, for the appellant.

R. Malcolmson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

RICHARDS, C. J.—In this matter it appears that Gobardhan was ordered to furnish security under section 110. The order upon him was that he should give security himself in the sum of Rs. 200 and two approved sureties of Rs. 100 each. If he complied with the terms of this order he was entitled to be released. Gobardhan has presumably given his own bond for Rs. 200. He has produced two sureties who are ready to give security to the extent of Rs. 100 each. The Magistrate has declined to accept the sureties on two grounds, first that the sureties reside in another police station. Apparently they are not very far removed from the residence of the accused but they are not in the same police district. The second ground is that they assisted Gobardhan in his defence. It seems to me that the second ground is no legitimate ground for refusing to accept the sureties. Presumably it will always be some friends of a person against whom proceedings have been taken under section 110, who will give security for him. It is very unlikely that any complete outsider, who has no interest whatever in the person charged, will undertake the responsibility. As I said before, it must always be a friend who will undertake the responsibility. The mere fact that these sureties evidenced their friendship by helping in the defence seems to me to be no reason at all for refusing to accept them as sureties. The first ground is, as already stated, they reside in another police district. The order simply required that the sureties should be "approved sureties." This I think to mean that they should be themselves persons of good character and solvent. I think therefore that both the grounds upon which the learned Magistrate refused to accept the sureties are not sufficient in law to justify his doing so. The matter will now go back to the Magistrate who will deal with the matter having regard to what I have said above.

Case sent back.

PRIVY COUNCIL.

AMRIT NARAYAN SINGH (*Plaintiff*)*versus*GAYA SINGH AND OTHERS (*Defendants*).

Hindu Law—Reversioner, right of—A mere spes successionis—Not assignable or transferable—Not capable of being dealt with by the guardian of a minor.

A Hindu reversioner has no right or interest *in presenti* in the property which a female owner holds for her life, until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

APPEAL from a judgment and decree of the Calcutta High Court, dated 16th July, 1913, reversing a decree of the Subordinate Judge of Patna, dated the 20th January 1909. One Jhamman Singh died leaving a widow, Radha Koer, a daughter Kar Koer and Amrit Narayan, the daughter's son, then a minor. The widow applied for mutation, but her application was opposed by the defendants, who were collateral relations of the deceased. Radha Koer's name was registered but she died in 1863. Disputes as to succession again arose, and Kar Koer and her husband Rajender Singh, father and guardian of the minor Amrit Narayan Singh, on the one side, and the defendants on the other executed an agreement to refer the matter to arbitration. But before the arbitrators could decide anything the parties entered into a compromise, which was placed before the arbitrators, and they were invited to make and did in fact make an award in accordance with the compromise. Under the compromise the properties in suit were awarded to the defendants. On the death of Kar Koer in 1905 the appellant Amrit Narayan brought the present suit to recover possession of these properties from the defendants. The Subordinate Judge found all the material issues in his favour and decreed the suit. The Subordinate Judge found that the plaintiff was not a party to the arbitration proceedings, that his father was not appointed his guardian under the provisions of Act XL of 1858, that the compromise and award were nullities and that the judgments of the District Judge and the High Court by which the award was made a decree of court were not binding on the appellant. The defendants appealed to the High Court, which allowed the appeal and dismissed the suit.

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WADDING-
TON,
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De Gruyther, K. C., (with him *B. Dube*), for the appellant.—Jhamman Singh was admittedly separate and the appellant was therefore entitled to inherit his estate. The suit was well within time under Art. 141 of the Limitation Act, 1874. Art. 95 of that Act does not apply. Plaintiff's claim was not barred by the proceedings in arbitration taken by his mother and father. There was really no arbitration. The award was based on the compromise which Kar Koer and Rajender Singh made. The appellant was not a party to the compromise and the same was made against his interest. The plaintiff did not possess any interest whatever in Jhamman Singh's estate during the life-time of his mother. His right was merely *spes successi-nis* and was not transferable. In any case the Civil Courts which dealt with the award did not adjudicate upon the reversionary right of the plaintiff and the award was made a decree of court against Kar Koer alone. Further section 3, Act XL of 1858 was intended for the protection of minors, but Rajender Singh was not appointed guardian of the minor. Reference was made to the following:—

Sham Sunder Lal v. Achhan Kunwar, [1896] 25 I. A., 18;

Musammam Bibi Walian v. Banke Behari Pershad Singh, [1903] 30 I. A., 182;

Nagandra Chandra Mittra v. Kishen Chundra Das 19 W. R., 13.

A. M. Dunne, K. C., for the respondents.—The plaintiff's mother represented the whole estate and the proceedings by which she sought to set aside the award were properly heard and decided and she failed. It was therefore a good judgment and was binding on the reversioners who succeeded the widow:—

Katama Natchiar v. Srimut Meeteo Vijaya, 9 M I A., 539, at p 604.

Further, the arbitrators decided the dispute by holding that the plaintiff and his mother had no interest according to the religious customs and usage of the parties. The minor was a party to the arbitration and the award was binding on him.

No reply was called for.

Their Lordships' judgment was delivered by

Mr. Ameer
Ali.

MR. AMEEB ALI.—This is a suit by a Hindu reversioner to recover possession of certain properties that originally belonged to his maternal grandfather, Jhamman Singh. He alleges that the defendants, respondents before this Board, wrongfully possessed themselves of these properties under colour of certain arbitration proceedings whilst the estate was held by his mother, Kar Koer, as a female owner under the Hindu Law. Kar Koer died in 1905, and this action was brought in 1908. The suit is therefore clearly within time. The sole question for determination in this appeal is whether the arbitration proceedings and the decree on the award which gave to the predecessors of the respondents possession of these properties are binding on the appellant.

On Jhamman's death Radha Koer, his widow, applied for the registration of her name in place of her deceased husband in the Collector's records. Her application was opposed by some of Jhamman's agnatic male relations, whom the respondents now represent; they claimed the property both under the general Hindu Law as also under some undefined family custom. Their objections were overruled by the Revenue Courts, and Radha Koer's name was duly entered in the Collector's register. Radha died shortly after in 1864, and was succeeded in the possession of the estate by her daughter, Kar Koer, the mother of the appellant. The agnates raised a fresh contest as to her right to hold the property. In the disputes that followed, and which were eventually referred to the arbitration of a number of caste-men, she seems to have been represented by her husband, Rajender Singh. There is nothing, however, on the record to show if he had any authority to act for her as her agent. Before the arbitrators had taken any action in the matter, a compromise was arrived at, in which also Rajender purported to act both for her and her infant son, the appellant. Under this compromise, Kar Koer abandoned, in favour of the agnates, all right to the immovable property of her father, receiving on her part, besides some moveable property, two small fractional shares in certain lands which stood in her and in her mother's names. The effect of the arrangement was to extinguish completely the reversionary interest of the appellant in his grandfather's estate.

The compromise was placed before the arbitrators and they were invited to make an award in accordance therewith, which they did. It is to be noted that there is nothing on the record to show that the proceedings before the arbitrators ever came to the knowledge of Kar Koer or that she knew of the compromise and its effect. In fact, it appears that Kar Koer did not acquiesce in the award, and the opposite party had to apply to the Civil Court under the provisions of section 327 of Act X of 1859 (the law that regulated at the time the procedure of the Civil Courts in India) for a decree on the award. The court of first instance held that all the proceedings in connection with the compromise and the award had been without Kar Koer's knowledge. It accordingly dismissed the application of the agnates under section 327.

They appealed to the District Judge, who apparently considered that as Rajender, her husband, was a party to the compromise, her denial could not be believed. He accordingly made a decree "to have the award filed and enforced under section 327." From this decision Kar Koer preferred a "special appeal" to the High Court of Calcutta, which was dismissed. She then applied for a review of judgment in which she was equally unsuccessful. The result of these decisions was to put her out of possession of the properties covered by the compromise, and which form the subject-matter of the present action. Although the respondents or their predecessors appear

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to have obtained possession of these properties after the proceedings in the High Court, which terminated in 1865, their names were not registered in the Collectorate in substitution of Radha Koer until 1877.

It is to be noticed that neither in the judgment of the District Judge nor in that of the High Court is there any reference to the right of Kar Koer's infant son or to the effect of the compromise which culminated in the award on his reversionary interest. Had the question been presented in any shape to the courts that were dealing with the matter, it is hardly likely their judgments would not have contained some expression as to whether the compromise and the award based thereon were or were not for the benefit of the reversioner.

In this action the plaintiff charged that the arbitration proceedings, together with the compromise and award, were fraudulent and taken and entered into without the knowledge or authority of Kar Koer, that in any event he was not bound by them. The defendants, on the other hand, among other pleas urge that the award and decree precluded the plaintiff from maintaining the action. The Subordinate Judge of Patna, before whom the suit came for trial in the first instance, framed a number of issues on the several allegations of the parties, most of which have become immaterial in view of the shape the case took on appeal to the High Court. The Trial Judge, in a well-reasoned and exhaustive judgment, held in substance that Jhamman at the time of his death was separated from his agnates; that the defendants had failed to prove the custom they alleged relating to the exclusion of widows and daughters; and that the plaintiff was not properly represented in the arbitration proceedings or in the proceedings before the Civil Courts, and was not bound by the award or the decree based thereon. He accordingly decreed the plaintiff's claim.

From this decree the defendants appealed to the High Court of Calcutta, where the case proceeded on the assumption that Jhamman was separate from his agnates, and that assumption has not been challenged before this Board. The contest in the High Court turned solely on the binding effect of the award and the decree enforcing it on the rights of the infant reversioner.

The learned Judges state thus the questions they had to determine, *viz* :—

"(1) Whether Rajender Singh had power to refer the matter on behalf of his minor son to arbitration; (2) whether the plaintiff was properly represented in the proceedings in the Civil Court under Section 327 of Act VIII of 1859; and (3) and if he was, whether he can now treat the decree, which was based on the award, as a nullity, and claim possession of these properties at this distance of time."

After answering the first two questions in the affirmative, the learned Judges decided the third against the plaintiff, and reversing the decree of the Subordinate Judge, dismissed the plaintiff's suit.

Their Lordships are unable to concur in the propositions on which the learned Judges of the High Court have based their judgment. With respect, in proceeding to consider whether Rajender Singh, the plaintiff's father, had power to refer the matter on behalf of his minor son to arbitration, they seem to have misconceived the legal position of the infant under the Hindu Law. Evidently they thought he had a right which could form the subject of bargain. This is an obvious mistake; a Hindu reversioner has no right or interest *in presenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto. Rajender's action, therefore, in referring to arbitration any matter connected with his son's reversionary interest was null and void.

The learned Judges seem also to have lost sight of the fact that the award actually made was based on the compromise; it gave effect to the agreement at which the parties had arrived. Even had the minor an existing right, the father would have no power to enter into an arrangement which wiped out all his interest without any consideration, for the little property that was left to Kar Koer was taken by her under the compromise, and not by virtue of her right to her father's estate. It is difficult to see how the learned Judges came to the conclusion that the compromise was to the benefit of the minor.

Apart from the question whether Rajender could represent his son under the proceedings under section 327 of Act VIII of 1859 without a certificate under section 3 of Act XL of 1858 on which their Lordships desire to express no opinion, it is abundantly clear that the Civil Courts did not purport in any shape or character to deal with or adjudicate upon the reversionary right of the infant. The decree enforcing the award was based on the finding that Kar Koer had acquiesced by her husband in the reference to arbitration, and that she had similarly consented to the compromise, and was therefore bound by the award. Beyond that the order of the District Judge, which was affirmed by the High Court, did not go; it affected her interest, and her interest only.

It may be noted here that on the appeal to the High Court the minor was not a party.

In the present appeal it has been attempted on behalf of the respondents to sustain the decree of the High Court on the basis of the *dictum* of the Judicial Committee in the well-known *Shivagunga Case**, where, dealing with the question under what circum-

* *Katama Natchiar v. Srimut Raja Mootoo Vijaya*, (9 Moo. I. A., 539).

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stances a decree against the widow may bind the reversioners, the Board expressed itself thus:—

“that unless it could be shown that there had not been a fair trial of the right in that suit, or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to Angamootoo. For assuming her to be entitled to the Zemindary at all, the whole estate would for the time be vested in her, absolutely for some purposes, though in some respects for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the courts of this country as to tenants in tail representing the inheritance would seem to apply to a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.”

In the present case their Lordships think it enough to say that the proceedings culminating in the decree by which the plaintiff is sought to be bound are entirely devoid of the conditions on which and which alone a reversioner can be shut out from the assertion of his right, which comes to him altogether independently of the female owner.

Their Lordships are of opinion that the judgment and decree of the High Court should be reversed and the decree of the Subordinate Judge restored. And they will humbly advise His Majesty accordingly. The appellant will have his costs in the High Court and in this appeal.

A. P. P.

Appeal allowed.

Watkins and Hunter:—Solicitors for the appellant.

Barrow Rogers and Nevill:—Solicitors for the respondents.

TARINI CHARAN SARKAR (*Appellant*)*versus*BISHUN CHAND AND OTHERS (*Respondents.*)

Bengal Land-Revenue Sales Act (II of 1859), sections 31 and 53—Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by the proprietor from dishonest motives—Code of Civil Procedure (Act V of 1908), sections 107 and 151—Order 41, rule 33—Powers of the Court of Appeal—Estoppel.

The Bengal Land Revenue Sales Act (II of 1859), section 31 provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the court; but the section nowhere transfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.

Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims, and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property, are those under section 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.

In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the *benamidar* of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The

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High Court heard all the appeals together, and affirming the finding of the court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds:—

Held: that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumstances relating to the sale, the court had abundant power under sections 107 and 151, and Order 4, rule 33, of the Code of Civil Procedure, 1908, to vary, as it did, the decree in the prior mortgagee's suit; *Held*, also, that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suits, and obtaining consequential relief.

APPEALS from a judgment of the Calcutta High Court (CHITTY and TEUNON, JJ., dated the 25th April, 1912, modifying one and affirming two other decrees made by the Subordinate Judge of Arrah. The facts of the case sufficiently appear from their Lordships' judgment.

De Gruyther, K. C., (with him *J. M. Parikh*), for Tarini Charan Sarkar, appellant.—Bishun Chand was estopped from impeaching the revenue sale. He was a party to the suit brought by Sri Kishun but did not plead therein that Tarini Charan and not Sangam was the real owner of the property. Instead of insisting that all mortgages should be paid out of the mortgaged property Bishun Chand allowed a decree to be made against the surplus sale proceeds only. He cannot say in one suit that the sale encumbrances are enforceable against the sale proceeds and in another that they are enforceable against the estate. (Reference was made to the Bengal Land-Revenue Sales Act, 1859, sections 31, 37 and 53, and, the Transfer of Property Act, (IV of 1882) section 73).

Dunne, K. C., (with him *B. Dube*), for Bishun Chand, respondent, was not called upon to argue Tarini's appeal but was asked to open Bishun Chand's appeal: Both Ramratan and Sri Kishun were entitled to be paid out of the sale proceeds only, as they treated the revenue sale as valid in every way. Sri Kishun's decretal money was recoverable under the decree of the Subordinate Judge from sale proceeds only. The High Court had no jurisdiction to modify the decree and make the mortgaged property liable at the instance of counsel for Tarini, who had not appealed. Under Section 31 of Act XL of 1859 Sri Kishun was entitled to treat the revenue sale as valid and to recover his mortgage money from the revenue sale proceeds. Tarini fraudulently brought the revenue sale and is not entitled to any equity. It is not open to the High Court to vary the decree under the Code of Civil Procedure except by an appeal for the purpose. Although the appeals were heard

together the findings in one appeal could not be used to influence the judgment in another appeal.

De Gruyther K. C., submitted that the High Court had ample jurisdiction to make a proper decree upon the facts proved before it. All the parties were before the court. Reliance was placed on sections 107 and 151 and Order 41, rule 33, of the Code of Civil Procedure, 1908. Reference was made to

Tricomdas v. Gopinath, [1916] L. R., 44 I. A., 65.

The judgment of their Lordships was delivered by

LORD BUCKMASTER.—These four appeals have been consolidated by order of the Board, dated the 26th March, 1917, and have been brought on and heard together.

In three of them Tarini Charan Sarkar is the appellant and Babu Bishun Chand is one of the respondents, and in the fourth Babu Bishun Chand is the appellant and Tarini Charan Sarkar is a respondent.

All the appeals are against a judgment of the High Court of Calcutta, dated the 25th April, 1912, and three decrees made by that court consequent on the judgment.

The questions raised arise out of certain mortgage transactions affecting a Tahal Touzi No. 7,062 and, though the facts and circumstances are complicated and involved, for the purpose of explaining the real issues that have to be decided they can be briefly summarised.

In the early part of 1904 the registered proprietors of the said Touzi were Ram Ratan Sarkar in respect of a 4-anna share, and Sangam Sarkar in respect of the remaining 12-anna share. The Touzi, however, was subject to certain mortgages, of which it is only necessary to mention the following: *Zarpeshgi* Thicca of the 15th July, 1889, in favour of Gajadhar Lal and Sri Kishun Lal to secure 11,506 rupees and interest at 9 per cent. per annum, a further mortgage in favour of the same mortgagees dated the 16th July, 1889, to secure 11,000 rupees and interest at the rate of 12 annas per cent. per month and a mortgage of the 10th February, 1896, in favour of the said Babu Bishun Chand to secure a loan of 5,999 rupees with compound interest at the rate of 24 per cent. per annum with half-yearly rests. In the year 1900 a 4-anna share of the estate was sold in execution of a mortgage decree and was bought on the 8th August, 1900, by Ram Ratan Sarkar, and on the 7th March, 1904, the said Touzi estate was purchased on a sale made in execution of a decree at the suit of another mortgagee by one Chatarbhuj Sahai in the name of one Mahanand Sahai, and he, on the 14th May, 1904, purported to sell the property to one Sangam Sarkar. Sangam Sarkar was, however, but a mere name, it has been found, and it cannot now be questioned that the real purchaser was

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the appellant, Tarini Charan Sarkar, who thus became the owner of the property subject to the mortgages.

On the 2nd June, 1904, the first of the suits, out of which these appeals proceed, No. 39 of 1904, was instituted by Babu Bishun Chand seeking relief in respect of his mortgage of the 10th February, 1896, against the representative of the original mortgagor and other parties. It would seem impossible that any estate could bear for long the burden of a mortgage on which the debt was accumulating by a process of compound interest on the principal sum at the rate of 24 per cent. per annum; and it appears that the appellant Tarni Charan Sarkar, instead of adopting what might have then been the inconvenient process of redeeming the mortgage by payment, resorted to the device of causing the mortgaged property to be sold for arrears of Government revenue and himself becoming the purchaser. To secure this object he wilfully allowed the Government revenue to fall into arrear, and the property was in consequence sold by the Government on the 28th August, 1906, nominally as the property of Ram Ratan Sarkar and Sangam Sarkar, the registered proprietors, and was purchased for 29,500 rupees by Tarini Charan Sarkar, the true owner. Had Tarini Sarkar been successful in concealing the fact of his ownership the result of this device would have been that the claim of all the mortgagees would have been thrown on to the balance left of the 29,500 rupees—after satisfying the Government debt; and he would have held the property free from the inconvenience of the many and heavy charges to which it was subjected. Directly after the sale—on the 22nd October, 1906, Sri Kishun Lal and others instituted proceedings (No. 258 of 1906) to obtain payment in respect of the mortgage of the 15th July, 1889, seeking to obtain payment out of the surplus proceeds of the money due under the mortgages, the amount of which was stated to be, at the date of the proceedings, 15,983 rupees. To these proceedings Babu Bishun Chand was by an order dated the 17th January, 1907, added as a defendant. On the 2nd December, 1907, Bishun Chand instituted his second suit, No. 153 of 1907, alleging that the purchase of the estate on the 14th May, 1904, was really made by Sangam Sarkar, *benami* for Tarini Charan Sarkar, that the sale for arrears of Government revenue had been fraudulently effected by the said Tarini Charan Sarkar, and asking either that the sale should be set aside or that his mortgage of the 10th February, 1896, should still remain valid and operative against the estate. In the first suit, No. 39 of 1904, the usual mortgage decree was made on the 6th January, 1905, but it was set aside on the 18th April, 1907, and another trial was ordered. This took place on the 30th June, 1909, when the usual mortgage relief was granted.

In the second suit by Sri Kishun Lal and others judgment was delivered on the 23rd December, 1907, and a decree made in favour

of the plaintiffs directing that the money due on the mortgage with interest and costs should be paid out of the surplus proceeds of sale. At the date of this decree the sale itself had become a subject of attack, and consequently the further provision was introduced that, in the event of the sale being set aside, the mortgage monies, interest, and costs should be realised by sale of the mortgaged property if the sum were not paid within six months from the date of decree.

The said Tarini Charan Sarkar did not appeal against this decree, but Babu Bishun Chand did, and the appeal came on for hearing together with the appeal by Tarini Charan Sarkar in the two suits commenced by Bishun Chand and an appeal by Sangam Sarkar in the suit No. 153 of 1907.

On the 25th April, 1912, the High Court delivered judgment, dismissing all the appeals; but at the instance of counsel who appeared for Tarini Charan Sarkar they varied the decree of the Subordinate Judge, in the suit by Sri Kishun Lal, by setting aside the direction that his mortgage monies should be paid out of surplus monies of the revenue sale and made in its place the ordinary decree against the property itself. It is this latter part of the decree that is challenged by the present appeal of Bishun Chand.

Before dealing, however, with his contention, it is desirable to dispose, in the first instance, of the appeals of Tarini Charan Sarkar. He stands in this position: He is held to have been the real owner of the estate Touzi 7,062 at the date of the sale of the 28th January, 1906, and it is further established by the findings, both of the Subordinate Judge and of the High Court that he deliberately allowed the Government revenue to fall into arrear in order that the property might be sold, and that he succeeded in purchasing it himself at an under-value under circumstances which concealed his original ownership, and appeared to establish an independent sale to an independent third party, so that all the claims of the mortgagees, beyond the amount that would be satisfied by the surplus proceeds of sale, would be wholly defeated.

These grave and serious charges are therefore supported by the concurrent findings of both the courts, and no grounds whatever can be shown for disturbing these decisions. Counsel for Tarini Charan Sarkar undoubtedly realised this difficulty, and refrained from attacking the substance of the judgment, but said that it was one which Bishun Chand had no right to claim, because he was estopped by his own conduct from seeking any such relief.

This estoppel is said to be effected by his action as a defendant in the suit brought by Sri Kishun Lal and his co-mortgagees. This suit, it will be remembered, was brought after the revenue sale and sought relief against the proceeds. In that suit the plaintiffs alleged that there had been intentional default in payment of the

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Government revenue, but they made no reference to the fact that Tarini Charan Sarkar was the real owner, a fact of which they were probably unaware, and which in any event was wholly immaterial to them, since the money in court was sufficient to satisfy their claims. Bishun Chand was only made a party to this suit as an encumbrancer upon the property. He had no power of controlling the form in which the suit was brought, nor was there any step which he took in the suit irrevocably asserting his intention to rely upon the sale and not impeach the whole proceedings. In these circumstances, it is obvious that no estoppel arises as against him, and as this is the only ground upon which the appeal of Tarini Charan Sarkar is or can be based, it follows that it must fail.

There remains the question of Bishun Chand's appeal, and the question to which that gives rise is one of more general importance. On his behalf it is alleged that Sri Kishun Lal and his co-mortgagees are entitled to be satisfied out of the proceeds of sale, and that, if these are sufficient for the complete satisfaction of their mortgages, their encumbrances are removed from the property, with the result that there is a more abundant security for Bishun Chand's claim; that, in fact, the proceeds of the first sale to the extent of Sri Kishun Lal's claim, are to be added to the proceeds of the sale made under the decree of the High Court, so as to make one fund out of which the mortgage debts may be satisfied.

In order to examine the value of this contention, it is necessary to look at "The Land Revenue Sales Act," No. XI of 1859, by which the rights of the parties are regulated. Section 31 of that Statute provides that the purchase monies, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the court.

It is to be observed that this section nowhere transfers the charges from the property to the proceeds; but, as the sale by the Government conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section referred to, and the court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in court.

It was a decree under this section that was obtained by Sri Kishun Lal, and it of course proceeded upon the assumption that the sale had been made to a *bona fide* third party. Section 53 regulates what happens when the property is bought by the recorded proprietor, and in that case it is enacted that the estate is acquired subject to all its encumbrances existing at the time of the sale. In such a case, therefore, the encumbrances are left entirely unaffected; the transaction of sale has merely provided money for payment of the Government claims, and the estate remains as it was before.

Were such a purchase honestly and openly made it was not disputed that the claims against the purchase money could not remain in addition to the claim against the estate. The appellant, however, says that in the present case the owner cannot claim this method of administration. He asserts that as it was by the fraud of Tarini Sarkar that the whole transaction was set on foot he is in a worse position than if he had become the purchaser on a sale made against his will.

Their Lordships are certainly not prepared to assist in providing any possible benefit for a course of conduct so dishonest as that revealed in this case but, on the other hand, it is not right to punish a man for fraudulent behaviour by making him suffer other penalties than those which are the direct consequence of his fraud. In the present case it is impossible to see how the position has been aggravated by the fact that the sale was effected for the purpose of defeating the mortgagees. The Act distinctly contemplates the purchase of property by a recorded proprietor, and the rights that arise in such a case are those which have been already mentioned. Their Lordships are unable to see why those rights should be increased against the purchaser because of the motives which led him to cause the sale or the purchase. The only effect of the statute is that, so far as the encumbrances are concerned, the sale is of no effect.

It is then urged that the Court of Appeal had no power to vary the order made in Sri Kishun Lal's suit, since he did not request such variation, nor were the facts relating to the sale proved and established in any suit to which he was a party.

Their Lordships think it would have been a matter for regret if the Court of Appeal had been thus hampered in making the order, which their Lordships regard as right in all the circumstances of the case. But they think abundant power is given to the court by sections 107 and 151 of the Code of Civil Procedure of 1908 and Order 41, rule 33 of the same statute. Section 107 gives power if necessary, to take additional evidence; and rule 33 of Order 41 gives power to pass any decree and give any orders which ought to have been passed or made, and to pass or make such further or other decrees or orders as the case may require.

On hearing the appeal in Sri Kishun Lal's suit, the court had before it the facts that showed all the circumstances relating to the sale. Sri Kishun Lal seems to have raised no objection to the variation of the order, and does not appear here on appeal against it. It is Bishun Chand, in whose suit all the facts were established who seeks, on the one hand, to retain a judgment based upon the view that the sale was regular, and, on the other, to get the benefit of the decree which determined that it was not. There is certainly nothing in the statute which gives him such rights, and there is no equity

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to which he can appeal which entitles him to their possession. This appeal must therefore also fail.

It may be doubted whether in the end any property will be left for the real owner. Bishun Chand's mortgage runs at 24 per cent compound interest with half-yearly rests. It began at 5,000 rupees, and in the hearing before the court it amounted to 40,000; and the long delay, amounting to five years, that has elapsed in prosecuting this appeal has more than doubled the amount. Usury and the abuse of legal procedure are formidable and dangerous combination to the well-being of any community. The former is one which it is not easy to repress, but the latter ought not to be incapable of remedy. There seems to be no lack of expedition in the courts in disposing of cases when once entered for hearing. The delay is associated with dilatoriness in procedure and apparent unwillingness on the part of persons who have the control of litigation to bring it to a speedy conclusion.

Eleven years have elapsed since Bishun Chand first instituted the proceedings in respect of his mortgage, and more time must pass by before the accounts are finally worked out and his claim ends; and having regard to the rate at which his debt accumulates, in a short time the amount might reach the total wealth of the entire province.

All the appeals, therefore, fail, and in all the circumstances their Lordships think there should be no costs on either side. They will humbly advise His Majesty to this effect.

A. P. P.

Appeal dismissed.

E. Delgado :—Solicitor for the appellant (Tarini Charan Sankar.)

Barrow, Rogers and Nevill :—Solicitors for the respondent (Bishun Chand.)

HIGH COURT.

MAHU AND OTHERS

versus

EMPEROR.*

CRIMINAL

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RICHARDS,
C. J.

*Criminal Procedure Code (Act V of 1898), section 107—Wrongful act—
Jurisdiction of Magistrate to order security to be given.*

Where there was already a cattle market and certain persons intended to open another cattle market upon their own land not far from the older market and the Magistrate apprehending that there would be a breach of the peace consequent thereupon bound over the latter under section 107 of the Code of Criminal Procedure, *held* that the order was illegal, the section being confined to cases where the Magistrate was informed that a person was likely to commit a breach of the peace or to do any wrongful act which may occasion a breach of the peace.

CRIMINAL REVISION from an order of MAULVI ISLAM NABI KHAN, Magistrate First Class of Aligarh.

Satya Chandra Mukerji, for the applicants.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

RICHARDS, C. J.—In this case the Magistrate has made an order under section 107 against the applicants. It appears there is a cattle market at a certain place not very far from land which is owned by the applicants. The Magistrate had reason to think that the applicants intended to open a market upon their land for the sale of cattle. He thought and I agree with him that this circumstance would very likely cause a breach of the peace. What would most likely happen was that the owners of the older market would raise objection to the new market and that the applicants as owners of the land upon which the new market would be held would resist the action of the owners of the older market. The section however provides that where the Magistrate is informed that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act which may occasion a breach of the peace or disturb the public tranquillity the Magistrate may then make the order. It is not pretended that the Magistrate was informed that any of the applicants intended to commit a breach of the peace. He was only informed that they intended to hold a market on their own land. If this act was wrongful act then the Magistrate would be entitled to act. But it is not contended that the act would be wrong. Under these circumstances I do not think that the order could legally be made. I accordingly allow the application and set aside the order of the Magistrate.

Richards,
C. J.

Application allowed.

CRIMINAL

1918

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RICHARDS,
C. J.

MAHABIR AND OTHERS

versus

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Criminal Procedure Code, (Act V of 1898), section 107—Accused convicted of riot by Magistrate first class—Conviction affirmed by District Magistrate—Security for good behaviour ordered—Particular individual ordered to be surety—Jurisdiction.

A District Magistrate has no jurisdiction in affirming a conviction for riot to order the accused to give security to be of good behaviour nor has he jurisdiction to order that a particular individual should be a surety.

CRIMINAL REVISION from an order of R. H. WILLIAMSON ESQ., District Magistrate of Basti.

Satya Chandra Mukerji for the applicants.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Richards,
C. J.

RICHARDS, C. J.—The applicants were charged under section 147 of riot and convicted by a Magistrate of the second class on the 31st of October, 1917. The accused appealed and on the matter coming up before the District Magistrate of Basti, on the 5th of November, 1917, he confirmed the order of the court below but in addition to that he ordered the accused to furnish security to be of good behaviour and that one of the sureties must be a certain lady. Apparently the District Magistrate thought that the riot had been either instigated by or had been made on behalf of the lady and that therefore she would be a very good person to give security. The order directed that the security should be for good behaviour. This was clearly a mistake because the District Magistrate would have no jurisdiction in appeal from conviction to order an accused person to give security to be of good behaviour although he might no doubt order security to "keep the peace". It is admitted on both sides that this error must be corrected.

A further objection is taken to the order that the District Magistrate had no jurisdiction to direct that one of the sureties must be a particular individual. The Assistant Government Advocate admits that he cannot support this order and I am also of opinion that the order directing that a particular person must be one of the sureties is not a valid order. I accordingly vary the order of the learned District Magistrate in this way. The applicants will themselves execute bonds in the sums of Rs. 200 with two sureties in like sums to keep the peace for one year in each man's case, from the date of the expiration of one month's rigorous imprisonment imposed for the offence. In default I direct simple imprisonment for the remainder of the year.

Order modified.

PRIVY COUNCIL.

METHARAM RAMRAKHIOMAL AND OTHERS (*Plaintiffs*)*versus*BEWAOHAND RAMRAKHIOMAL AND OTHERS (*Defendants*).

Hindu Law—Mitakshara—Joint family—Self-acquired property—Gains obtained from an education received at the expense of the joint family—Partibility of—Science acquired at the expense of ancestral wealth—Special and general education

Although the Mitakshara lays down that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father," this does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education-exercised by the person educated at the expense of the joint family. There is no authority in the Mitakshara for the proposition that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self-acquired property.

APPEAL from a decree of the Court of the Judicial Commissioner of Sind, confirming a decree of a single Judge of the court, exercising jurisdiction as the District Court of Karachi.

The facts of the case are sufficiently set out in their Lordships' judgment. The suit was brought by appellants for a declaration that property which one Shewaram purported to devise as self-acquired was the joint property of a Hindu joint family to which he and they belonged and that the will passed no title to it. Both the lower courts held that the property in question was self-acquired. Leave to appeal to the Privy Council was granted on the ground that the appeal involved a substantial question of law, which had been expressly left open by the Board in *Pauliem Valloo v. Pauliem Sooryah*, [1877] 4 I. A., 109, *viz*, whether a mere general education such as Shewaram received was sufficient according to Hindu Law to constitute his earnings joint family property.

P.O. Lawrence K. C. (with him *E.B. Raikes*), for the appellants.—
I put first the broad proposition that a general education imparted

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at the expense of the family makes the "gains of learning" of the person who receives it partible. The Mitakshara Chapter I, Section IV, clauses 1-11 (Colebrook's edition, pp.25-28) deals with effects not liable to partition. Clause 1 lays down the general rule that anything acquired by a man himself without detriment to the father's estate does not appertain to the co-heirs. This general rule runs throughout the section: the gains of science are separate only if the science is acquired without use of the father's goods (Clause 6). The vernacular of science is *vidya*: science then meant knowledge of the Vedas, the only knowledge of those times: it is equivalent to education. The illustration given in Clause 8 is that of science acquired when receiving a foreign maintenance: gains derived from such science are not participable. Science there means any knowledge gained at the family expense, even reading and writing.

[SIR W. PHILLIMORE.—Or do you mean any knowledge or training which is exceptional for his position?]

No: I would put it as any knowledge which has to be paid for.

To the same effect as the Mitakshara is the Mayukha Chapter IV, Section VII, paras. 2, 4.

[SIR LAWRENCE JENKINS.—Does the Mayukha apply in Sind?]

I am rather doubtful: but it merely follows the Mitakshara on this point. The authority of the Mayukha in Western India is discussed in Mayne's Hindu Law, para. 28. (p. 29 of 8th edition).

[SIR LAWRENCE JENKINS.—I think its authority only extends to Bombay Island and Gujrat. Sind has nothing to do with Gujrat: it is a mere accident of administration that it is associated with Bombay.]

In some of the earlier judgments the courts came to the conclusion that although science included general education, yet if a son blossomed out into a particular line, his gains from that would not be partible. The first case of importance was

Chalakonda Alasani v. Chalakonda Ratnachalam, [1861] 2 Mad. H. C. R., 56,

which laid down that the gains of science were indivisible only when the science was imparted at the expense of persons not members of the learner's family.

It was the case of a dancing girl specially educated at the expense of the joint family for her trade. The District Judge, Mr. Collett, in an elaborate judgment, came to the conclusion, on the Sanskrit authorities, that the gains of the dancing girl were impartible: but his judgment was reversed by the Madras High Court (PHILLIPS and HOLLOWAY, JJ) who held that the gains of science imparted at the family expense are joint property.

HOLLOWAY, J., at p 78 seems to distinguish between ordinary and extraordinary gains.

In

Dhupookdharee Lal v. Gunput Lal, [1868] 10 W. R., 122 ; 11 Ben.

L. R., 201, Note,

the Calcutta High Court took a contrary view to Madras, and held that the fact of defendant having been educated at the expense of the joint family did not necessarily make his gains acquired by the aid of such education joint: but the facts of the case do not appear from either of the reports.

In

Bai Manchha v. Narotamdas Kashidas, [1869] 6 Bom. H. C. R., 1, the Bombay High Court followed the Madras decision. A later decision in Madras to the same effect was

Durtasula Gangadharadu v. Durtasula Narasammah, [1872] 7 Mad.

H. C. R., 47,

where it was held that the professional gains of a Vakil who had received a general education at the family expense were joint.

[SIR JOHN EDGE.—The education required for a High Court Vakil must have been less in those days. A High Court Vakil nowadays requires a very special education, more than is generally understood—more I think than is needed to be called to the Bar.]

Then came the judgment of this Board in

Pauliem Valloo Chetty v. Pauliem Sooryah Chetty, [1877] 4 I. A., 109,

where the point was discussed but explicitly left open, and since then there seems to have been a reluctance on the part of the Judges in India to follow the earlier decisions, which I submit are right and would ordinarily be binding. There have been four cases since.

Booloogam v. Swornam, [1881] I. L. R., 4 Mad., 330 ;

Lakshman Mayaram v. Jamnabai, [1882] I. L. R., 6 Bom., 225,

where for the first time a distinction is drawn between special and general education.

Krishnaji Mahadev v. Moro Mahadev, [1890] I. L. R., 15 Bom., 22 ;

Lachmin Kuar v. Debi Prasad, [1897] I. L. R., 20 All., 435.

I submit that all these four later cases were wrongly decided and that the proper interpretation of the article of the *Mitakshara* laid down in the earlier decisions has not been adhered to. My submission is that the true meaning of "science" is that given to it by the courts before the Privy Council decision, that it is equivalent to ordinary knowledge.

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In 1891 a bill was brought forward to make the gains of education impartible but it created so much sensation that Government dropped it. The state of the law which that bill was designed to alter is the state of the law for which I contend.

Counsel further submitted on the facts that even if the property in suit were originally separate, there was an agreement by Shewaram to throw all his funds into the joint purse.

Raikes, followed :—Under the *Mitakshara* maintenance plus any education would be a detriment to the family purse. The decisions which take the other view have come about partly through the Board's observations in *Pauliem v. Pauliem* (s. c.), and partly through Mayne's observations based on the *Dayabhaga*. Till 1877 the decisions were unanimously in my favour then came this Board's judgment in *Pauliem v. Pauliem*: and in 1878 the first edition of Mayne's *Hindu Law* appeared. Mayne deals with the matter in para 283. The view he there propounds, so far as it deals with the construction of *Mitakshara* I. 4, 8, is an innovation introduced from the *Dayabhaga*: it has no proper place in the Western School of law. Mayne's observations are cited and misunderstood in

Lakshman Mayaram v. Jamnabai, [1882] I. L. R., 6 Bom, 225 at pp. 242, 243.

Secondly, this is not a case where the learner received only the same education as the rest of the family. He had a better education than his elder brother: nor is it material that his younger brothers received the same education as himself

When the education was given none of these cases except *Bai Manekha v. Narottamdas Kashidas*, (1869—s. c.) had been decided. Shewaram and Metharam may have been doubtful as to the legal position; the arrangement between them, even if invalid as a contract for want of consideration, may have been good as a compromise. Till 1888 Shewaram never asserted self-acquisition.

The Board intimated that they did not desire to hear arguments for respondent, but would be obliged if respondent's counsel could refer them to any other authorities.

De Gruyther K. C., thereupon referred to Sir Thomas Strange's *Hindu Law*. Although the *Mitakshara* is in terms a commentary, yet as regards the people to whom it applies it is the law and you start from it. The texts on which the question depends are cited in Mr. Collett's judgment in 2 Mad. H. C., 56 at pp. 59 *et seq.* In *Manu* IX, *slokas* 206, 208 there quoted "without using the patrimony" means without using the family property in the actual exercise of your profession. So in *Mitakshara* Chapter I, section IV, paras. 10, 11, "to the detriment of the family estate" is equivalent to "without using the patrimony." This is made very clear in Strange's *Hindu Law*, at p. 213: "the essence of the

exclusion consists in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family."

[SIR W. PHILLIMORE.—Your argument would go to destroy all those cases about special education.]

That is not necessary for the decision of this case.

Strange, goes on to lay down (at p. 215) that the acquisition vests in the family only if the common fund has been *directly* instrumental: the emphasis is on the word '*direct*.' He has given as his authority certain passages in the Dayabhaga, but on the general question whether property is joint or self-acquired there is no distinction between the two.

[SIR W. PHILLIMORE.—But you say the *Mitakshara* is the law and we have to construe that]

You have to decide what is meant by "science" and "to the detriment of the family," and in construing those words it is legitimate to refer to another work of great authority. Those passages of the *Mitakshara* have also been translated by Sir W. Jones: he translates as "learning" what Colebrook renders as "science."

P. O. Lawrence, referred to

Durga Dat Joshi v. Ganesh Dat Joshi, [1910] I. L. R., 32 All., 305.

Their Lordships' judgment was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 24th June, 1910, of the Court of the Judicial Commissioner of Sind, which confirmed a decree, dated the 3rd April, 1908, of a single Judge of that court exercising jurisdiction as the District Court of Karachi.

Sir John
Edge.

The suit in which this appeal has arisen was brought in the court of the District of Karachi on the 26th May, 1905, by the appellants here, to obtain a declaration that the property which one Shewaram purported to devise by his will and a codicil was the joint family property of Shewaram, the plaintiffs and some of the defendants, and that the will and codicil were inoperative to pass any title to the property. Other reliefs were claimed to which it is not necessary to refer. The executors of the will were amongst the defendants to the suit.

Shewaram died on the 27th May, 1899. He had been and was at the time of his death a member of a joint Hindu family, which was governed by the law of the *Mitakshara*. The plaintiffs were members of the same joint family. The question in the suit was whether the property of which Shewaram purported by his will and codicil to dispose was property of the joint family or was property self-acquired by Shewaram which had not been thrown by him into the joint stock of the family property.

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The plaintiffs, Metharam, Shewaram, and the defendants, Rewachand and Hermandas, were sons of one Seth Ramrakhimal Jethanand, and they and others, parties to this suit, constituted a joint Hindu family. The family business was that of money-lending, and was carried on at Karachi, Seth Ramrakhimal being, until his death in 1884, the manager. On his death the money-lending business of the family was continued, and was carried on under the management of the plaintiff Metharam, who was the eldest son. Shewaram, who was the second son, was born in or about 1847. He was educated at the expense of the joint-family at the Government school at Karachi, which in the evidence is referred to as a High School. At that school Shewaram learned to speak and to write English. When he was 22 years old he became a pleader's clerk. He continued to be a pleader's clerk until 1878, when he entered the employment of Messrs. Volkart Brothers. He was subsequently in the employment of Messrs. Rose and Co., and in October 1881 he entered the employment of the firm of Charles Forbes and Co., as their head broker. With the latter firm he continued until he died in 1899. It may be assumed that the knowledge of English which Shewaram acquired at the Government school was of use to him as a pleader's clerk and in the other employments in which he was subsequently engaged. From the savings out of his salaries and brokerage, and from the profits which he derived from a money-lending business which he personally carried on, he acquired a fortune of about 2 lakhs and 50,000 rupees, which is represented by the property of which he purported to dispose by his will and codicil. The money-lending business which Shewaram personally carried on was started by him with capital derived from the savings out of his salary as a pleader's clerk, and without the aid of the joint fund.

In the plaint it was in effect alleged that the property of which Shewaram purported by his will and codicil to dispose had been acquired by him as a member of the joint family, and was joint family property of which he could not dispose by will, and alternatively that Shewaram had thrown his self-acquired property into the common stock with the intention that it should be treated as joint and not self-acquired property. In the written statements of the executors it was alleged that the property of which Shewaram had by his will and codicil disposed was his self-acquired property, and it was denied that Shewaram had thrown his self-acquired property into the common stock of the family. The learned Trial Judge fixed the following amongst other issues which are now immaterial:—

2. Did Shewaram acquire the property in suit with the assistance of joint family funds?
3. If not, did Shewaram join the property to the common ancestral property?

Those issues were agreed to by the parties. No issue was suggested or fixed as to the education which Shewaram had obtained, nor was it contended before the Trial Judge that the property in question had been acquired by Shewaram by means of any special or other education. The Trial Judge, having stated in his judgment that the evidence in the case "covers nearly every year of Shewaram's active life, and details every incident from which an inference can be extorted that Shewaram's property was the property of the family," considered the evidence fully and in detail, and found the second and third issues in the negative, and dismissed the suit. The plaintiffs appealed to the Court of the Commissioner, and in their grounds of appeal did not suggest that the education which Shewaram had received at the expense of the joint family had been such as to entitle the joint family to the gains made by him as a pleader's clerk or in his subsequent employments, or as a money-lender. When, however, the appeal came on for hearing in the Court of the Commissioner the learned counsel who appeared for the plaintiff-appellants contended, amongst other things, that it had been proved that Shewaram had obtained the posts from which he had derived his salary and brokerage through the general education which he had received from the joint family funds.

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There is no evidence on the record to show what was the nature of the education which Shewaram received at the school at Karachi. Had the plaintiffs been in a position to prove that his education had been of an exceptionally high standard and more expensive than the education which ordinarily would be provided for a member of such a family as he belonged to, they could have raised an issue on that subject and have called evidence in support of it. The learned Judges who heard the appeal considered that the English education received at the Government school at Karachi could not be regarded, for a well-to-do family, as more than a general education, and certainly was not a special education comparable with special training for the Bar or the Civil Service, and they concurred with all the material findings of fact of the Trial Judge, and by their decree dismissed the appeal. From that decree this appeal has been brought.

In this appeal it has been contended on behalf of the plaintiffs that in arriving at their findings on the second and third issues the courts below have misconstrued, a document in writing. The document referred to was a letter which was written by Shewaram to his brother Metharam, and was as follows:—

"My Dear Brother,

"I am ready to join my property with the family property, and take my share from it.

"SHEWARAM,"

"Dated 1st October, 1888."

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The Trial Judge construed that letter as a conditional offer. "If you will come to partition I shall join my fund to yours;" implying "If you don't come to partition, I shall not join them."

The plaintiffs endeavoured to prove by oral evidence that Metharam had asked Shewaram for a chit showing that the joint family fund and Shewaram's self-acquired fund were liable to be partitioned as a joint family fund, and that thereupon Shewaram wrote the letter of the 1st October, 1888. That story rested solely on the evidence of Metharam and Rewachand, and the Trial Judge entirely disbelieved it. The Judges who heard the appeal construed the letter as an offer made by Shewaram during negotiations for partition, and found that the offer was never accepted. The courts below rightly construed the letter. In their Lordships' opinion, Shewaram's letter affords strong evidence that on the 1st October, 1888, his contention was that the property which he had acquired was his self-acquired property, and was not the property of the joint family. If Shewaram had, before the 1st October, 1888, thrown his self-acquired property into the joint family fund there was no object in his writing the letter to Metharam, who was the manager for the joint family. In neither of the courts below did the Judges misconstrue the letter of the 1st October, 1888; and the plaintiffs are concluded, so far as conclusions of fact to be drawn from the evidence are concerned, by the concurrent findings of fact of those courts that the property in suit was the self-acquired property of Shewaram, and that Shewaram did not join his self-acquired property to the joint family property.

It has, however, been contended on behalf of the plaintiffs that as Shewaram had received an education in English at the school at Karachi at the expense of the joint family, the property which he acquired must be attributed to that education, and must in law be held to be the joint property of the joint family. That contention depends upon the interpretation of texts of the Mitakshara, which are to be found in section 4, chapter 1. Section 4 deals with effects which are not liable to partition. Those texts of the Mitakshara translated by Mr. Colebrooke are as follows:—

"1. The author explains what may not be divided, 'whatever else is acquired by the co-parcener himself without detriment to the father's estate, as a present from a friend, or a gift at nuptials, does not appertain to the co-heirs. Nor shall he who recovers hereditary property, which had been taken away, give it up to the parceners; nor what has been gained by science.'"

"5. He need not give up to the co-heirs what has been gained by him through science, by reading the scriptures, or by expounding their meaning; the acquirer shall retain such gains.

"6. Here the phrase 'anything acquired by himself without detriment to the father's estate,' must be everywhere understood; and it is

thus connected with each member of the sentence ; what is obtained from a friend, without detriment to the paternal estate ; what is received in marriage, without waste of the patrimony ; what is redeemed of the hereditary estate, without expenditure of ancestral property ; what is gained by science, without use of the father's goods. Consequently, what is obtained from a friend, as the return of an obligation conferred at the charge of the patrimony ; what is received at a marriage concluded in the form termed *Asura* or the like ; what is recovered of the hereditary estate by the expenditure of the father's goods ; what is earned by science acquired at the expense of ancestral wealth ; all that must be shared with the whole of the brethren and with the father."

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The Sanskrit word which Mr. Colebrooke translated as "science" was translated by Sir William Jones as "learning."

The earliest case, to which their Lordships have been referred, decided in India on the meaning of those texts of the *Mitakshara* was *Chalakanda Alasani v. Chalakanda Ratnachalam* (1). That case was decided by the High Court of Madras in 1864. It was a very peculiar case. The plaintiff and the two defendants were dancing girls and constituted a Hindu joint family. The first defendant was the plaintiff's adopted daughter, the second defendant was the plaintiff's natural daughter. The plaintiff brought the suit to obtain possession, as the manager of the joint family, of gold and silver jewels and other personal property which represented gains of the first defendant in her calling of a dancing girl, she also claimed certain household utensils and some other minor articles. The plaintiff had spent a considerable amount of money in educating the first defendant in singing and dancing.

MR. COLIETT, who, as the Civil Judge of Vizagapatam, tried the suit, having in a learned judgment considered several Sanskrit texts, as translated, including the texts of the *Mitakshara*, *Manu*, *Yajnavalkya*, *Narada*, and the *Dayabhaga* and the works of some modern writers on Hindu Law. said :—

"I am sure I am laying down an equitable rule, and I believe also the rule most consistent with the weight of authority. There is no doubt some conflict of opinion ; but I think that the true position is that the mere fact of a Hindu having received a professional education at the expense of his family, as for instance from his father, does not render all his subsequent professional earnings liable to be divided with his brothers. I believe that on a due consideration of the authorities the rule of law is not really different in respect to property acquired by learning to what it is in respect to property acquired by agriculture or by trade. The test is the substantial use of joint property during and for the purpose of the acquisition, if there is none such, then the acquisition does not become joint property."

(1) [1864] 2 Mad. H. C. R., 55.

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MR. COLLETT made a decree in favour of the defendants with the exception of the house-utensils and some other minor articles. From that decree the plaintiff appealed to the High Court of Madras. PHILLIPS AND HOLLOWAY, JJ., in their judgment in the appeal, said:—

"We are constrained to say that we feel bound by authority to hold that the gains, at all events the ordinary gains of learning and science which have been taught at the expense of the family funds, are not impartible. To render them so the science or learning must have been imparted by persons not members of the learner's family."

and they allowed the appeal.

In *Dhunookdharee Lall v. Gunputt Lall* (1), which was decided by the High Court of Bengal in 1868, the defendant proved that in acquiring the property, which was alleged to be joint property, he did not use any of the property which belonged to the joint family, and L. S. JACKSON and DWARKANATH MITTER, JJ., in appeal dismissed the suit. DWARKANATH MITTER, J., added:—

"His (the plaintiff's) case in the court below was that the defendant received his education from the joint estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindu Law, and I see nothing in justice to recommend it."

In *Bai Manchha v. Narotamdas Kashidas* (2), which was decided by the High Court of Bombay in 1869, one Jamnadas, a deceased member of a joint Hindu family, had made money as a vakil and as a money-lender, and it was held by COUCH, C. J., and NEWTON, J., that the onus of proving that the property so acquired by Jamnadas was his self-acquired property was upon the party alleging that it had been self-acquired. Those learned Judges approved of the judgment of the High Court of Madras in *Chalakonda Alasani v. Chalakonda Ratnachalam* (3).

In *Durvasulu Gangadharudu v. Durvasula Narasammah* (4), which was decided by the High Court of Madras in 1872, it was proved that a vakil had received from his father nothing more than a general education, and it does not appear that the vakil was distinguished by his professional learning. KINDERSLEY J., considered that the fair presumption was that such attainments as the vakil possessed had been acquired with the assistance of the family means, and that presumption not having been rebutted by evidence of the acquisition of such attainments without such assistance, he held that the professional earnings of the vakil were subject to partition. The judgment of KINDERSLEY, J., suggests that he considered that if the professional gains of the vakil had not been

(1) [1868] 10 W. R., 122

(2) [1869] 6 Bom. H. C. R., 1.

(3) See *Supra*.

(4) [1872] 7 Mad. H. C. R., 47.

merely the result of the general education which he had received at the expense of the joint family to which he belonged, but had been the result of much legal learning or skill, his professional gains would have been his self-acquired property. HOLLOWAY, J., entertained no doubt that the fund representing the professional earnings of the vakil was partible, and expressed his full adherence to the judgment of the High Court of Madras in *Chalakonda Alasani v. Ratnachalam* ⁽¹⁾, and especially to the statement in that case, that the ordinary gains of science by one who has received a family maintenance are certainly partible, and concluded his judgment by observing, "I do not believe, moreover, that within the meaning of the authorities the vakil's business is matter of science at all."

Apparently HOLLOWAY, J., regarded the learning in the law required by a vakil of his day as inferior to the science necessary to her success in her line of life of an Indian dancing girl.

In *Pauliem Valloo Chetty v. Pauliem Sooryah Chetty* ⁽²⁾, which came before this Board in 1877, the Board, on the evidence, found that the son had not been educated by means of any joint fund of the family, but out of the separate estate of his father, over which the father had an absolute power of disposition. In that case the *Mitakshara*, chapter 1, sections 4, 6, 7, and 8, and the decisions in *Chalakonda Alasani v. Chalakonda Ratnachalam*, *Dhunookdharee Lall v. Gunput Lall*, *Bai Manchha v. Narotamdas Kashidas* and *Durvasula Gangadharadu v. Durvasula Narasammah* were referred to in argument before the Board, and their Lordships with reference to them observed—

"it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant, which stated in plain terms, amounts to this : that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property, is or is not maintainable. Very strong and clear authority would be required to support such a proposition. For the reasons that they have given, it does not appear to them necessary to review the text books or the authorities which have been cited on this subject. It may be enough to say that, according to their Lordships' view, no texts which have been cited go to the full extent of the proposition which has been contended for. It appears to them, further, that the case reported in the tenth volume of *Sutherland's 'Weekly Reporter'*, in which a judgment was given by MR. JUSTICE JACKSON and JUSTICE MITTER, both very high authorities, lays down the law bearing upon this subject by no means so broadly as it is laid down in two cases which have been quoted as decided in *Madras*, the first being to the effect that a woman adopting a dancing

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(1) See *Supra*. (2) [1877] L. R., 4 I. A., 109 ; S. C., I. L. R., 1 Mad., 252.

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girl and supplying her with some means of carrying on her profession was entitled to share in her gains; and the second, to the effect that the gains of a vakil who has received no special education for his profession are to be shared in by the joint family of which he is a member; decisions which have been to a certain extent also acted upon in *Bombay*. It may hereafter possibly become necessary for this Board to consider whether or not the more limited and guarded expression of the law upon this subject of the courts of *Bengal* is not more correct than what appears to be the doctrine of the courts of *Madras*."

That intimation appears to have had its effect upon courts in India.

In *Boologam v. Swornam* (1), which was decided in 1881, INNES and KERNAN, JJ., on the evidence having found that the earnings of the dancing girls, who had received an ordinary education sufficient to fit them to earn a living as dancing girls, were acquired by them without detriment to the family estate and without any scientific acquirements which had been imparted by the aid of the family funds held that the earnings of the girls were their self-acquired property.

In *Lakshman Mayaram v. Jamnabai* (2), which was decided in 1882, MELVILL and KEMBALL, JJ., who considered that the dictum of MITTER, J., in *Dhunookdharee Lall v. Gunput Lall* that the Hindu Law nowhere sanctions the contention that acquisition of a member of a Hindu family who has received education is liable to partition, is not strictly accurate, held that when the Hindu texts "speak of the gains of science which has been imparted at the family expense, they intend the special branch of science which is the immediate source of the gains, and not the elementary education which is the stepping stone of all science," and consequently that the property which was acquired by a Subordinate Judge who had received a mere elementary education at the family expense, but had obtained in a lawyer's office and in the Sadar Adalat that knowledge of law and judicial practice which had qualified him for the post of a judge, was his self-acquired property and was impartible.

In *Krishnaji Mahadev v. Moro Mahadev* (3), which was decided in 1890, BIBDWOOD and CANDY, JJ., held that the gains made as *karkuns* by two members of a joint Hindu family who had received only a rudimentary education at the expense of the joint family were their self-acquired property.

In *Lachmin Kuar v. Debi Prasad* (4), BURKITT and DILLON, JJ., in 1897, approved of the decision in *Krishnaji Mahadev v. Moro Mahadev*, and following it held that the gains from employment in the Commissariat Department of a member of a joint Hindu

(1) [1881] I. L. R., 4 Mad., 330.

(2) [1882] I. L. R., 6 Bom., 225.

(3) [1890] I. L. R., 15 Bom., 32

(4) [1897] I. L. R., 20 All., 435

family, who was not shown to have had any assistance from the joint family funds except his support in early years and the usual rudimentary education, were his self-acquired property.

With the exception of the cases to which they have referred, no case decided in India or in which this Board has expressed an opinion on the question as to whether the gains of a member of a joint Hindu family, who had been educated at the expense of the joint family, are in law to be considered as his or her self-acquired property or as belonging to the joint family, has been brought to the attention of their Lordships.

Their Lordships will assume that the Sanskrit word used in the *Mitakshara* which Mr. Colebrooke translated as "science" means "learning." The latter apparently is the meaning of the word which has been generally accepted by the courts in India. It gives the Sanskrit word a wider meaning than it would otherwise have. It would be difficult, if not impossible, to ascertain what could have been the science or sciences which the author of the *Mitakshara*, *Vijnanesvara*, who wrote his commentary in the latter part of the eleventh century, had in contemplation if he used a word which meant "science" strictly so called and is not susceptible of the wider and more comprehensive meaning "learning."

In construing the texts of the *Mitakshara* which their Lordships have quoted, it is necessary to bear in mind that education beyond that of a very elementary kind must have been limited to very few of the people for whose guidance the *Mitakshara* was written, and that for that limited few there could have been then no education attainable in the arts, sciences, and professions of that time comparable with the education now obtainable and necessary for a successful career in the arts, sciences, and professions of the present day. It may be assumed that the author of the *Mitakshara*, who was construing and explaining the more ancient texts of the Hindu Law for the benefit and guidance of the Hindu community, could not have intended to penalise an education which was not in his contemplation and of which necessarily he knew nothing. Nor can it be assumed that his intention was to penalise and discourage self-acquired skill, or the exercise of high mental abilities or great individual effort in winning success in an art, or science, or a profession. He must have been writing of education, learning, such as he knew it to be, and when he laid down that the gains obtained from an education received at the expense of a joint family should be partible, he could not have intended that such gains should include the gains which were the result, not of the education received at the expense of the joint family, but of the peculiar, skill, mental abilities and individual effort in applying and improving such education exercised by the person who had been educated at the expense of the joint family. Their Lordships cannot find in the texts of the *Mitakshara* any authority for the contention in this case that the gains made as a

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clerk, as a broker, or as a money-lender, personally and without the aid of the joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged, should in law be regarded as partible and not as his self-acquired property. The question of whether a man who happening to be a member of a joint family carried on his business, whatever it was, personally for his own personal benefit without detriment to the joint family fund, or carried on such business as a member of the joint family for the benefit of the joint family, is a question of fact to be determined on the evidence. No inferences can be drawn from the fact that until Shewaram became a pleader's clerk he was maintained by the joint family funds. As a member of the joint family he was entitled to be maintained at the expense of the joint family, and to receive an ordinary education suitable to a person of his position, as was any other member of the family.

Their Lordships are of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

A. P. P.

Appeal dismissed.

T. L. Wilson & Co :—Solicitors for the appellants.

Drake-Son & Parton :—Solicitors for the respondents.

HIGH COURT.

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 January, 30.
 KNOX, J.

MAGAN LAL
versus
 GANESH PRASAD.*

Penal Code (Act XLV of 1860), sections 409, 420, 211—Accused acquitted of charges made against him—Sanction to prosecute granted—Case filed before Joint Magistrate and transferred to Honorary Magistrate, first class—Case pending for four months—Case sufficiently important and serious to be tried by Sessions Judge—Transfer—Criminal Procedure Code (Act V of 1898), section 526.

Where a person was charged with offences falling within sections 409 and 420 of the Indian Penal Code of which he was acquitted on trial, and he obtained sanction under section 211 of the Penal Code to prosecute the complainant for falsely charging him with the aforesaid offences, and the case was filed before a Joint Magistrate who transferred it to the court of an Honorary Magistrate having first class powers where the case remained pending for four months, *held* that case was of a nature serious enough to be tried either in a Court of Session or by a more experienced Magistrate.

* Cr. Mis. No. 11 of 1918.

CRIMINAL MISCELLANEOUS Application for transfer from the court of RAJA PARTAP BAHADUR, Honorary Magistrate, First Class of Allahabad.

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Magan Lal was charged by Ganesh Prasad with offences under sections 409 and 420, Indian Penal Code, he was tried and acquitted. He then obtained sanction to prosecute Ganesh Prasad under section 211, Indian Penal Code, for having falsely charged him with the offences aforesaid. In pursuance of the sanction Magan Lal filed a complaint before the Joint Magistrate. The case was transferred to the court of an Honorary Magistrate having first class powers, who after hearing the evidence for the prosecution framed a charge under section 211 in respect of the complaint which had been made by Ganesh Prasad under sections 409 and 420, Indian Penal Code. It appeared that the attention of the Honorary Magistrate was then drawn to the fact that the charge framed was one triable exclusively by a Court of Sessions inasmuch as one of the offences, namely that under section 409, which formed the subject of Ganesh Prasad's complaint was punishable with transportation for life. The Honorary Magistrate amended the charge to the effect that the offence described in Ganesh Prasad's complaint as one under section 409 was really one under section 406, Indian Penal Code, as Magan Lal was not a banker within the meaning of section 409. With this amended charge he proceeded to try the case himself. Magan Lal applied to the High Court, after an application to the District Magistrate had proved ineffectual, under sections 526 and 435 of the Code of Criminal Procedure praying that the case might either be committed for trial to the Sessions Court or be transferred to some other experienced Magistrate.

Peary Lal Banerji, for the applicant.—Magan Lal was charged with, and underwent his trial for, an offence under section 409, Indian Penal Code, and it was not competent for the present Magistrate to say that the charge should have been or was intended to be under section 406, Indian Penal Code. It was an aggravation of the falsity of the charge to have described Magan Lal as a banker if he was not one in fact. On the charge as now framed by the Magistrate it would be possible for Ganesh Prasad to plead not guilty on the simple ground that he never in fact had charged Magan Lal with an offence under section 406. It was not open to the Magistrate to amend the charge in the way he did, and, unless the amendment was allowed to stand, the offence was one triable exclusively by the Court of Sessions; *vide* Code of Criminal Procedure, schedule II, under section 211, third sub-head. The case should be committed for trial to that court. In the alternative, the case should be transferred to a Magistrate with greater experience.

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Satya Chandra Mukerji, (with him *Uma Shankar Bajpai*), for the opposite party.—The third sub-head under the heading of section 211 in the schedule of the Code of Criminal Procedure applies only to offences which are punishable with a *minimum* punishment of transportation for life. An offence under section 409, Indian Penal Code, is punishable with transportation for life or imprisonment for 10 years. So it is not an offence which falls under the third sub-head, and the present case is not one exclusively triable by a Court of Sessions. The alteration made by the present Code in the language of the third sub-head makes it clear that this sub-head was intended to cover only those offences which are punishable with either death or transportation for life. It is inconceivable that the original offence under section 409 should be triable by a Magistrate, but that a case under section 211 with respect to that offence should be triable exclusively by a Court of Sessions. The original bill, before Act V of 1898 was passed, also supports my contention.

It is competent for a Magistrate at any stage to amend a charge, and the present amendment was well within the Magistrate's powers; *vide* cl. (5) of section 195 of the Code of Criminal Procedure, what the applicant asks is that this Court should at this stage interfere with the charge as drawn up by the lower court.

The entire prosecution case is complete, and this application for transfer has been made at a very late stage.

Peary Lal Banerji, was not heard in reply.

The following judgment was delivered by

Knox, J.

KNOX, J.—This is an application presented to this Court under section 526 of the Code of Criminal Procedure. I am asked that the case of *Magan Lal v. Ganesh Prasad*, now pending in the court of Raja Partab Bahadur, Honorary Magistrate first class, Allahabad, be either directed to be committed for trial to the Court of Session, or transferred for trial to some other competent Magistrate. From the affidavit filed in connection with this application it appears that Magan Lal was tried in the court of the Joint Magistrate of Allahabad on the complaint of Ganesh Prasad charging Magan Lal with offences under sections 409 and 420 of the Indian Penal Code. Magan Lal was acquitted after trial by the Joint Magistrate. He then obtained sanction from the Joint Magistrate's court to prosecute Ganesh Prasad for having falsely charged him with offences under sections 409 and 420 of the Indian Penal Code. The case was transferred by the Joint Magistrate of Allahabad to the court of Raja Partab Bahadur, Honorary Magistrate, first class, Allahabad, and came to his court on the 21st of August, 1917. It has been, therefore, pending for about four months and is still incomplete. The ground urged for transfer or for the order prayed for is *inter alia* that the learned Honorary Magistrate does not know the

English language and the applicant deponent is put to trouble and expense in being made to file translations from English judgments into Urdu, and that there have been already several unnecessary adjournments due to the fact that the learned Magistrate begins his sittings between 3 and 4 p. m. A further contention is raised in the affidavit that the Honorary Magistrate has kept the case for trial in his court although he has no jurisdiction to try it. I have examined the statement made by the complainant, Ganesh Prasad, when he first made his complaint. There is no doubt that he did charge Magan Lal with offences under sections 409 and 420 of the Indian Penal Code. It is alleged that that complaint was a false one. If so, it was a false complaint of these specific offences, and was therefore a false complaint falling within the second paragraph of section 211 of the Indian Penal Code. Criminal proceedings were instituted upon a complaint of an offence punishable with transportation for life, or imprisonment of either description for a term which may extend to 10 years. If the complaint was a false one, of course it is to be clearly understood that I commit myself to no opinion of any kind as to whether the charge was true or false, the charge and the criminal proceedings ensuing therefrom were of a very serious nature. It is a case which ought to be tried either by a Court of Session or at any rate by a Magistrate of considerable experience, and it is not a case of the kind that should have been sent for trial to an Honorary Magistrate who does not appear to have had much experience in the trial of criminal cases. I say this because on looking to the order sheet I find adjournments and cross-examinations allowed which are never intended by law and which should never be granted by any Magistrate of experience. I find that the complainant was cross-examined on four different occasions, and this is a mere sample of the kind of procedure which received sanction of the Honorary Magistrate. The mere fact that the inquiry or so called trial has lasted for nearly four months calls for the case being removed from the court of the Honorary Magistrate and tried by some one of experience in these matters. I understand that all the evidence for the prosecution has been taken, and I direct that the case be now committed for trial to the Court of Session on the charge of instituting or causing to be instituted a false charge of offences under sections 409 and 420 of the Indian Penal Code and therefore falling within the second clause of section 211 of the Indian Penal Code, a case which is triable by a Court of Session. Let the record be returned.

B. K. M.

Record returned.

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March, 1.

PIGGOTT, J.

ABDUL LATIF

versus

EMPEROR*

Criminal Procedure Code (Act V of 1898), section 437—Accused discharged by Magistrate—District Magistrate ordering further inquiry—No notice issued—Judicial discretion in such matter.

Nothing in section 437 of the Code of Criminal Procedure requires previous notice to be given to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the court to answer the facts alleged against him.

CRIMINAL REVISION from an order of E. P. FAWCETT, Esq., District Magistrate of Etah.

A. H. C. Hamilton, for the applicant.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

PIGGOTT, J.

PIGGOTT, J.—This application in revision arises on the following state of facts :—On the 17th of July last a woman named Dojia was struck by a bullet while she was with her husband in a field where he was working. The shot had been fired by some sportsman in the immediate neighbourhood, and it is not suggested that the injury to Musammat Dojia was anything but accidental. A number of villagers were attracted to the spot and proceeded to arrest two Mohammedans, named Abdul Latif Khan and Badal Khan, as being responsible for the injury caused to Musammat Dojia. These two men were taken to the Kasganj Police Station, some five miles distant, along with the injured woman and her husband and at the same time there was produced at the police station a double barrelled muzzle loading gun. The two Mohammedans arrested on suspicion were admittedly strangers to Musammat Dojia and her neighbours. The police eventually sent up one of these men, Abdul Latif Khan, for trial in respect of offences under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. The Magistrate who took cognizance of the matter began by issuing process against the other stranger, Badal Khan; but after taking the evidence discharged both the accused persons. The order of discharge is dated September, the 21st, 1917. The

gun in question, although bearing a serial number and therefore having apparently at some time or other been held lawfully under a license, could not be traced in the Etah district; and it is admitted that Abdul Latif Khan and Badal Khan held no license to possess fire-arms of any description. Representations were made to the District Magistrate as to the impropriety of the order of discharge, and on the 10th of November, 1917, the District Magistrate, after examining the record, passed an elaborate order, reviewing the evidence, discussing the comments made on the same by the trying Magistrate and finally directing further inquiry to be made as regards Abdul Latif Khan. This order was of course passed under section 437 of the Code of Criminal Procedure. It is quite clear that no previous notice had been issued to Abdul Latif Khan to show cause why the order of discharge passed in his favour should not be set aside. A curious feature of the case is that before that order had been set aside at all, that is to say on the 7th of November, 1917, another first class Magistrate of the Etah district had taken cognizance of the offence and had issued process to Abdul Latif Khan to appear and answer charges under section 338 of the Indian Penal Code and section 19 of the Indian Arms Act. However, the question whether Abdul Latif Khan could have been retried by another Magistrate without the order of discharge passed on the 21st of September, 1917, being first set aside is not now before me and I need not discuss it. The application in revision which I have to consider is against the District Magistrate's order of November the 10th, 1917. Now it is beyond question that nothing in section 437 of the Code of Criminal Procedure requires previous notice to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is to say by the High Court, or the Sessions Judge, or the District Magistrate. Nevertheless it has been laid down in a number of cases that as a matter of judicial discretion it is advisable that previous notice should issue, when the matter for consideration is the setting aside of an order of discharge passed in favour of an accused person who has actually been before a court to answer the facts alleged against him. I am not aware that the decision of this Court in *Queen-Empress v. Ajudhia*(¹), which itself follows certain older decisions, has ever been disapproved of in any subsequent decision of this Court. I am myself of opinion that in a matter of this sort it would have been better for the District Magistrate to give Abdul Latif Khan previous notice and an opportunity of arguing the case before him. I am not disposed, however, to interfere with the order of the court below merely on this ground. If the only result of my doing so were to compel the District Magistrate to issue notice now to Abdul Latif Khan, this might only lead to the passing of another order under

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(1) [1898] I. L. R., 20 All., 339.

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section 437 of the Code of Criminal Procedure, and the only result would have been inconvenience to the courts and undesirable delay in the disposal of the matter. If on the other hand I were to take it upon myself to direct that no further proceedings be taken, I conceive that I should be straining the powers of this Court, and I am not satisfied that I should not be prejudicing the interests of justice. I have preferred to deal with the matter by asking the learned Advocate who represents Abdul Latif Khan to take this opportunity of showing cause why further enquiry should not be ordered. In substance I have dealt with the matter as if the record had been called for directly by this Court with a view to considering the propriety of the order of discharge. I do not think it would be advisable for me to enter into detail with regard to the very different opinions expressed by the trying Magistrate and by the District Magistrate in respect of the value and reliability of the evidence produced at the original hearing. I do think, however, that the District Magistrate's order shows good and sufficient cause for further inquiry into this matter in the interests of justice. It seems practically beyond question that an offence punishable under the Indian Arms Act, as well as an offence punishable under Indian Penal Code, were committed by some person or other on the occasion in question. I agree with the District Magistrate that it is in the interests of justice that there be further inquiry into the question whether the commission of one or both of these offences is or is not brought home to the accused Abdul Latif Khan. I think it advisable under the circumstances that this inquiry should take place outside the limits of the territorial jurisdiction of the District Magistrate of Etah. My order, therefore, is that this application for revision do stand dismissed, and that the further inquiry against Abdul Latif Khan directed by the order of 10th November, 1917, be held in the district of Aligarh. I transfer the case in question to the court of the District Magistrate of Aligarh, who may either dispose of it himself or transfer it for disposal to the court of any first class Magistrate Subordinate to himself.

With regard to one matter of detail which has been pressed upon my notice, I may say that I agree with the District Magistrate that the proceedings taken against Badal Khan were injudicious, and that the fact of his having been in the position of an accused person during the inquiry which resulted in the order of discharge should in no way be considered to prevent his being summoned as a witness in the further inquiry now ordered.

Further inquiry ordered.

L. W. ORDE (Plaintiff)

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL
(Defendant).*

CIVIL

1918

January, 29.

*Land Acquisition Act (I of 1894), sections 23, 49—"Market value of land"—
Compensation awarded on the basis of rent income—Compound appurtenant
to house but in cultivatory possession of tenants with rights of occupancy—
Mode of assessment.*

PIGGOTT, J.
WALSH, J.

In a case of compulsory acquisition of land, a plot of land appurtenant to a house as compound was acquired. The land in question was let to agricultural tenants who had acquired occupancy rights. The sum awarded to the appellant for compensation was calculated at 16 years' purchase on the net rent income of the plot *plus* a sum of money paid as compensation to the tenants. The owner objected that compensation should have been given to him according to the market value of the land considered as a building site:—*Helā* that the principle adopted for awarding compensation was correct inasmuch as that the land was not at the disposal of the owner for sale as a building site its value as such being diminished by the existence of occupancy rights.

FIRST APPEAL from a decree of L. JOHNSTON, Esq., District Judge of Meerut.

For the purposes of this report the facts of the case may be briefly stated as follows.—The appellant owned a house, and a compound surrounding it, in the city of Meerut. He had let portions of the compound to agricultural tenants who had acquired occupancy rights therein; Government revenue was assessed on such portions. There were houses and other buildings in the vicinity of the compound. Under the Land Acquisition Act I of 1894 the Government acquired for building purposes a plot, measuring about $9\frac{1}{2}$ bighas, out of the said compound. The sum awarded to the appellant for compensation was calculated at 16 years' purchase on the net rent income of the plot, and it worked out at about Rs. 213 a bigha, exclusive of the value of a well and of the 15 per cent allowance. A further sum of Rs. 1,022 odd was paid as compensation to the occupancy tenants of the plot, and this came to about Rs. 108 per bigha. The appellant objected *inter alia* that he ought to have been allowed the full market value of the land considered as a building site in that locality, and that action should have been taken under either section 49 or section 23

* F. A. No. 349 of 1915.

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(1) 'thirdly' of Act I of 1894. The District Judge, upon a reference, came to the finding that the value of land for building sites in that locality was at least Rs. 500 per bigha, but as the land in question was hampered by the existence of the tenants' occupancy rights it had no value other than the value calculated on its rent income to a person who could not extinguish those occupancy rights. The District Judge further held that section 49 had no application inasmuch as the compound had not been kept up as such but let out to tenants who had been allowed to acquire rights of occupancy. Except in a matter of slight detail the District Judge maintained the award. The appellant appealed to the High Court.

Sital Prasad Ghosh, for the appellant, contended that the District Judge had proceeded on an erroneous principle in ascertaining the market value of the land. He relied upon the case of

Kailas Chandra v. Secretary of State etc., [1910] 18 I. C., 638; S. C., 17 C. L. J., 34,

and upon the observations of BATCHELOR, J., in the case of

Trustees for the Improvement etc. v. Jalbhoy Adeshir, [1909] I. L. R., 33 Bom., 483, at p. 496,

as to the true meaning of "the market value of the land" in section 23 of the Land Acquisition Act.

As to the proper method of ascertaining the market value of agricultural lands, situated within a municipal area, which were in the possession of occupancy tenants, he relied on the ruling in

The Collector of Dacca v. Hari Das Bysak, [1912] 14 I. C., 163. (Cal.),

and contended that the appellant landlord was entitled to the difference between the value of the land which might be paid by a willing purchaser if it were not in the possession of occupancy tenants and the amount actually awarded to the latter by the Collector. On the Judge's own findings the appellant was entitled to the difference between Rs. 500 and Rs 108 per bigha.

He relied further on the case of

Dhani v. The Superintendent of Dehra Dun, [1890] A. W. N., 129,

as to the value of the land in question as a building site as disclosed by the evidence on the record. He also submitted that enhanced compensation on the ground of damage from severance of the land in question from the rest of the compound should have been allowed.

A. E. Ryves, (Government Advocate), for the respondent, was not called upon.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This is an appeal in a land-acquisition case. The plot of land in question is situated at Meerut and is required by

Government for the purpose of a boarding-house in connection with an important school. The owner objected to the District Judge against the sum awarded by the Collector, but his objections failed and he has appealed to this Court against the order of the District Judge. The memorandum of appeal before us raises three points: two of which may be briefly disposed of. The plot of land in suit forms part of a compound appurtenant to a house owned by the appellant, and the point as taken in the memorandum of appeal before us is that the District Judge has erred in refusing to enforce in favour of the appellant the provisions of section 49 of the Land Acquisition Act (No. I of 1894), according to which the appellant was entitled to claim that the entire compound should be acquired. As a matter of fact the point has not been argued before us precisely in this form. It has rather been contended that the provisions of section 23, clause (1) (thirdly) have been overlooked by the court below, and that the compensation awarded should have been increased upon an estimate of the damage presumably sustained by the appellant in consequence of the severance of this parcel of land from the rest of the compound. If we thought that injustice had been done to the appellant in the court below, merely because he had failed to make it sufficiently clear by his pleadings whether he was desiring to claim his remedy under section 49 or under section 23 aforesaid, we should not have felt that there was any technical objection in the way of our doing substantial justice. We find that this point has been considered in all its bearings and has been disposed of by the learned District Judge. The fact is that, although the land in suit may be spoken of in a sense as forming part of the compound of a house, the area in question has not been kept up as a compound. Both the plot of land in suit and the adjoining area have been brought under cultivation and occupancy tenants are in cultivating possession of the same. Under these circumstances it does not appear that any case is made out for a claim for enhanced compensation on the ground of damage from severance. The third plea in appeal is as to the alleged under-valuation of the well situated on the plot of land in suit. It is sufficient to say about this that the learned District Judge was right in remarking that, on the materials available on this record, there was no case made out for increasing the sum awarded by the Collector under this head. There remains the more substantial plea taken in the second paragraph of the memorandum of appeal. It is contended that the land in question, although at present under cultivation and held by occupancy tenants, has a value as a building site which has been entirely disregarded by the court below. We have been referred to the case of *Bombay Improvement Trust v. Jalbhoy Ardesir*(¹), where the principles applicable to the acquisition of land in respect of which there exists more than one interest have been discussed and laid down. We do not see that these principles have been

(1) [1909] I. L. R., 33 Bom., 483.

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overlooked by the court below. The learned District Judge has taken into consideration what the market value of this land might be, if it were vacant and available for building purposes. He has estimated its value from this point of view at Rs. 500, a *bigha*. The memorandum of appeal before us seems to accept this valuation as more or less adequate from the point of view on which it proceeds. In argument our attention has been drawn to portions of the evidence from which it might be inferred that even this sum of Rs. 500 a *bigha* was an under-valuation, but on the evidence as a whole there seems no reason why it should not be accepted as far as it goes. As the learned District Judge however points out, the difficulty of this case lies in the fact that the land in suit was not at the disposal of the appellant for sale as a building site. Any one desiring to acquire it for that purpose would have to deal, not merely with the appellant, but with the occupancy tenants, who have vested rights not transferable except under stringent limitations as laid down in the Tenancy Act. Taking this matter into consideration, the learned District Judge has come to the conclusion that the value of this land to the appellant himself does not exceed the sum which has been allowed by the Collector, calculated on the basis of so many years' purchase of the annual profits actually derived by him from it at the present time. We have been asked to consider what has been actually paid by Government under the orders of the Collector to the occupancy tenants for the purchase of their rights; but the occupancy tenants accepted the Collector's valuation and their case was not before the court below. Had the occupancy tenants given evidence in the present case, and established the fact that they would have been prepared at any time to surrender their rights to their proprietor for the time being, in return for the sum which was awarded to them as compensation by the Collector, there might have been some basis for the contention that the award in favour of the present appellant should be increased by the difference between the market value of the land as a building site, calculated at the presumed rate of Rs. 500 a *bigha*, and the sum total of the compensation awarded by the Collector to the appellant and to the occupancy tenants. There is however no such evidence on the record and the mere acquiescence by the occupancy tenants in the Collector's award by no means suggests, as a necessary inference, the fact that they would not have stood out for a higher price if they had found themselves bargaining with a proposed purchaser of the proprietary rights. It seems therefore that no cause has been shown for interference with the order of the court below. We dismiss the appeal with costs

B. K. M.

Appeal dismissed.

SHANKAR LAL (*Plaintiff*)*versus*RAM BABU (*Defendant*)*

CIVIL

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March, 7.

RICHARDS,
C. J.
BANERJI, J.

Accounts, suit for rendition of—Partnership—Death of one partner—Suit against his minor legal representative—Whether suit maintainable.

Held that a suit for rendition of accounts of a partnership business is maintainable by the surviving partner against the minor son of a deceased partner who in his life-time was manager and had the account books in his keeping.

SECOND APPEAL from a decree of D. R. LYLE ESQ., District Judge of Agra, confirming a decree of P. K. Ray Esq., Munsif.

Suit for rendition of accounts.

The facts shortly stated were as follows:—Puran Chand defendant's father, took a contract of the grass farm for one season from the Cantonment Magistrate at Agra in July, 1912, and made the plaintiff his sub-partner. Plaintiff's case was that he deposited with Puran Chand his share of the capital, that most of the sums realized remained with Puran Chand who used to keep the accounts. Puran Chand having died, plaintiff instituted the present suit against the defendant, Puran Chand's minor son, for settlement and rendition of accounts. In reply the defendant urged that he could not be called upon to render accounts and that as a matter of fact the plaintiff himself had realized a much larger sum than was due to him. The courts below dismissed the suit holding that the defendant, being merely the personal representative of a deceased partner, was not the accounting party. The plaintiff appealed.

Kailas Nath Katju, (with him *Shiam Krishna Dar*), for the appellant, submitted that the suit, as brought, was maintainable. There was nothing in law to prevent a surviving partner from suing the personal representatives of a deceased partner who might have been in this case the managing partner, for settlement of account. If that were not so, great injustice would result, and the plaintiff, not having the accounts in his own possession, and not knowing whether anything was really due to him, would be without any remedy. He referred to

Haji Muhammad Akbar v. Dwarka Nath Sircar, [1910] 11 Cal. L. J., 658;

Zohra Bibi v. Zobeda Khaton, [1910] 12 Cal. L. J., 368.

* S. A. No. 770 of 1916.

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LINDLEY on *Partnership*, 8th ed., pp. 569, 693.

He distinguished

Pritam Singh v. Mubarik Singh, [1911] 9 I. C., 561 ;

Manmohonath Bose Mullick v. Basanto Kumar Bose Mullick, [1900] I. L. R., 22 All., 332 ;

Kumeda Charan Bala v. Asutosh Chattopadhyaya, [1912] 16 I. C., 742

Mangal Prasad Bhargava, for the respondent, replied.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—We think that both the courts below have taken an extremely narrow and technical view of this case. It appears that one Puran Chand had a lease of the grass farm at Agra. He took into partnership the plaintiff. They were to provide the capital between them and to share in the profits. Puran Chand died. The plaintiff then instituted the present suit alleging that he had received certain monies and that Puran Chand and after his death his minor son received further money in connection with the joint enterprise. He alleged that there was a much larger sum received by Puran Chand's estate than he had received and that there would be a balance payable to him upon taking accounts. He accordingly asked that the accounts should be taken. The courts below have dismissed the suit holding that it was not maintainable and that the minor could not be liable to render accounts. It seems to us (assuming the plaintiff's allegation to be true), that it would have been a very right and proper thing that the minor should have been ordered to render an account of the monies received by Puran Chand or after his death by his estate in respect of the enterprise. It is said that he (the plaintiff) ought to have claimed a definite sum. It is only after he knew what had been received by the other side and what expenses had been incurred that he would be in a position to name the sum that ought to be paid to him. The learned District Judge says that it will be most unfair that the plaintiff should escape rendering an account whilst the other side was ordered to render accounts. We cannot understand what there was to prevent the courts below if it was objected on behalf of the minor defendant that it was not admitted that the plaintiff had only received the sum he alleged, to have directed that he also should furnish an account of what he had received and what he had expended. We think that the personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership. Of course the personal representative will only be liable for the person he represents, to the extent of the assets he receives. What we think the court below ought to have done was to have passed the preliminary decree directing that each party should furnish an account of what has been received and what has been spent. These accounts after they have been filed can be

accepted or objected to in the ordinary way and dealt with by the court. It may be objected that the minor is unable to give the accounts. The mere fact that he is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for Puran Chand during his life or for the minor and the estate of Puran Chand after his death. We allow the appeal, set aside the decrees of both the courts below and remand the case to the court of first instance, through the lower appellate court, with directions to re-admit the suit in its original number and to proceed to deal with the same having regard to what we have said above. The court can deal with the case as near as possible on the lines of the provisions of Order 20, rule 15 of the Code of Civil Procedure making a preliminary decree for an account. Costs here and heretofore will be costs in the cause.

K. N. K.

Appeal allowed. Cause remanded.

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KALI CHARAN PANDE AND OTHERS (*Plaintiffs*)*versus*GUPT NATH MISRA AND OTHERS (*Defendants*)*

Civil Procedure Code (Act V of 1908), schedule II, para 14 (c)—Reference to arbitration without intervention of court—Six arbitrators appointed—All the arbitrators not taking part in the proceedings—Award invalid.

Disputes between the plaintiffs and defendants were referred to the arbitration of six arbitrators, the decision in the case to be according to the verdict of the majority. The arbitrators met on two different dates, but on neither of those dates was any award drawn up. The arbitrators of the defendants did not agree with those for the plaintiffs and they withdrew from the arbitration. They took away the records of the depositions of witnesses. Thereupon on a third date the arbitrators for the plaintiffs recorded the evidence afresh, and took fresh proceedings in the absence of the defendants and their arbitrators and gave an award:—*Held* that all the arbitrators not having taken part in the fresh proceedings on the third date, the award so passed by the arbitrators was invalid on the face of it under paragraph 14 (c), schedule II to the Civil Procedure Code.

CIVIL REVISION, from an order of F. D. SIMPSON, Esq., District Judge of Allahabad.

Uma Shankar Bajpai, for the applicants.

Kailas Nath Katju, for the opposite party.

* Civ. Rev. No. 183 of 1917.

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Tudball, J.

The judgment of the Court was delivered by

TUDBALL, J.—This is an application in revision arising out of arbitration proceedings. The facts briefly are as follows:—The parties to the dispute agreed to settle it by arbitration (out of court). There was no suit pending. They referred their dispute to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators met on the 10th of February, 1915. The parties produced evidence which was recorded. The arbitrators again met on the 19th or 20th of February. They discussed the matter and apparently were soon divided into two groups in the opinions they expressed. No decision was arrived at, no award was drawn up. Two of the arbitrators withdrew from the arbitration and sent in notice to that effect. Thereupon the remaining four arbitrators again met on the 21st of March. Prior to that date notice was issued to the parties for that date and was also sent to the defendants and their arbitrators. On that date the four arbitrators proceeded to take all the evidence afresh, that the plaintiffs offered. The defendants were not present nor were their witnesses. One fact has to be noted and that is that after the meeting of the 19th or 20th of February, one of the two arbitrators who withdrew, took away with him the record of the evidence which had been taken on the 10th of February. On the 21st of March, the four arbitrators after recording the evidence of the plaintiffs' witnesses, on that date drew up an award and signed it. It was this award which the plaintiffs put forward in Court that it should be filed and a decree passed upon it. The court of first instance granted the application. The lower appellate court held that this award on the face of it and upon the facts stated, was an illegal award and set aside the order of the first court. It seems to us in the first place that the order of the court below was correct. The award of the 21st of March was not an award within the intention of the parties. It was based upon fresh proceedings and fresh evidence taken by four out of six arbitrators and it was not an award based upon the proceedings of the 10th of February and 19th or 20th of February. We can find no ground whatsoever for revision. The court below was entitled to go into the matter and to see whether any of the grounds mentioned in paragraphs 14 and 15 of the second schedule of the Civil Procedure Code were proved. It went into the facts and held, as we have mentioned above, that the award was invalid and set aside the order of the first court. We cannot find that the court below acted illegally or with material irregularity in the circumstances of this case. There is therefore no force in the application. It is dismissed with costs.

Application dismissed.

MUHAMMAD FARZAND ALI (*Plaintiff*)*versus*RAHAT ALI AND OTHERS (*Defendants*) *

CIVIL

1918

Feb. 5.

*Code of Civil Procedure (Act V of 1908), Order 44, rule 1, section 115—**Application for leave to appeal in forma pauperis—Application rejected—* TUDBALL J.*Appellant praying permission to pay court-fee on memorandum of appeal—* RAFIQ, J.*Court refusing permission—Failure to exercise jurisdiction.*

An application was presented with a memorandum of appeal for permission to appeal as a pauper. The appellate court rejected the application. The appellant then prayed permission to put in the necessary court-fee on his memorandum of appeal. This petition was rejected on the ground that the petitioner's appeal had been rejected:—*Held* that the court had rejected the application for leave to appeal *in forma pauperis* and not an appeal and it had failed to exercise jurisdiction in refusing to allow the petitioner to pay in the court-fee for his memorandum of appeal.

CIVIL REVISION from an order of L. JOHNSTON Esq., District Judge of Meerut.

A suit was instituted *in forma pauperis*, and a decree was passed therein. The plaintiff applied under Order 44, rule 1, Civil Procedure Code to be allowed to appeal as a pauper; the application was accompanied by a memorandum of appeal as directed by the rule. The appellate court directed further inquiry to be made by the court of first instance in respect of the applicant's *pauperism*, and that court reported that the applicant was a pauper. The appellate court then took action under the Proviso to rule 1 of Order 44 and rejected the application. On receiving intimation of the rejection the applicant filed a petition praying for permission to pay the requisite court-fee on his memorandum of appeal. But the court rejected his petition on the ground that his appeal had already been dismissed. Against this order he applied in revision to the High Court.

Iqbal Ahmad, for the applicant.—What had been rejected was the application for leave to appeal as a pauper. The memorandum of appeal itself had never been dealt with or rejected. The wording of Order 44, rule 1 clearly shows that the memorandum of appeal is not a part of the application for leave to appeal as a pauper, but that the two things are quite distinct and separate. In rejecting the one the Judge thought that he had rejected the other as well.

* Civ. Rev. No. 129 of 1917.

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Under this misapprehension he thought he had no jurisdiction to entertain the petition for permission to pay the court-fee on the memorandum of appeal. The court undoubtedly had jurisdiction to allow the applicant to pay the court-fee, although the memorandum of appeal was filed without any stamp. The words, "*the whole or any part*," in section 149 of the present Code have made this clear.

Uma Shankar Bajpai, (for *S. M. Sulaiman*), for the opposite party, relied on the cases of

Bishnath Prasad v. Jagarnath Prasad, [1891] I. L. R., 13 All., 305 ;

M. G. Wa Tha v. Abdul Gani, 18 I. C., 518 (L. B.)

He submitted that even if the court-fee were allowed to be paid the appeal would be barred by limitation.

[TUDBALL, J.—That point does not call for a decision at this stage.]

It was further submitted that the granting or rejection of an application to pay in court-fees was a matter within the discretion of the lower court, and even an incorrect exercise of that discretion did not furnish a ground for revision.

Iqbal Ahmad, was not heard in reply.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—The present applicant brought a suit *in forma pauperis* for possession of certain property which had been mortgaged. He sought to recover possession without payment of any sum of money. On the 15th of July, 1916, the court gave a decree for redemption of the mortgage on payment of Rs. 4,301-3-2. On the 19th of August, he filed an application under Order 44, rule 1 together with a memorandum of appeal as directed therein asking for permission to be allowed to appeal *in forma pauperis*. The appellate court directed further enquiry by the court of first instance into the alleged *pauperism* and on the 15th of February, that court reported that the applicant was a pauper. On the 17th of February, 1917, the court then took action under the proviso to rule 1 of Order 44. It examined the judgment and the decree and rejected the application under that proviso. Information of this was sent to the applicant by post and he received it on the 17th of March, 1917. On the 20th of March, 1917, the applicant filed a petition stating that he had received a post card from the court intimating that his application for permission had been rejected. He therefore prayed that he might be permitted to pay the court-fee on his memorandum of appeal. On this the lower court passed the following order:—"Yesterday the applicant filed a petition requesting to be allowed to deposit fees and to prosecute his appeal. His appeal was dismissed on the 17th of February last. I reject his petition." The court therefore refused to exercise its jurisdiction in allowing the

court-fees to be paid under the impression that the appeal had been dismissed on the 17th of February. This is clearly wrong. The appeal had never been dismissed. The memorandum of appeal is still before the court. On the 17th of February, what was rejected was the application for permission to appeal *in forma pauperis*. We think that in the circumstances the appellant should have been allowed to pay the court-fees if he so wished, and we allow this application and direct the lower court to allow this to be done. Any question of limitation that may arise will be decided by the court in the usual way according to law. The court below will fix a time within which the applicant will pay the court-fees. In regard to the costs of this application, they will be costs in the cause and will abide the result.

B. K. M.

Application allowed.

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EMPEROR

versus

BHAGWANI *

CRIMINAL

1918

March, 16.

PIGGOTT, J.

Procedure—Two persons convicted by Magistrate of offence of kidnapping—Appeal by one to Sessions Judge—Sessions Judge alters charge—Magistrate directed to commit accused to Court of Sessions—Reference of the case of non-appealing accused to High Court—Magistrate committing both accused while the other's case pending in High Court—Jurisdiction—High Courts powers in revision.

Two persons were tried for the offence of kidnapping under section 363 of the Penal Code and convicted. One of them appealed to the Sessions Judge against the conviction the other did not. The Sessions Judge acting under section 423 of the Criminal Procedure Code set aside the conviction and sentence and ordered the accused to be committed for trial for an offence under section 366 of the Penal Code. As regards the other accused he referred the case to the High Court. While the latter's case was pending in the High Court the Magistrate committed both the accused to the Court of Sessions for trial for an offence under section 366 of the Penal Code:—

Held that so long as the conviction and sentence against the non-appealing accused on the trial under section 363 of the Penal Code stood, the Magistrate had no jurisdiction to commit that person to the Court of Sessions, and the High Court set aside that order in revision.

* Cr. Rev. No. 158 of 1918.

CRIMINAL

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Piggott, J.

CRIMINAL REVISION from an order of W. R. G. MOIR Esq., Sessions Judge of Gorakhpur.

The parties were not represented.

The following judgment was delivered by

PIGGOTT, J.—The learned Sessions Judge has been quite right to refer this case. The proceedings in the Magistrate's court have been distinctly irregular. Two persons were sent up for trial, Achuta and Musammat Bhagwani, in connection with an alleged offence of kidnapping under section 363 of the Indian Penal Code. The Magistrate framed the charge under that section, convicted both accused and sentenced them to rigorous imprisonment for eighteen months. Achuta appealed against his conviction, but Musammat Bhagwani did not. The learned Sessions Judge had jurisdiction to deal with the case of Achuta under section 423 of the Code of Criminal Procedure and he accordingly set aside the conviction and sentence and ordered Achuta to be committed for trial on a properly framed charge under section 366 of the Indian Penal Code, he being of opinion that the offence disclosed by the evidence, if committed, fell under that section and was exclusively triable by the Court of Sessions. The case of Musammat Bhagwani, who had not appealed, could only be referred to this Court for the exercise of its revisional jurisdiction. In the meantime, while the reference of the learned Sessions Judge was pending before this Court, the Magistrate has proceeded to pass an order of commitment against both Achuta and Musammat Bhagwani which he had not jurisdiction to do while the conviction and sentence against that accused person on her trial under section 363 of the Indian Penal Code remained standing. Taking up the matter now in revision I set aside the conviction and sentence against Musammat Bhagwani under section 363 of the Indian Penal Code ; I also set aside as irregular the commitment order which has been passed against this accused but I direct that, she be committed to the Sessions Court for trial so that she may be tried along with the other accused Achuta on a properly framed charge under section 366 or 366/109 of the Indian Penal Code.

Commitment ordered.

THE COLLECTOR OF MORADABAD (*Plaintiff*)*versus*MAQBUL-UL-RAHMAN AND OTHERS (*Defendants*)*

CIVIL

1918

March, 7.

PIGGOTT, J.

WALSH, J.

Registration Act (XVI of 1908), sections 32, 33, 71, 73, 75—Mortgage-bond—Registration—Presentation by person under a duly authenticated power-of-attorney on behalf of mortgagee—Failure to appear on the part of mortgagor—Refusal to register—Death of mortgagee—Application by his representative—Registrar's certificate ordering same to be registered—Presentation on behalf of Collector as Manager of Court of Wards for the mortgagee's representatives by a messenger along with a letter from Collector accompanied by Registrar's certificate—Validity of such presentation.

Certain persons executed a mortgage-deed in favour of *P* on November 20, 1911. Before the deed could be registered *P* fell ill, and on February 8, 1912, a special power-of-attorney as required by section 33 of the Registration Act, was executed in favour of *N* authorising him to present the document for registration on behalf of *P*. On February 5, 1912, *N* acting, under this power of-attorney presented it for registration before the Sub-Registrar. On February 8, 1912, *P* died. The mortgagor having failed to appear to admit execution, the Sub-Registrar refused to register the document. Thereupon the widow of *P* acting as the natural guardian of *P*'s sons who were minors applied to the Registrar to have the document registered, and on June 28, 1912, a certificate was granted by the Registrar ordering the same to be registered. On July 23, 1912, (within thirty days of the certificate) the Collector as Manager of the Court of Wards (which in the meantime assumed the superintendence of the estate of the minors) sent the document by a messenger with a covering letter accompanied by the Registrar's certificate to the Sub-Registrar for registration and it was duly registered. On a suit being brought on the document, it was objected, *inter alia*, that the document had not been validly registered:—*Held*, that under section 75 (2) of the Act the document had been duly presented when on the 23rd of July, 1912, the Registering Officer received it under cover of an official letter from the Collector of Moradabad, no matter who the messenger might have been who carried the document in question; *held* also that when the Sub-Registrar endorsed due authentication on the power-of-attorney on the 3rd February, 1912, and the mortgage deed was presented for registration on the 5th February by the person holding such power-of-attorney, there was no defect in the presentation.

*F. A. No. 188 of 1916.

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 RAHMAN.

In the provision about presentation in section 75 there is an absence of imperative language and that distinguishes cases under that section from cases under sections 32 33, and 34 of the Act.

Per WALSH, J.—Part VI and Part XII (of the Registration Act) deal with totally different circumstances and contemplates a totally different situation. Part VI is a collection of sections dealing solely with “of presenting documents for registration.” Part XII is also self-contained and deals with a situation created by what is called “of refusal to register,” and a case of refusal to register and of another kind of presentation in consequence thereof has to be dealt with. Consequently, it would be to attribute totally superfluous particularity to the legislature if one were to hold that the provisions in section 75 superimpose upon the solemn proceeding and final decision, a duty upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary before the registration by the Registrar has taken place. What takes place after the Registrar’s order as provided by section 75 is pure machinery. Any form of presentation, if it is supported by an application, which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. If some other form of presentation is intended the mistake is merely a defect in procedure which is covered by section 87.

FIRST APPEAL from a decree of BABU RAM CHANDAR SAKSENA, Additional Subordinate Judge of Moradabad.

A. E. Ryves, for the appellant.

S. M. Sulaiman, Surendra Nath Sen and Gulzari Lal, for the respondents.

The following judgments were delivered

Piggott, J.

PIGGOTT, J.—This was a suit on a mortgage dated the 20th of November, 1911. The persons impleaded are the mortgagor and certain subsequent transferees. The mortgage was in favour of one Sahu Parshadi Lal. The evidence shows that before registration of the document had been effected the mortgagee fell ill. It seems a fair matter of inference that the mortgagor endeavoured to take advantage of this fact to defeat the registration of the document. On the 3rd of February, 1912, a special power-of-attorney of the kind spoken of in Section 33 of the Registration Act (No XVI of 1908), was registered at the office of the Sub-Registrar of Moradabad, whereby the mortgagee, Sahu Parshadi Lal, purported to authorise a pleader named Pandit Nanak Chand to present the mortgage of November the 20th, 1911, for registration on his behalf. Accordingly, on the 5th of February, 1912, within the period prescribed by law, the mortgage-deed in suit was presented for registration by the said Pandit Nanak Chand, purporting to act

under the authority of the special power-of-attorney of the 3rd of February, 1912. A question has been raised as to the validity of this presentation, and it is just as well to dispose of it at once. The learned Subordinate Judge who tried this suit seems to have thought that, whatever the facts may have been, the plaintiff had been remiss in the matter of producing satisfactory evidence and that the Court had before it no evidence from which it was entitled to infer that Pandit Nanak Chand did hold a valid power-of-attorney under the provisions of section 33 aforesaid, authorising him to present this document for registration. I think the decision of the court below on this point is clearly wrong. The document in suit was presented for registration at the office of the Sub-Registrar of Moradabad, the very same office in which the special power-of-attorney had been registered two days previously. In his endorsement on the deed in suit the Sub-Registrar certifies its presentation by Pandit Nanak Chand under a special power-of-attorney duly authenticated in his office. That certificate is evidence under the Registration Act of the truth of the facts therein stated. There is no reason whatever for presuming that it is in any way an incorrect statement of the facts. What has been contended before us is that the special power-of-attorney referred to in section 33 of the Registration Act requires, not merely to be authenticated by the Sub-Registrar, but to be executed before him. The argument is that the certificate above referred to does not specify that the document in question had been executed before the Sub-Registrar. Moreover it is suggested that, on the evidence as to the illness of Sahu Parshadi Lal, it is fairly certain that he did not appear personally before the Sub-Registrar on the 3rd of February, 1912. Had he been able to appear in person at the Sub-Registrar's office on that date he would presumably have presented the mortgage of the 20th of November, 1911 himself. This argument, however, overlooks the proviso to section 33 of Act XVI of 1908. We may take it from the evidence that Sahu Parshadi Lal was suffering from bodily infirmity at the time. Indeed the argument addressed to us on behalf of the respondents on this point assumes that Sahu Parshadi Lal was in fact unable by reason of bodily infirmity to attend in person at the Sub-Registrar's office. It was therefore open to the Sub-Registrar to attest the special power-of-attorney without requiring the personal attendance of the executant at his office, provided only that he satisfied himself that it had been voluntarily executed by the person purporting to be the principal. We have it from his certificate that the special power-of-attorney was not merely registered in his office but was duly authenticated by him. In this state of the evidence we are entitled to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to section 33 aforesaid. I think therefore there can be no doubt that the original presentation of the document in suit for registration on the 5th of February, 1912,

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was a proper and valid presentation under section 32 of Act XVI of 1908. The mortgagee Sahu Parshadi Lal died on the 8th of February 1912, a few days after the presentation of the document before the Sub-Registrar. The mortgagor, the executant of the said document, failed to appear before the Sub-Registrar to admit execution of the same. As I have already suggested, I see no reason to doubt that he was purposely keeping out of the way. The Sub-Registrar had no option but to treat the non-appearance of the executant as a denial of execution and to refuse registration on that ground. We know that he did so. This refusal gave rise to a right on the part of any person claiming under such document, or the representative of any such person, to apply to the Registrar to establish his right to have the document registered. We know that such an application was in fact made to the Registrar of Moradabad. It has been made a grievance on the part of the respondents in this Court that the evidence on the record does not show with certainty by whom this application was made. We have been informed that the application was made on behalf of the mother of the two minor sons of Sahu Parshadi Lal, acting as their natural guardian. It does not seem however in any way incumbent upon us to call for specific evidence on this point. We know that the Registrar had before him an application on which he proceeded to take action under the appropriate section of the Registration Act. He was satisfied that he had before him a valid application by, or on behalf of, a person entitled to make the same. I do not see that we are called upon to enquire into the precise nature of that application, especially in the absence of any specific plea that it was made by the particular person not authorised to make it. The proceedings before the Registrar resulted in an order by him, under the first clause of section 75 of Act XVI of 1908, whereby he ordered the document to be registered. In the meantime the estate of the minor sons of Sahu Parshadi Lal had been taken under the management of the Court of Wards, and the Collector of Moradabad, in his official capacity as Manager of the Court of Wards, became charged with looking after the interests of the minors in this matter. The Registrar's order for the registration of the document was dated June, the 28th, 1912. Within the prescribed period of 30 days, that is to say, on the 23rd of July, 1912, the Collector sent the document in suit to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication took cognisance of the same as a presentation of the document, within the meaning of section 75, clause (2) of the Registration Act, and proceeded to register the document accordingly. The present suit was instituted on the 23rd of November, 1914, the plaintiff being the Collector of Moradabad as Manager of the Court of Wards in charge of the estate of the two minor sons of Sahu Parshadi Lal. The defendants were the original mortgagor, who did not contest the suit, and a number of subsequent transferees.

In the written statements filed by some of these men the plea was taken that the document sued upon had not been duly presented for registration within the requirements of the law, that its registration was consequently invalid and that it could not affect the property hypothecated. The court below fixed a number of issues, but as between the plaintiff and the subsequent transferees it has tried out only the one issue as to the validity of the registration. Having come to a finding that the registration was invalid the learned Subordinate Judge has dismissed the plaintiff's claim altogether holding that, as a claim for a simple money debt against the original mortgagor, the suit would be barred by limitation.

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The appeal before us raises simply the question of the validity of the registration. In the earlier portion of this order I have taken occasion to dispose of two points which were incidentally argued. There remains the main substantial point in the appeal, namely whether the Sub-Registrar of Moradabad was right in treating this document as having been duly presented to him on the 23rd of July, 1912, when he received it under cover of an official letter from the Collector of Moradabad. In dealing with this point I do not propose to refer to the numerous authorities which have been cited before us. The present case is clearly distinguishable on the facts from any of those authorities, in that it turns upon section 75, and not exclusively upon section 32 of the Registration Act. This was not a case in which the registration officers had never been lawfully seised of the document at all. There had been, as I have held, a valid presentation of the document in the first instance on the 5th of February, 1912. Moreover, there was in existence a positive order by the District Registrar that the document be registered. The only question, therefore, is whether the procedure adopted in carrying out that order was such as wholly to invalidate the registration which followed, or was at most an irregularity of procedure on the part of the Sub-Registrar of Moradabad covered by section 87 of the Registration Act. The provisions of section 75, clause (2) of the Act are somewhat curiously worded. There is no such categorical imperative as is to be found in section 32, where it is laid down that, subject to certain exceptions, every document to be registered shall be presented by one or other of the persons described in the categories which follow. All that section 75 clause (2) does is to empower the registering officer to register the document, without such complete compliance as would otherwise be required with the provisions of sections 58, 59 and 60 of the Act, provided only it be duly presented to him within 30 days of the making of the Registrar's order. The controversy before us has turned on the expression "duly presented." The Sub-Registrar's duty when he received this document on the 23rd of July, 1912, was no doubt to satisfy himself that it was being presented to him by a person claiming under the document. If the Collector of Moradabad had pre-

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sented himself in person at the office, the Sub-Registrar would presumably have taken the Collector's word for it that the estate of the minor sons of the deceased mortgagee was now in his charge as Manager of the Court of Wards and that he was entitled to prefer a claim under the document on behalf of the said minors, or he might have satisfied himself on this point by a reference to the notification in the official Gazette. What he had before him was an official letter on the authority of the Collector of Moradabad, claiming to be in charge of the estate of the minors and to be entitled to present the document for registration. The argument that the Collector's failure to present this application in person is a fatal defect in the registration of the document seems to me open to a *reductio ad absurdum*. Whoever the messenger may have been who carried the document in question along with the Collector's letter to the office of the Sub-Registrar of Moradabad, the Collector could have given him formal authority to present the document by the execution of a special power-of-attorney; that special power-of-attorney being an instrument executed by the Collector in his official capacity could have been registered on the strength of an official letter from the Collector without his personal attendance at the office under the provisions of section 88 of the Registration Act. On the principle that the greater includes the less it seems to be asking far less of the Sub-Registrar that he should take cognizance of the Collector's official signature and designation to a letter informing him of the Collector's interest in the document in suit and presenting it for registration, than to ask him to accept a similar letter as proof of the fact that a particular document, as for instance a power-of-attorney, had been executed by the Collector. Under the circumstances of the case I think we are not straining the law in holding that the presentation of this document made on the 23rd of July, 1912, was a sufficient compliance with the requirements of section 75 clause (2) of the Act. Even if I do not think so, I should feel justified in regarding the action of the Sub-Registrar in taking cognizance of certain facts on the strength of an official letter received from the Collector of the district, without requiring the personal attendance of that officer before him, as at most a defect of procedure, curable by the provisions of section 87 of the Act. I hold therefore that the finding of the court below that the document in suit is invalid as a mortgage for want of due registration is incorrect and must be reversed. Although certain other issues have been disposed of in the judgment under appeal, this was the main issue decided as between the plaintiff and the subsequent transferees and it was certainly a preliminary issue. As we have reversed the finding of the court below on this point I think the proper order to pass is that the decree of the court below be set aside and the case returned to that court for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale, to be costs in the cause.

WALSH, J.—I agree. I think the case of the respondents is an attempt to apply the *dicta* of the Privy Council to a situation in respect of which they were certainly not uttered and to which, I think, they are not applicable. I propose to cite authorities only for the purpose of showing the principles which have to be borne in mind and then to attempt to construe these somewhat complicated provisions in order to make them work, if possible, naturally and easily.

Now, first, with regard to the presentation by the pleader on the 5th of February. By the endorsement that presentation purports to have been made under the authority of a special power-of-attorney duly authenticated in the registration office two days before. I feel a difficulty in applying the terms of section 60, sub-section (2) to that endorsement. The endorsement, it seems to me, is only evidence of the facts mentioned by it after the provisions of the section have been complied with and a certificate has been issued for registration. And, inasmuch as the very question which we have to decide is whether those provisions have been complied with as provided by section 60, it looks to me somewhat like begging the question to apply section 60, sub-section (2) to this endorsement. There is a further difficulty strongly relied upon in argument by Dr. Sulaiman that it is only evidence of the facts mentioned in the endorsement and the endorsement does not, it so happens in this case, mention the fact of the execution of the power-of-attorney. And therefore, although I agree in the conclusion at which my brother has arrived to be drawn from that endorsement, I do so for somewhat different reasons. I think it is in any event, apart from the provisions of the Act, an instance of the sort of case to which the old maxim of *omnia presumuntur rite et solemniter acta esse* ought to be applied, and that view seems to me to be supported by a passage in a case under this Act of a similar nature decided in the Privy Council as long ago as 1877. In that case Sir Montague E. Smith, delivering the judgment of their Lordships, said "If the High Court is to be understood to mean that in all cases where a registered-deed is produced, it is open to the party objecting to the deed, to contend that there was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with, their Lordships think this is too broadly stated. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally, that all courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed. . . . If the registration could at any time, at whatever distance of time, be opened, parties would never

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know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal." Applying that general statement of principle to the endorsement on a deed of the alleged authentication before the Registrar of a power-of-attorney under which a person presenting the deed for registration purported to act, I think in the absence of either a finding or of evidence to the contrary, and there is a total absence of either in this case, we are entitled to assume that when the Registrar endorsed on the deed the due authentication in his office of the power-of-attorney he meant that it was a power-of-attorney which had been properly executed and authenticated before him in accordance with law. And I therefore agree with my brother that the case of the respondents with regard to the presentation of the 5th of February breaks down.

We, therefore, start with this, that the document in question was presented at the Sub-Registrar's office for registration in accordance with the requirements of the law which the Privy Council in a passage which I propose to cite has said "it is the duty of courts of India to see carried out" The guiding principle recognised more than once by the Privy Council and reiterated by decisions in this Court is to be found in the head-note to the decision in *Mujib-un-nissa v. Abdur Rahim* (1) "The power and jurisdiction of the Registrar only arises when he is invoked by a person in direct relation to the document" And the necessity of guarding against opening the door even to trivial breaches of these requirements has been recently enforced by the judgment of their Lordships delivered by SIR JOHN EDGE in *Jambu Prasad v. Muhammad Aftab Ali Khan* (2). "It is the duty of courts of India not to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it." I would only add that a perusal of the judgment of the High Court in that case delivered by GRIFFIN, J., shows that there was positive evidence and a finding of fact negating the strict compliance with the requirements of the Act

These cases are decisions, as my brother has pointed out, under sections 32, 33 and 34 of the Act. And, as my brother has already pointed out, there is in the provision about presentation in section 75 to which I propose to refer in a moment, an absence of that imperative language which Sir JOHN EDGE refers to in the passage I have quoted. This brings me to the question of the second presentation, namely of the 23rd of July, by the Collector through a letter after various incidents including the death of the mortgagee had occurred, and a proceeding had taken place before the Registrar. The receipt of that letter was carefully endorsed by the Sub-Registrar on the deed on the same day, and the second point which we have to decide and it is really the great difficulty in the

• (1) [1901] I. L. R., 23 All., 233. (2) [1915] I. L. R., 37 All., 56.

case is whether there was a due presentation of that deed in accordance with section 75. I have come to the conclusion that there was, very largely for this reason. I think part VI and part XII of the Act deal with totally different circumstances and contemplate a totally different situation, and that the fallacy underlying the respondent's argument is an attempt to introduce into part XII considerations bearing upon interpretation which are really only applicable to part VI. The contrast between the two parts is really significant. Part VI is a collection of sections, and they are those on which the decisions of High Courts and Privy Council have been mainly given, dealing solely with "of presenting documents for registration." Part XII is also self-contained and deals with a situation created by what is called "of refusal to register." We have to deal with a case of refusal to register, and of another kind of presentation in consequence of the proceedings rendered necessary by such refusal. Section 71 (2) says that "no registering officer shall accept for registration a document endorsed with a refusal unless and until, under the provisions hereinafter contained, the document is directed to be registered." Section 72, so far as there is anything before us in the case at present, does not apply but I refer to it for one rather important fact. The word "presented" occurs in it, namely, an appeal may be heard from the order of the Sub-Registrar if presented to the Registrar within 30 days. It could hardly be contended that that presentation must be of the strict personal character which is obviously intended by part VI of the Act and therefore we find in the part of the Act which we have to construe that the word "presented" is used in what I may call a more elastic sense. Section 73 deals with the right of the party who desires to secure registration where the Sub-Registrar refuses on the ground of the denial of execution. That right is to apply to the Registrar to establish his right to have the document registered. Section 74 provides for an enquiry before the Registrar, as the result of such application, into (a) the execution, (b) the compliance with the requirements of the law. As regards "presenting" it clearly refers to such presentation as is dealt with by part VI "so as to entitle the document to registration." And in connection with such enquiry section 75 (4) enables the Registrar to summon and enforce the attendance of witnesses, to compel them to give evidence as if he were a Civil Court, and to deal with costs which are made recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In my view that proceeding is a judicial proceeding and was intended by the Legislature to be a judicial proceeding, the ordinary penalty for failure in which was visited on the unsuccessful party in the way such penalties are. And to my mind therefore the questions of the due execution, the due authorisation of the person presenting, and the due presentation, when such an enquiry has taken place, are decided, and disposed of for the purpose of the immediate question of registration

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or non-registration in a final order. The result of the Registrar's order, if in the affirmative, is to establish the right of the person to have the document registered and to entitle the document to registration, and the form of his order is an order that it shall be registered. To my mind, though I feel difficulty and hesitation about it, it would be to attribute totally superfluous particularity to the Legislature if one were to hold that these provisions in section 75 superimpose upon that solemn proceeding and final decision, a duty upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary and have been held by the Privy Council to be necessary before the registration by the Registrar has taken place. To my mind what happens after the Registrar's order is pure machinery. Any form of presentation, if it is supported by an application, which takes place on behalf of the presenter and is noted on the order in his favour, is sufficient. And even if it were not, I agree with my brother that section 87 covers the case. I, therefore, agree that this decision cannot stand.

I want to add one word with regard to the way in which the case has been dealt with. As I have often said it is in the interest of the courts themselves, and what is far more important in the interests of the litigant, that in a case of this description, where the evidence has in fact been taken and both sides have done all that they are able or likely to be able to do before the trial court, and the court, when it sits down to review the whole case and write its judgment, finds that there is some technical point which in its opinion enables it to dismiss the case, it should go on to dispose of all of the issues which have been dealt with in evidence and argued at the bar before it. It is just as easy and there is no better time than when the hearing of the case is fresh in the recollection of the court. Nobody is infallible and in a difficult case of this kind it is not impossible that the appellate court will take a different view of the law and therefore it is of the highest importance that the courts, with such points before them, should go on to complete the whole case and come to a conclusion upon the merits.

The real question in this case is whether there is anything to show that these two infant children whom the Court of Wards represents as plaintiffs are to be deprived of the fruits of the contract entered into by their father. And here are we, sitting in this Court, with all the evidence material to that point already given on both sides in the court below, and if findings had been arrived at by the court below, fully equipped for disposing of the case upon the merits, compelled to send the case back practically for a re-hearing, probably before another Judge, two years at least after the original hearing of the suit. It is suggested that even after that has taken place and it has come to this Court again there may still be an appeal to the Privy Council on the main question of registration.

All these proceedings have a tendency to prolong to an unspeakable extent the decision of a comparatively trivial dispute and to accumulate the expenditure of costs out of all proportion to the issues involved. • Of course where there is a real preliminary point, it is a totally different matter. No doubt it is necessary sometimes to decide as a preliminary matter whether the court is competent to hear a case at all. But when every thing has been done to enable the trial court to dispose of a case, I think it is a great misfortune, and it happens a great deal too often, that a Judge gets rid of it by disposing of some technicality raised by one of the parties, leaving the merits wholly untouched. I agree with my brother that this is a preliminary point and that the proper order is the one that has been passed.

BY THE COURT.—We set aside the decree of the court below and remand the case to that court under Order 41, rule 23 of the Code of Civil Procedure for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale, to be costs in the cause.

Appeal allowed—Cause remanded.

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Arms Act (XI of 1878), section 19 (f)—Minor—Actually in possession of arms without license—Guilty of offence under the Act.

Held that a minor who has in his custody and under his control arms without a license is guilty of an offence under section 19 (f) of the Arms Act, there being nothing in the Act to prevent a minor being guilty of an offence thereunder.

CRIMINAL APPEAL by the Local Government, from an order of acquittal passed by ABDUL ALI KHWAJA Esq., Additional Sessions Judge of Gorakhpur.

A. E. Rytes (Government Advocate), for the Crown.

C. R. Alston and Abdul Raoof, for the opposite party.

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The judgment of the Court was delivered by

TUDBALL, J.—This is a Government appeal against an order of acquittal passed by the Additional Sessions Judge of Gorakhpur in the case of the opposite party Sheikh Ghulam Husain who had been convicted by a Magistrate of the first class for an offence under section 19, clause (f) of Act XI of 1878 (The Arms Act). The facts are simple. Sheikh Ghulam Husain is the son of one Khadim Husain who died in 1901. The family is of good social position and owns considerable property. Khadim Husain was an Honorary Magistrate and as such was exempt from the operation of the Arms Act. The family lives in a three storied *pacca* building at Ganeshpur. At the death of Khadim Husain, Ghulam Husain was a boy of tender years. His younger brother was born a few months after his father's death. Musammat Amina Bibi is the widow of Khadim Husain. Apparently after the death of Khadim Husain, the weapons which he had in his possession remained in the family residence and no steps were taken to obtain a license for their possession. Ghulam Husain has grown up and at the time that this case occurred, was on the verge of majority, being between the ages of 17 and 18 years. On the 12th of September, 1917, at 3 p. m. in the absence of Musammat Amina Bibi and of Ghulam Husain, the family house was searched and in it were found in the *zenana* quarters locked up in *almirahs*, three guns, 8 swords, one dagger, one *kukhri* and three old pistols. At the same time in the house were also found some spears on one of which was engraved Ghulam Husain's name. The weapons were all in good condition and apparently had been kept properly cleaned. There was some evidence given in the case to the effect that Ghulam Husain had been seen out in the open accompanied by a servant carrying a gun some days previous to the search. The Magistrate who tried the case held that the accused was in-charge of the guns, that they were under his control and that he was responsible for their possession without a license under the Act. He therefore convicted him and sentenced him to a fine of Rs 1,000. On appeal the learned Additional Sessions Judge has held that the mother, Musammat Amina Bibi, being the manager of the family is the person who in law must be deemed to have been in possession of these weapons; that the accused being a minor cannot be held to have been in possession and therefore ought not to have been convicted. He accordingly set aside the conviction and sentence and acquitted Ghulam Husain. It is from this acquittal that the Local Government has preferred this appeal. It is true that Ghulam Husain was not of full age at the time that these weapons were recovered, but there is nothing in law which prevents a minor from being in actual fact in possession of arms without a license or which prevents him from being guilty of an offence under section 19, clause (f) of the Act. It is difficult for us to believe that a *purdah-nashin* lady like Musammat

Amina Bibi would have taken any care or specially retained in her possession the weapons which were found in her house. It is clear that these weapons were retained and that they were cleaned and properly looked after. In the same room with these weapons was the spear belonging to Ghulam Husain himself on which his name was engraved and it is clear therefore that he took an interest in the weapons. There is, we think, good reason to believe that they were in his custody and under his control and that he has, as a matter of fact, committed the offence under section 19, clause (f) of the Act. Whether his mother has committed the same offence or not is not a question which we have to decide in this appeal but we can see nothing in the present case to prevent it being held on the evidence that the weapons were under the control of Ghulam Husain and not of his mother. In the circumstances of the case we do not think that so heavy a fine as Rs. 1,000 was called for. Khadim Husain left behind him a *purdha-nashin* woman as a widow and a small boy. These weapons had probably been lying in the house for years owing more or less to the neglect of the District Magistrate in not having taken proper action on the death of Khadim Husain. The offence committed is one for which a more or less nominal punishment will suffice. We therefore allow the appeal, set aside the order of acquittal and restore the conviction of Ghulam Husain under section 19, clause (f) of the Arms Act and sentence him to pay a fine of Rs. 100 or in default to one month's simple imprisonment.

Appeal allowed.

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Criminal Procedure Code (Act V of 1898), sections 423, 435—Procedure—Evidence of a witness not taken by first court—District Magistrate ordering a retrial in appeal on this ground—Order not justified—Revision.

TUDBALL, J.

Where a District Magistrate ordered a re-trial of an accused person on the sole defect in the procedure of the court of first instance that certain evidence had not been brought upon the record which ought to have been there, the High Court in revision set aside the order for re-trial and directed the District Magistrate to summon and examine the witnesses named by him.

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CRIMINAL REVISION, from an order of W. GASKELL Esq., District Magistrate of Allahabad.

Satya Chandra Mukerji, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

TUDBALL, J.—In this case Ishwar Prasad has been convicted of an offence under section 411 of the Indian Penal Code and has been sentenced to a fine of Rs. 100 by a Magistrate of the second class. He appealed against his conviction to the District Magistrate who has directed the case to be re-tried in another court in accordance with law. It is within the Magistrate's power to direct a re-trial under section 423, clause (b) of the Criminal Procedure Code. The grounds given by the District Magistrate for ordering a re-trial are as follows:—He says "that from its appearance the case would seem to have been hurriedly tried and one in which the evidence is deficient. In particular it is not clear why the evidence of the *ekkaivala* who was present at the search was not taken as he is one of the main witnesses whose evidence is intended by law to be of importance in a case of this type. The procedure adopted is open to criticism. It is necessary that the case should be re-tried." If the only defect in the procedure of the court of first instance is that certain evidence has not been brought upon the record which ought to have been there, then it seems to me it is quite unnecessary to do any more than to have that evidence taken and brought upon the record. It would be unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. It is not clear except for the above in what way the procedure of the first court is open to criticism. There is no explanation by the District Magistrate in the matter. I therefore direct that the record be sent to him in order that he may point out in what way the procedure is open to criticism other than the fact that certain evidence has not been recorded.

I have read the report of the District Magistrate. I do not think it is quite fair to the accused in the present case to direct his re-trial. There is only one witness left for examination and a few questions to be put to the police officer who conducted the case. I therefore allow the application to this extent that I set aside the order of the District Magistrate directing a re-trial. I direct the District Magistrate to summon the witnesses named by him in his report to examine them and after so doing to decide the question of the applicant's innocence or guilt.

Application allowed.

SRIPAT NARAIN RAI (*Opposite-party*)

versus

TIRBENI MISRA (*Petitioner*)*

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March, 2.

RICHARDS,
C. J.
BANERJI, J.

Execution of decree—Decree passed against a deceased person—Representative of the deceased can show in execution that the decree is void—No question of jurisdiction in such a case.

A decree made against a dead man is a nullity and cannot be executed by the executing court. No question of the jurisdiction of the court arises in such a case. It is open to the representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made and that such a decree is void and incapable of execution as against the person so dead. *Imdad Ali v. Jaganlal*, I. L. R., 17 All., 478, followed.

EXECUTION SECOND APPEAL from a decree of W. R. G. MOIR Esq., District Judge of Gorakhpur, reversing a decree of Maulvi Saiyed Muhammad Said-ud-din, Munsif of Bansgaon.

Haribans Sahai, for the appellant.

Iswar Saran, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of execution proceedings. It appears that a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. It is alleged, and it is possibly correct that all the three persons constituted a joint Hindu family. The question of jointness is not now before us. Bindeshri died and the present application was for execution against the surviving defendants and also against the sons of Bindeshri as his legal representatives. It was objected that Bindeshri had died before the decree was made. Having regard to the order of the court below and to what happened when this case was before us on a previous occasion, we intend to deal with the case on the assumption that Bindeshri was dead at the time the decree was made against him. The lower appellate court has dismissed the application for execution as against the sons of Bindeshri as his legal representatives. This Court has held in the case of *Imdad Ali v. Jagan Lal*(¹), that it is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show

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C. J.

* E. S. A. No. 686 of 1917.

(1) [1895] I. L. R., 17 All., 478.

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that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the person so dead. This is an authority which we think we ought to follow unless it can be shown that it is no longer law. It is contended that there has been a change in the new Code of Civil Procedure by the omission from Order 21, rule 7 of the word "jurisdiction." We think that this alteration in no way modifies the authority of the case to which we have referred. No question of "jurisdiction" of the court to make the decree arises because no court can make a decree against a dead man; and a decree so made is a nullity. In this view we think the decision of the court below was correct. It is suggested that as the family is joint it was sufficiently represented by the members of the family who were alive when the decree was made, and that it is unnecessary that the sons of Bindeshri should be named as judgment-debtors. A good deal might be said for this contention particularly if the pre-emption money is accepted by the joint family, but we have not to decide this matter in the present appeal. We express no opinion as to what the effect of the execution of the decree against the surviving defendants will be. But we think the court below was justified in dismissing the application for execution against the sons of Bindeshri as his legal representatives. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

MIR DAD KHAN AND ANOTHER (*Defendants*)*versus*RAMZAN KHAN AND OTHERS (*Plaintiffs*)*

CIVIL

1918

March, 9.

PIGGOTT, J.
WALSH, J.

Agra Tenancy Act (II of 1901), sections 10, 21—Two documents executed on the same day—Usufructuary mortgage of sir land with covenant that mortgagors will not set up ex-proprietary rights—Deed of relinquishment of sir—Actual possession of such land given to mortgagees—One transaction under colour of two deeds—Covenants void—Evasion of law.

If a covenant to relinquish the *sir* lands is part of a transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If a court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by statute, deliberately chooses as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, the law cannot protect a reckless and imprudent man against the consequence of his own acts. Mir Dad Khan and others owned certain zemindari property with 30 bighas of *sir* land. They were indebted to certain persons for a sum of Rs. 9,000. On June 19th, 1913, two documents were executed by one of which the zemindars covenanted to mortgage with possession the 30 bighas of *sir*. The mortgage-deed contained not merely an express stipulation to put the mortgagees in actual cultivating possession of the *sir* lands, but a penalty clause binding the mortgagors not to assert their rights as ex-proprietary tenants. By the other document, which was a deed of relinquishment, the mortgagors purported to surrender or to relinquish in favour of the mortgagees, in lieu of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of *sir* :—*Held* that the transaction was one single transaction effected under cover of two deeds, and the covenants relating to the surrender of ex-proprietary rights and the transfer to the mortgagees of actual cultivating possession thereon were void and unenforceable, the attempt in this way being to evade the provisions of sections 10 and 20 of the Tenancy Act.

FIRST APPEAL, from a decree of MUNSHI SHAMS-UD-DIN KHAN, First Additional Subordinate Judge of Aligarh.

Panna Lal, for the appellants.

M. L. Agarwala and *Girdhari Lal Agarwala*, for the respondents.

* F. A. No. 149 of 1916.

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Piggott, J.

The following judgments were delivered by

PIGGOTT, J.—The suit out of which this first appeal arises is based upon the following state of facts:—

Mir Dad Khan and others were the owners of proprietary rights in a certain mahal. Appurtenant to those proprietary rights was a considerable area of land of which these zemindars were in possession either as *sir* or *khudkasht*. With reference to the *khudkasht* land it is sufficient to say that it was land which had been held by the proprietors in their own cultivation for the full statutory period and which had therefore acquired the essential character of *sir* land, so far as section 10 of the Local Tenancy Act No II of 1901 is concerned. For purposes of brevity therefore it will be convenient hereafter to speak of these lands as the *sir* lands of Mir Dad Khan and others. Now these proprietors were indebted and the evidence on the record shows that there was a decree out against them for a sum of Rs. 9,000, held by Thakur Das and others. The proprietors endeavoured to come to terms with these creditors and I do not think that there can be any doubt as to the nature of the arrangement effected. The creditors were willing to accept a usufructuary mortgage for Rs. 9,000, that is to say, for a sum sufficient to pay off their decree, provided that the land mortgaged, being 30 bighas of the *sir* land of the debtors, should pass into their actual cultivating possession. In endeavouring to effect such a transaction the parties concerned had to get round the difficulties placed in their way by Statute, that is to say, by the Local Tenancy Act, and particularly by sections 10 and 20 of that Act. It so happens that the law on this point has been recently settled by the highest possible authority in the case of *Moti Chand v. Ikram-ullah Khan* (1). So far as I am concerned I think I am entitled to say that there is nothing in the propositions of law there laid down other than I have been consistently asserting for some years past, or other than were given effect to by MR JUSTICE TUDBALL, and myself in the case of *Dipan Rai v. Ram Khelawan* (2). Their Lordships of the Privy Council, in deciding the case before them, by no means overlooked the provisions of section 83 of the Tenancy Act, according to which a tenant may at the end of any agricultural year surrender his holding to his proprietor. What they point out is that this right of surrender cannot be permitted to be used in such a manner as to defeat the provisions of the law by which ex-proprietary tenancies are created. They point out that the policy of Act No. II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal, or in any portion of it, are transferred, otherwise than by gift or exchange between co-sharers in the mahal, a right of occupancy in his *sir* lands. Such right of occupancy is secured and preserved to

(1) [1916] I. L. R., 39 All., 173.

(2) [1910] I. L. R., 32 All., 383.

the proprietor, who becomes by a transfer the ex-proprietary tenant, whether he wishes the right to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between him and the transferee. It is further pointed out that the courts must not allow the policy of the Act to be defeated by any ingenious devices, arrangements or agreements between a vendor and a vendee for the relinquishment by the vendor of his *sir* land. They go on to point out, more particularly, that devices to compel such a surrender by the inclusion in the deed of transfer of provisions amounting to a penalty against the transferor, in the event of his failing to relinquish the ex-proprietary tenancy, must also be regarded as devices or arrangements for defeating the policy of the Act. Cases in which attempts have been made, more or less openly, to evade the provisions of the law on the subject of ex-proprietary tenancies do from time to time come before the courts, and we have to notice more particularly the decision of a Bench of this Court in *Lekhranj v. Parshadi*(1), in which it would appear that a transaction which one might at least suspect of having been of this nature was given effect to by the Court. According to their Lordships of the Privy Council I take the true test to be this:—If a covenant to relinquish the *sir* lands is part of the transaction of sale or of mortgage, then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If the court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an ex-proprietary tenant, with full knowledge of that fact and of the rights preserved to him by the Statute, deliberately chooses, as a separate transaction, to relinquish his ex-proprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, then the law cannot go further in the way of protecting a reckless and imprudent man against the consequences of his own acts.

In the present case what we have to consider is the nature of the agreement actually entered into between Thakur Das and his fellow creditors on the one hand and Mir Dad Khan and his fellow zamindars on the other. Two documents were executed on one and the same date, namely, the 19th of June 1913. By one of these documents the proprietors covenanted to mortgage with possession 30 highas of land forming part of their *sir* lands. They declared themselves to have put the mortgagees in actual possession of the land in question, surrendering all their rights in the *sir* and *khudkashat*. They further covenanted that, if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the *sir* from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy

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(1) [1909] 6 A. L. J. R., 713.

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interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 bighas of land already referred to, but in a total area of 63 bighas and odd belonging to the mortgagors. The consideration for this document was stated at a sum of Rs 8,000. A further attempt was made to safeguard the mortgagees, in any event, against a possible refusal on the part of the mortgagors to carry out the contract in its entirety. The mortgagees did not content themselves with taking a usufructuary mortgage pure and simple. They inserted a covenant that, in spite of their right to obtain possession of the 30 bighas of land and to enjoy the usufruct in lieu of interest, they should nevertheless be entitled at any time to sue for the principal of their mortgage debt and to bring to sale the proprietary rights of the mortgagors in this area of 30 bighas, which were formally hypothecated as security for the debt. The other document of the same date was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees, in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of *sir* land in question. Whatever doubt there may be in particular cases as to the precise nature of the transaction entered into, it seems to me that there is no room for doubt in the present case. The total sum of money which Mir Dad Khan and his fellow zemindars owed to Thakur Das and others was Rs 9,000 and this was distributed between the two deeds, the mortgage-deed and the deed of relinquishment. Moreover the mortgage-deed itself contained, not merely an express stipulation to put the mortgagees in actual cultivating possession of the *sir* lands, but a penalty clause binding the mortgagors not to assert their rights as ex-proprietary tenants. The transaction therefore was one single transaction effected under cover of two deeds. It was a determined attempt to evade "by ingenious devices and arrangements," as their Lordships of the Privy Council have put it, the provisions of sections 10 and 20 of Act No. II of 1901. It is quite immaterial that, according to the terms of the two documents, the surrender purports to have been actually effected. In any such attempt to get round the provisions of the law the transferee is certain to insist upon a statement that he has actually been put in possession and that the surrender which he desires has actually been effected. I must note however that the mortgage-deed in question is not a usufructuary mortgage pure and simple; to a certain extent it is a combination of a simple and a usufructuary mortgage, and is therefore what the courts in India commonly speak of as an anomalous mortgage. We are principally concerned in the present case with the effect of this document as a usufructuary mortgage. On the principles laid down by their Lordships of the Privy Council all the stipulations about the surrender of ex-proprietary rights and about the transfer to the mortgagees of actual cultivating possession over this area of 30 bighas are void and un-

enforcible. The penalty clause goes along with the rest, being strictly analogous to the sort of device spoken of by their Lordships of the Privy Council at the close of the judgment already referred to, whereby the vendor covenants to make himself liable to a suit for breach of contract on his failing or refusing to carry out the stipulated relinquishment of his ex-proprietary rights. Such a stipulation would, in the opinion of their Lordships, be void and unenforcible. I can see nothing in the stipulation in the deed in suit by which the mortgagors bound themselves, in the event of their setting up any claim to possession as ex-proprietary tenants, to submit to a decree for sale against their proprietary rights in an area of 63 bighas and odd, to distinguish it from a stipulation that they should be liable to a suit for damages, or to any other kind of penalty, in the event of their failure to relinquish. In the view of the case which I take I am by no means disposed to differ from such decisions as that which we have been referred to viz, I. L. R., 39 All., p. 539, where a mortgage affecting some property which was transferable, along with other property which was by law non-transferable, was allowed to be enforced against the former of the two properties. I do not say for a moment that the mortgage-deed in suit, regarded as a usufructuary mortgage, was altogether void and of no effect. What it gave the mortgagees was the right affirmed by MR. JUSTICE TUDBALL and myself in *Dipan Rai v. Ram Khelawan*(1), namely the right to proprietary possession in respect of this area of 30 bighas and the right to have rent assessed thereon upon the mortgagors, as ex-proprietary tenants, and to receive and enjoy the said rent in lieu of interest on their money. This was no doubt less than the mortgagees wanted and hoped to secure by the transaction, but it was the legal effect of the transaction actually entered into, in view of the provisions of section 10 of the Tenancy Act by which the ex-proprietary tenure was preserved to the former proprietor, "whether he wished it or not," as the Privy Council have said. We have been asked however to consider further the anomalous nature of this mortgage and the legal effect of hypothecation of the proprietary rights in this area of 30 bighas as security for repayment of the principal loan for reasons which I shall have to state presently. I do not think that any decision on this point is necessary to the determination of this appeal. My own opinion undoubtedly is that the original mortgagees, Thakur Das and others, could have enforced this stipulation. They could have taken up the position that the contract of mortgage which they had entered into was a usufructuary mortgage combined with a simple mortgage; that they had made a mistake in attempting to evade the statute law by the terms of their usufructuary mortgage, and that they therefore claimed to fall back upon the document as a simple mortgage and to ask for a decree on that basis. It may, however, be noticed at the same time that this re-

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(1) [1910] I. L. R., 32 All., 383.

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medy would have been worth extremely little to the mortgagees. If the proprietary rights of Mir Dad Khan and his fellow zemindars in this area of 30 bighas had been brought to sale on a decree enforcing the hypothecation of the same for repayment of the loan of Rs. 8,000, the sale itself would at once have given rise in favour of the mortgagors to this very ex-proprietary tenure which it was the object of the deed in suit to get round. The purchaser at auction, whether Thakur Das or another, would have had to be content with the rent assessed by the Collector on this ex-proprietary tenure as representing to him the usufruct of the property purchased. This right the original mortgagees could enjoy as mortgagees under the usufructuary part of the mortgage, and it would not have made much difference to them to have endeavoured to work out the same result by enforcing the hypothecation lien, if that were limited (as it must be limited apart from the penalty clause) to the proprietary rights in the area of 30 bighas.

The case now before us is not between the mortgagors and the original mortgagees. The plaintiffs, who are the respondents to this appeal, were co-sharers in the same mahal, and the transfer of the proprietary rights of Mir Dad Khan and others by way of usufructuary mortgage gave rise to a right of pre-emption on their part. This right they claimed to enforce and they brought a suit accordingly. That suit was finally settled by a compromise and the compromise decree, which is dated the 16th of June 1914, gives these plaintiffs as pre-emptors the right of possession as mortgagees over the property pre-empted, that is to say, over the 30 bighas of *sir* land in suit. It gives them nothing more : even if what I have called the penalty clause of the original contract of mortgage were enforceable by the original mortgagees, which I believe it was not, there is nothing in this decree to make it enforceable by the pre-emptors. Still less does this decree give the plaintiffs any right, under the mortgage-deed of June the 19th, 1913, to bring the property to sale under the hypothecation effected in the earlier part of the said deed. I doubt whether an alienation by way of simple mortgage would have given rise to any right of pre-emption. The presumption is that persons possessing the right of pre-emption would have had to wait until the property was brought to sale in enforcement of the hypothecation lien, and then to have asserted any rights of pre-emption which they might claim. However this may be, the pre-emption decree actually passed does not transfer to these plaintiffs any rights as simple mortgagees in respect of the land in suit.

In the suit as brought the plaintiffs claim the full benefit of the terms of the mortgage of June the 19th, 1913. They say that they are entitled to actual possession over the area of 30 bighas in question or, failing this, that they are entitled to recover the mortgage debt of Rs. 8,000, with interest at 2 per cent per mensem—
 • under the penalty clause of the mortgage-deed, by sale of the area

of 63 bighas and odd referred to in that clause. The learned Subordinate Judge who tried the case was not an officer with any revenue experience, nor had he before him at the time of his decision the clear pronouncement of their Lordships of the Privy Council to which reference has already been made. It is therefore no imputation against him to say that, in the very brief judgment pronounced by him, he has not shown much appreciation of the difficulties of the case. He has definitely held that the plaintiffs were not entitled to possession as mortgagees over the land in suit, but he has enforced in their favour the penalty clause in the original contract of mortgage, which they were most certainly not entitled to have the benefit of. The decree as passed is for recovery of the principal of Rs. 8,000, with arrears of interest and costs, by sale of the 63 bighas and odd of land already referred to. From the operation of this decree, however, a certain share has been excluded, on the ground that one of the former proprietors was a minor and that his certificated guardian joined in this mortgage on his behalf without having duly obtained the sanction of the District Judge. We have a petition of cross-appeal before us challenging the decision of the trial court on this point; but in view of the decision which we have arrived at on the main question it seems unnecessary for us to go into it. If the appeal of the defendants succeeds the cross-objection must obviously fail.

Now, as regards the appeal of the defendants, I have already given abundant reasons why in my opinion the decree as passed cannot stand. In the very able and ingenious argument addressed to us by Mr. M. L. Agarwala on behalf of the respondents, although he very properly declined to give up any part of his client's case, it is doing him no injustice to say that he could not make out much of a case for affirming the decree of the court below as it stands. What he really pressed upon us was the right of his clients to one or other of two different reliefs. He contended that, in any event, his clients should be given the benefit of what I have called the hypothecation clause in the mortgage-deed of June 19th, 1913, and the proprietary rights of the mortgagors in the 30 bighas of land in question be brought to sale, at least in satisfaction of the principal of the mortgage debt. In reply to the suggestion that the right to enforce this hypothecation clause had not passed to his clients under the pre-emption decree, Mr. Agarwala contended with much keenness that no plea to this effect had been taken in the written statement of any of the defendants. It seems a fair rejoinder to this to say that neither was any claim to this effect set up in the plaint. The claim in the plaint was for cultivating possession over the land in suit, by ejectment of Mir Dad Khan and his fellow mortgagors, or in the alternative for enforcement of the penalty clause by the passing of a decree for sale in respect of the entire area of 63 bighas and odd. I feel

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quite satisfied that, whatever might have been the rights of Thakur Das and others in respect of the hypothecation of the area of 30 bighas, those rights did not pass to the present plaintiffs under the pre-emption decree and that therefore this relief is not open to them.

The other contention pressed upon us by Mr. Agarwala has caused me more difficulty. It is based not merely on the documentary evidence already referred to, but upon certain evidence as to transactions which followed the execution of the mortgage-deed in suit. Broadly speaking, Mr. Agarwala's contention is this:—That the mortgagors, Mir Dad Khan and others, whatever may or may not have been their rights under the deed in suit, did carry out their part of the contract by actually surrendering to the mortgagees, Thakur Das and others, the ex-proprietary tenancy which the Statute created in their favour. The argument is that the original mortgagees thus obtained actual cultivating possession of the land in question and enjoyed the same for the period of about a year; that by this possession the ex-proprietary tenure became finally extinguished and can no longer be set up against the plaintiffs, pre-emptors. I admit the contention to be a highly ingenious one and the question which it raises seems to me of some difficulty. In the first place however, I think that on the evidence on this record Mr. Agarwala is asking too much of us in the way of findings of fact in his favour. The patwari of the village was not put into the witness box nor were any of the original mortgagees called. We know from the plaint that Mir Dad Khan and the other mortgagors were in actual cultivating possession of the 30 bighas of land when the suit was instituted on the 5th of July, 1915, and the plaint certainly does not explain how or when they recovered that possession, if they did in fact surrender their ex-proprietary tenancy into the hands of the original mortgagees. One of the plaintiffs was put into the witness box and deposed that the mortgagees, Thakur Das and others, had entered into actual possession of the land. He said he himself failed to get actual possession because Mir Dad Khan forcibly cultivated it. He was cross-examined on this point in a manner which clearly showed that the defendants did not admit the facts stated by him to be correct, but the only evidence by which he sought to support himself was the production of certain records of the Revenue Courts showing the mutation proceedings which followed the execution of the mortgage-deed in suit. Now the execution of that deed required in any event to be taken due notice of in the village records. There had to be some mutation of names in respect of it and the natural tendency of the Revenue Courts, unless their attention was specially called to the matter, would be to effect formal mutation of names in accordance with the terms of the deed. What I notice more particularly is that the Tahsildar,

on whom the duty of making the necessary preliminary enquiries lay, when reporting the matter for the orders of the Assistant Collector in-charge of the Sub-division, contented himself with mentioning that there had been a surrender of the ex-proprietary holding, keeping back the very important fact, which he should certainly have mentioned, that that surrender purported to have been made and attested by a deed of even date with the usufructuary mortgage itself, that is to say, at a time when it was at least doubtful whether the mortgagees were entitled to receive any such surrender, and under circumstances strongly suggestive on the face of them of an attempt to evade the law. The Assistant Collector appears to have passed his order for mutation of names, without further consideration or enquiry, on the strength of the Tahsildar's report. I am not satisfied therefore that this evidence proves that there was an effective surrender of the land in suit into the hands of Thakur Das, much less that the possession of Thakur Das and his fellow mortgagees lasted for the entire period of one year, or for anything like that period. It is of course possible that, as between the original mortgagees and the original mortgagors, the contract would have been carried out according to its terms, if the plaintiffs had not interfered with their suit for pre-emption. The fact remains that, by the time when the present plaintiffs tried to obtain the benefit of their pre-emption decree, they found the original mortgagors in effective possession of the land in suit and claiming to be exactly what the law says they are, namely ex-proprietary tenants of the same. Looking at the matter in its broadest aspect, I would say that the rights which these plaintiffs took under their pre-emption decree in respect of the mortgage-deed in suit, regarded as a usufructuary mortgage, were simply the rights which the law would permit the original mortgagees themselves to take under the same, namely, the right to proprietary possession subject to an ex-proprietary tenancy in favour of the original mortgagors. This is the position taken up by the defendants in this suit, and I think that position is correct in law and that the plaintiffs are not entitled, either to the relief which has been decreed to them by the court below, or to any of the reliefs which have been claimed on their behalf in the alternative. In this view of the case I would allow the appeal set aside the decision of the court below and dismiss the plaintiffs suit with costs, and similarly dismiss with costs the cross-objection filed by the plaintiffs-respondents.

WALSH, J.—I agree. I think this is a colourable transaction. The two deeds were in fact an attempted sale of the ex-proprietary rights. If so, the case is clearly covered by the decision in *Dipan Rai v. Ram Khelawan*⁽¹⁾ and also by the observations of the Privy Council reported in I. L. R., 39 All., p. 173 where Sir JOHN EDGE,

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in delivering judgment, affirmed the principle laid down by the High Court that the transaction was not a lawful one, whether it was regarded as an attempted sale of the ex-proprietary rights, or an agreement to relinquish those rights when they should arise, and pointed out that the policy of Act No. II of 1901 was that the right of occupancy should be secured and preserved to the proprietor who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not, and notwithstanding any agreement to the contrary between himself and the transferee.

The transaction in these two deeds are in substance one transaction which took place on the same day. They are in form inseparable, but I think that the same principle would apply even if they were in form separable. I apply the reasoning which was applied by the House of Lords in *Maas v. Pepper* (1). The law being in England that no mortgage, of moveable chattels can be entered into where the chattels remain in the possession of the grantor without a registered document, there had been a sale of furniture to an alleged purchaser, who by a contemporaneous document re-let them on a hire agreement for the original price at which he had bought them, plus an addition to that sum which the court regarded as merely interest under another name, the agreement giving to the hirer the right to become the owner by re-purchase if he paid the instalments under the agreement. Now those two documents were entirely independent in form. None the less the House of Lords held that the trial court had been right in going behind the form and deciding what was in substance the real transaction, and pointed out that the sale was really a colourable sale to disguise what was in substance a loan. I think by the same reasoning this was a colourable relinquishment to disguise what was in fact a sale. No doubt an ex-proprietary tenant can, as such, surrender his rights by proper relinquishment. No body can put the point, I think, better than it has been put by Mr. M. L. Agarwala at page 69 of his book on the Tenancy Act in this sentence:—"It comes to this that though a proprietor can, in fact, give up his ex-proprietary rights when they accrue, by not availing himself of them he cannot bind himself by an express stipulation to that effect in a deed of transfer of the property or the like."

I think that is what these documents purported to do. I agree with what my brother has said about the decision in *Lekhranj v. Per-shadi* (2). Unless the facts of that case are distinguishable from this case by something which does not appear in the judgment I am bound to say, having regard to the fact reported that the two transactions were contemporaneous in date, I should have found difficulty in holding that the alleged relinquishment in that case

(1) [1905] A. C., 103. (2) [1909] 6 A. L. J. B., 13, S.C., 2 I. C., 409.

was not also a colourable transaction. To that extent I am unable to agree with the decision.

BY THE COURT.—We allow the appeal, set aside the decision of the court below and dismiss the plaintiffs' suit with costs including fees on the higher scale. We also dismiss with costs the cross-objection filed by the plaintiffs respondents.

Appeal allowed—Cross-appeal dismissed.

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MIR DAD

KHAN

v.

RAMZAN

KHAN.

Walsh, J.

GANESHI LAL (*Plaintiff*)*versus*BABU LAL AND OTHERS (*Defendants*).*

Hindu Law—Partition—Division made by mutual mistake as to property subject thereof—Re-partition.

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Feb. 4.

PIGGOTT, J.

WALSH, J.

Where by mutual mistake the parties to a partition included in the division certain property to which a third person was entitled and who got his share in the property by suit from the parties who had made the original division, *held* that the partition was liable to be re opened. *Maruti v. Rama*, I. L. R., 21 Bom., 333.

FIRST APPEAL from a decree of E. R. NEAVE Esq., Subordinate Judge of Dehra Dun.

Ganeshi Lal and Babu Lal were brothers. In 1910 Babu Lal sued Ganeshi Lal for partition of the joint family property, namely a number of houses in Pilkhna in the Meerut district. Ganeshi Lal in his defence stated that there was another item of joint family property, namely a "shop" at Landhour (Mussoorie), which also should be included in the partition. The parties compromised, and on 21st December, 1910, a decree was passed in accordance therewith. By this decree one-half of a large house was allotted to Babu Lal and the other half to Ganeshi Lal; and of the smaller houses, some were allotted to Babu Lal and others to Ganeshi Lal, and one was left in their joint possession. The effect of the decree upon the "shop" at Landhour was a matter of controversy.

In 1914 Khairati Lal, a cousin of the two brothers, brought a suit against them claiming title to one-half of the family property and asking for possession by partition of his half share out of the whole of the property dealt with in the suit of 1910. The two brothers denied that Khairati Lal had any title. The court found in

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favour of Khairati Lal, and on 3rd February, 1915, decreed his claim. The decree awarded him two of the smaller houses which had been allotted to Babu Lal by the partition of 1910, and also that half of the large house which had been allotted to Ganeshi Lal. It appeared that at the time of the litigation of 1910 the two brothers were acting under a *bona fide* mistake as to their being the sole owners of the joint family property, and were unaware of the existence of Khairati Lal's title.

The present suit for partition was brought by Ganeshi Lal on the ground that in consequence of Khairati Lal's suit and the decree passed therein he was entitled to re-open the question of the distribution of the property effected by the partition of 1910, including the "shop" at Landhour; it was not specifically alleged, however, that the parties were then under a mutual *bona fide* mistake. The suit was brought in the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas raised by the principal defendant, Babu Lal, was that the court had no jurisdiction to try the suit inasmuch as what was described as the "shop" at Landhour was only a business located in a house which did not belong to the parties, and consequently there was no immoveable property situate within the territorial jurisdiction of the court. The Subordinate Judge was of opinion that he had jurisdiction to try only that part of the suit which related to the said "shop," but that there was no ground for re-opening the partition of 1910 with respect thereto; he, accordingly, dismissed the suit. The plaintiff appealed.

Gulzari Lal, for the appellant.—The compromise and decree of 1910 effected only a partial partition; the "shop" and business at Landhour and a house at Pilkhna were left joint. A subsequent suit for partition lies where the former partition was partial. Moreover, the parties to the partition of 1910 had no idea that their cousin Khairati Lal was also entitled to a share, and on that point they were labouring under a *bona fide* mistake, one-half of the property having been awarded to Khairati Lal under the decree of 1915, the previous partition was disturbed and the plaintiff was prejudiced in consequence of the common mistake. Under these circumstances the plaintiff is entitled to have the partition re-opened and to have the property remaining after the allotment of Khairati Lal's share re-divided. I rely on

Mayne: Hindu Law, Eighth edition, p. 690.

Maruti v. Rama, [1895] I. L. R., 21 Bom, 333.

The lower court is wrong in holding that it had jurisdiction to entertain only a portion of the claim. It had jurisdiction to try the whole suit if it had jurisdiction at all, that is, if any portion of the property was situate within its territorial jurisdiction.

Surendra Nath Sen, for the respondent.—The parties to the present suit were co-defendants in Khairati Lal's suit for partition,

and in such suits there can be *res judicata* between co-defendants. Having regard to the nature and character of a partition suit, the present plaintiff might and ought to have pleaded in Khairati Lal's suit that there should be a re-adjustment of the shares between the defendants *inter se*. He cannot be allowed to re-agitate the same matter by a separate suit.

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Pursotam Rao Tania v. Radha Bai, [1910] 7 A. L. J. R., 451.

I am entitled to support the decree of the lower court on this ground although it was not the ground upon which that court disposed of the case.

A partition once effected cannot be re-opened excepting upon some well-defined grounds, which are summarised in

Ramakrishna: Hindu Law, Volume II, p. 116.

The plaintiff has not pleaded either in the plaint or in the grounds of appeal that there was a *bona fide* common mistake at the time of the partition of 1910.

The lower court has not properly tried the question of jurisdiction. There appears to be no immoveable property situate within the jurisdiction of that court. The business at Landhour is not immoveable property, and the house in which it is located does not belong to the parties. Under section 16, Civil Procedure Code, the lower court had no jurisdiction to entertain the suit and it was rightly dismissed.

Gulzari Lal, was heard in reply.

The judgment of the Court was delivered by

PIGGOTT, J.—This is an appeal by a plaintiff whose suit for partition has been dismissed by the court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas taken in the written statement was that that court had no jurisdiction to try the suit at all. So far as we can gather from the judgment of the learned Subordinate Judge, he seems to have found that he had no jurisdiction to try the whole suit but had jurisdiction to try part of it, and he has therefore proceeded to try what he regards as a preliminary question sufficient to determine that portion of the suit which he conceived himself to have jurisdiction to try. The conclusion we have come to is that the court below either had jurisdiction to try the entire suit, or had no jurisdiction to try any part of it. Further, we are of opinion that the decision pronounced with regard to a portion of the plaintiff's claim proceeds upon erroneous principles of law and is calculated to make it impossible for the plaintiff in any event to litigate a possibly just claim any further. We must therefore set aside the decree of the court below and remand the case to that court under the provisions of Order 41, rule 23 of the Code of Civil Procedure. In so doing however, we must make it quite

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clear that we do not feel able on the materials before us finally to determine the question of jurisdiction. We leave that question still open and the court below, after receiving this order of remand, should again take that point into consideration at once and pass appropriate orders, according as to whether it finds that it has or that it has not jurisdiction to try the suit. The said suit arises out of the following state of facts. Ganeshi Lal the plaintiff and Babu Lal the principal defendant are brothers. They were admittedly up to the year 1910 members of a joint undivided Hindu family. In the year 1910 Babu Lal brought a suit for partition against Ganeshi Lal. The specification of the property sought to be partitioned given at the foot of the plaint sets forth a number of houses situated in the town of Pilkhna in the Meerut district, and the suit was accordingly filed in the court of the Munsif of Ghaziabad, within whose territorial jurisdiction the said property was situated. In his defence Ganeshi Lal raised a question as to whether the plaint contained a complete specification of the property which ought to be brought under partition. He pleaded that Babu Lal and himself were the joint owners of a shop at Landhour, the Cantonment of Mussoorie, that this shop was an ancestral business carried on for the benefit of both parties, that it had not been doing well and that there were heavy liabilities attaching to the business. His written statement implies, if it does not actually state, that this shop or business at Landhour was in the possession and under the management of Ganeshi Lal, and it is suggested that Babu Lal's object in suing for the partition of the joint family property at Pilkhna, while omitting all mention of the Landhour business, was to saddle his brother Ganeshi Lal with all the liabilities of that business while taking for himself his full half share in the joint property, some of which it was contended had been purchased out of the profits of that business at a time when such profits were available. This pleading obviously raises questions of fact and of law which the court conducting the partition would have had to determine before any decree could be passed; but as a matter of fact the case was settled by a compromise between the two brothers. The precise effect of that compromise as regards the business at Landhour is a matter of controversy in the present suit; but it is sufficient to note that its result was to partition the immoveable property at Pilkhna in a particular manner. One large house was divided between the brothers in equal shares, the Eastern portion being assigned to Babu Lal and the Western portion to Ganeshi Lal. Certain other houses were assigned, some to one brother and some to the other, and in respect of one house it was provided that it should continue in the joint possession of both parties. A decree was passed on the 21st of December, 1910, in the terms of the compromise. In the year 1914, one Khairati Lal, a cousin of the parties, instituted a suit in which he claimed to recover possession of one-half share of the whole of the property

which had been dealt with in the partition of December the 21st 1910, alleging himself to be the owner of the same and asking that his moiety might be divided by metes and bounds from the rest and he be put into possession. This suit was contested by both the brothers, who denied that Khairati Lal had any right or title in respect of any share whatever in this property; but the suit was decreed in Khairati Lal's favour on the 3rd of February, 1915. The result of this decree was that the Western portion of the largest of the houses in question, that is to say the portion which had been assigned to Ganeshi Lal at the partition of 1910, was awarded to Khairati Lal; and along with this one smaller building, described as a shop with a *kuchcha* house appertaining thereto, and another *kuchcha* built house were awarded to Khairati Lal out of the property allotted to Babu Lal in 1910. The plaintiff claims that, in consequence of the success of Khairati Lal's suit, he is entitled to re-open the question of the distribution of the joint family property, and more particularly of the immoveable property, effected at the partition of 1910. We must take it that at that time Ganeshi Lal and Babu Lal honestly believed themselves to be the sole owners of the property in their possession which they then partitioned amongst themselves. There was therefore a *bona fide* mistake on the part of both parties to the partition, and that mistake has now become apparent and has produced inequitable results because of the success of Khairati Lal's suit. There is good authority for the proposition that under such circumstances the party to the partition who finds himself prejudiced as a consequence of the common mistake is entitled to have the question of the partition re-opened. A very clear case on this point is that of *Maruti v. Rama* (1). We agree with the principles laid down by the learned Judge who decided that case and we think that they apply to the case now before us. Ganeshi Lal however has chosen to complicate the question in two ways. He wishes to re-open, not merely the question of the division effected of the house property at Pilkhna by the partition of 1910, but also the question then raised by him as to the respective rights and liabilities of himself and his brother in connection with the business at Landhour. Believing apparently that he could do this more effectually by means of a suit instituted in the court within whose territorial jurisdiction this Cantonment is situated, he has brought the present suit, not in the court of the Munsif of Ghaziabad, but in that of the Subordinate Judge of Dehra Dun and Mussoorie. The question whether that court has any jurisdiction to entertain this plaint depends simply on whether or not any immoveable property sought to be partitioned is situated within the territorial jurisdiction of that court. The provisions of section 16, clause (b) of the Code of Civil Procedure are quite clear in their application to the present case and, inasmuch as the defendant Babu Lal does not

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live or carry on business within the jurisdiction of the Subordinate Judge of Dehra Dun and Mussoorie, no possible question arises as to the effect of any subsequent section of the same Code. Either the court below had jurisdiction to entertain the whole of this suit or it had no jurisdiction to entertain it at all, and this depends on what the parties meant in that court when they spoke of the "shop" situated at Landhour. The wording of the plaint suggests that they were speaking only of a "business," possibly carried on in a hired shop; but it has been pressed upon us on behalf of the plaintiff that this point is not made clear beyond dispute by the record as it now stands before us and that there is room for further enquiry in the court below. The only other substantial point in the case turns on the wording of the compromise of 1910 and the decree passed in accordance therewith. We are not sure that we have all the materials before us for pronouncing a final opinion on this point and it is not advisable that we should endeavour to try this question on the merits before the question of jurisdiction has been finally determined. According to the defendant the effect of the compromise decree of 1910 was not merely to assign the business at Landhour with its assets and its liabilities, whatever these might be, entirely to the share of Ganeshi Lal; but it did this independently altogether of the partition of the joint property effected by the other portion of the compromise. Virtually the contention for the defendants is that the decision arrived at between the parties on their own compromise in December, 1910, amounted to a decision that this Landhour business did not form part of the assets of the joint family but was entirely a matter for which Ganeshi Lal alone was responsible. This is a question which may yet have to be determined between the parties and it is possible that further evidence may be required before a decision can be pronounced. The point seems worth mentioning in order to make it clear that, in saying that Ganeshi Lal is in our opinion entitled to have a re-partition of the joint family property made in consequence of the success of Khairati Lal's suit, we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landhour business should or should not be taken into account in connection with such re-partition. Our order therefore is that we remand this case to the court below under Order 41, rule 23 for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the cause.

WALSH, J.—I entirely agree. I only wish to add one word on the point arising on the merits which was substantially argued before us. I agree with the decision in I L. R., 21 Bom., 333, but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition. I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle,

that where parties arrive at a partition either by agreement, or by a decree (which after all is only a more solemn and binding form of agreement,) there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which of course in the case of a decree is adopted by the court making the decree, the mistake can be set right *pro tanto*.

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Case remanded.

DEBI PARSHAD AND ANOTHER (Plaintiffs)

versus

BADRI PARSHAD (Defendant)*

Limitation Act (IX of 1908), section 28, schedule I, article 144—Right occurring on occasion—Adverse possession—Right to take wood from trees when fallen or cut—Right disputed on two previous occasions—No uninterrupted and continuous possession.

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March, 13.

TUDBALL, J.

RAOOF, J.

Plaintiffs' ancestor obtained leave in 1867 to plant trees on land belonging to Government. He was to do so at his own expense and to tend them; the only right he was entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions *viz.*, once in 1900 and at another time in 1910, the defendant who had purchased the village got the proceeds of the sale of such wood. The plaintiffs on both the occasions asserted their claim to wood or the price thereof but remained unsuccessful. Within six years from the date of the last sale they brought the suit for declaration of their right to get the dry wood under the agreement of 1867. The defendant pleaded adverse possession:—*Held* that the right being one which could only be exercised on occasion that is when the wood might fall or be cut from the trees, and not occurring every year or at stated times, and there having been disputes as to the right between the parties on two previous occasions, there could be no adverse possession.

Query, whether section 28 of the Limitation Act applies at all to a case like this.

* S. A. No 712 of 1916.

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SECOND APPEAL from a decree of G. C. BADHWAR Esq., Additional Judge of Farrukhabad confirming a decree of Ali Ausat Esq., Officiating Subordinate Judge.

Suit for declaration of right.

The facts of the case are shortly as follows:—Madan Gopal, the father of the plaintiffs, was a mortgagee in possession of a village, called Runi Charsai. There was a *kachcha* road leading from Runi Charsai to mouzah Patia. In 1867, Madan Gopal made an application to the Collector of Farrukhabad asking for permission to plant a row of trees on either side of the *kachcha* road for the comfort and convenience of travellers. He represented further that he would never sell the trees, would watch and tend them at his own expense and appropriate for his own use dry fallen wood of the trees. The Collector gave the permission asked for, and Madan Gopal planted the trees. In 1883 Madan Gopal transferred his zamindari in mouzah Runi Charsai, but did not transfer his rights in the trees planted on the roadside. Subsequently the zamindari came into the possession of the defendant by purchase in 1887. The sale deed in his favour included the row of trees above mentioned. The defendant thereupon began to assert his rights to the row of trees and on some occasions he appropriated the fruits to his own use. In 1900 the District Board had the branches of the trees lopped off. Madan Gopal and the defendant laid claim to the price realised on the sale of the loppings. After enquiry, the District Board paid the price to the defendant. In 1901 the defendant sued some persons for damages for wrongful plucking of the fruits. The suit was dismissed by the District Judge on the ground that the defendant had no right whatever in the trees. In 1910, some dry wood was sold by the District Board and again rival claims were made by the defendant and the plaintiffs (as the heirs of Madan Gopal). The District Board again recognized the rights of Badri Prasad and paid over the money to him. The plaintiffs instituted this suit for a declaration of their rights to the dry and fallen wood of the trees. The defendant pleaded that the trees were appurtenant to his zamindari and in the alternative that he had been in adverse proprietary possession of the trees for over twelve years. The courts below dismissed the suit. The lower appellate court found that the trees stood on Government land and were in possession of the same. It nevertheless held that time at the latest had begun to run against the plaintiff since the dispute in 1900 and the suit was therefore barred by time.

Plaintiffs appealed.

Kailas Nath Katju, for the appellants.—There can be no adverse possession of a right such as the one claimed by the plaintiffs. A plea of adverse possession presupposes two things, firstly, that the plaintiff was entitled to immediate possession of the property in

dispute, and secondly that the defendant is in such possession. In the present case neither supposition holds good. Neither party is entitled to possession of the property. Government is in possession as of right. The right reserved by Madan Gopal was to the fallen wood and would only become operative whenever any wood happened to fall. Such a right is incapable of adverse possession by any body. The party relying upon a plea of adverse possession has to make out continuous un-interrupted possession in himself for 12 years. Here wood happened to fall twice in 12 years, once in 1900 and again in 1910. The wrongful appropriation by the defendant of such wood on those two occasions would not deprive the plaintiffs of their right for ever. Every fresh invasion of a right gives a cause of action for a suit for declaration until the right itself is extinguished by operation of section 28 of the Limitation Act.

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Ilahi Bakhsh v. Harnam Singh, [1898] A. W. N., 215 ;

Allah Jilal v. Umrao Hussain, [1914] I. L. R., 36 All., 492.

Section 28 is expressly confined to suits for possession of property and does not apply to claims of any other kind. It was impossible for the plaintiffs to claim possession of this intangible right. Rights of this description are valuable and have been recognized by the courts.

Bishan v. Naipdl, [1886] A. W. N., 299 ;

Bailey v. Stephens, [1862] 12 C. B. N. S., 91, S. C., 42 E. R., 1077 at 1084.

In order to prevent all further disputes this was a fit case for the granting of the declaration prayed for.

Surendra Nath Sen, for the respondent.—The findings show that the defendant has been exercising all acts of possession which were open to him having regard to the nature of the property. He had been appropriating and selling the produce of the trees ever since 1889 and taking the fallen wood whenever there was any, and had all along been asserting his rights. It is true that the Government was in possession of the trees, but it was open to the defendant to acquire by adverse possession all the rights which the plaintiffs had in them and much more over and above that, just as it is open to one to acquire by adverse possession the limited rights of a tenant. It is not in every case that actual physical and continuous possession should be proved to make out a title by adverse possession.

Lord Advocate v. Young, [1887] 12 A. C., 544.

The right of Madan Gopal has been constantly denied during the last 25 years, and it is too late now to seek a declaration. The

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granting of a declaration is within the discretion of the court, and such discretion should not be exercised in support of such a vague and shadowy right as claimed by the plaintiff.

Further the plaintiffs are the sons of Madan Gopal. There is nothing to show that the original grant in favour of Madan Gopal enures for the benefit of his successors. There is no formal grant in existence; and the application made by Madan Gopal in 1867 does not show that it was anything more than a personal license given to Madan Gopal alone. To entitle themselves to a declaration the plaintiffs must prove clearly that they have the right they claim. The Government was also a necessary party.

Kailas Nath Katju, in reply.—The case has been fought throughout on the footing that the right reserved to Madan Gopal was a heritable and transferable right. In fact the defendant himself had in the first instance claimed as a transferee from Madan Gopal. The defendant should not be allowed to raise a new point in second appeal. Having regard to the very nature of the right, the presumption was that it must have been regarded as heritable. The Government had never denied the existence of the right and was wholly indifferent as to the merits of the rival claimants.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—This is a plaintiff's second appeal. The facts of the case are as follows. In the year 1867 the father of the two plaintiffs, one Madan Gopal, was the mortgagee of certain zamindari rights in the village of Runni Chursai. There was a public unmetalled road which ran from the village lands of this village up to the pucca road some short distance away. This public road belonged to the state and still belongs to it. In 1867 there were no trees standing on it and Madan Gopal applied to the Collector of the district in writing pointing out this fact and that he wished to plant trees upon the public road for the benefit of the public; that he would tend and look after them, and that he would only claim the wood that might fall from the trees as his own. He would have no right to sell the trees. The Collector agreed to this and Madan Gopal planted these trees along the public road. It is quite clear, as the land vested in the state the ownership of the trees did not vest in Madan Gopal, but as the Collector had agreed to the condition that he was to take the fallen wood, he no doubt continued to take it so long as he remained in the village, but in the years 1885 and 1887 there were certain transfers of the zamindari shares in the village and Madan Gopal lost all interest in the zamindari of Mauza Runni Chursai. In 1887 Badri Prasad became a co-sharer in the village by a sale deed under which his transferor purported to sell to him not only the zamindari share but also the trees which had been planted upon the road as being his. In

1890 and again in 1892 Badri Prasad sold the fruit of these trees to various persons. In 1899 he had some civil litigation in regard to the fruit of the trees against a third party. In 1901 the Chairman of the District Board under whose control the road is, sold the fruit to a third party. Badri Prasad objected and the Collector cancelled his sale. In 1900 the trees were lopped and the loppings were sold by the District Board. Badri Prasad claimed title to the loppings. Madan Gopal objected to his claim. The Collector finally decided that Badri Prasad was entitled and paid over to him the proceeds from the sale of the loppings *minus* expenses. In 1901 Badri Prasad had some civil litigation against certain other persons who were co-sharers in this village. They had taken the fruit of the trees and he sued them for damages. They denied his title in every way to the trees or to the fruit. The court of first instance gave Badri Prasad a decree. On appeal the suit was dismissed by the District Judge on the clear finding that Badri Prasad had not a shadow of a title whatsoever to the trees or to the fruit or to any of the produce thereof. Madan Gopal in that suit was called as a witness and testified to his claim and to the proceedings of 1867 on the basis of which the District Judge decided against Badri Prasad. In 1910 some more branches fell from these trees and there was a dispute between the plaintiffs who are the sons of Madan Gopal on the one side and Badri Prasad on the other. Again the proceeds of the sale of the wood were made over to Badri Prasad by the District Board. The present suit was brought within six years from this, that is, on the 18th of March, 1915, in the court of the Subordinate Judge of Farrukhabad. The plaintiffs in their plaint claimed that they were the owners of and in possession of the trees; that they had been protecting and looking after the trees and had been taking all the produce thereof that their father had been in continuous possession of the trees and that they were like him still in possession, that the defendant Badri Prasad had no right or title or interest whatsoever in these trees; that in the absence of the plaintiffs the defendant had realised the value of the wood from the District Board; that they had got to know of it in the month of November, 1914, hence the present suit. They asked for a declaration that the trees were planted by their father; that they were still in possession of the trees and that they were the owners thereof. They further asked for an injunction restraining the defendant from interfering with the plaintiff's right. The defendant in reply pleaded that the land on which the trees stood was zamindari land and not the property of the state and that it belonged to the defendant; that the property had been sold and purchased by him in 1887 and that he was the owner and in possession of the trees; that the plaintiff's had no title whatsoever; that even if the defendant had no real title in the beginning, still he and his predecessors had been in proprietary and adverse possession and enjoyment of the trees since the year 1881.

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and therefore the suit was barred by limitation; the defendant having acquired title by prescription. The court of first instance found that the trees were planted on the land of the road; that the land was the property of the state; that the trees had nothing to do with the zamindari of the defendant; that the plaintiffs claim however was barred by twelve years adverse possession and that they were not entitled to the declaration, the defendant having held adverse possession since the year 1885. In the course of the suit on the 16th of June, 1915, the plaintiff's pleader, *vide rubkar* 65 A, clearly stated to the court that his client only claimed a right to tend the trees and to take the fallen wood; that he claimed no greater right than this; that he had nothing to do with the fruit *etc.* The plaintiffs appealed. The court below has treated the case as if it was clearly a suit in respect to the ownership of the trees and the possession thereof. It has said that the questions for determination in the appeal are:—Whether the plaintiffs have been in possession within twelve years of the suit or whether the defendant has been in adverse proprietary possession for more than twelve years; also whether the suit is barred by limitation. In the preamble of its judgment the lower appellate court has stated the facts as to the planting of the trees. In the body of its judgment it has stated as follows:—“No trees nor any rights in them were transferred to the defendant, nor are the trees standing on village lands. Under the contract with the Collector the plaintiffs' father reserved to himself only the right to take the fallen wood of the trees but nothing else. No rights in the trees could be transferred by the planter of the trees. The plaintiffs have no zamindari left in the village and they do not reside in Mauza Runni Chursai. They brought this suit for a declaration that they were the owners of these trees and had the right to take the fallen wood and also for an injunction that the defendant should not interfere with the exercise of their right. The appellate court held that the defendant had been in possession, (presumably of the trees, though it does not say so clearly) for more than twelve years and has dismissed the appeal and the suit. The plaintiffs come here in second appeal. It is clearly admitted before us that the only right which the plaintiffs claim and can claim is the right to tend the trees and to take any wood that may fall; that they have no concern whatsoever with the fruit, and that they have no other right whatsoever in the trees. It is conceded before us *on behalf of both parties* that these trees, planted in the manner stated above and standing on public property belonging to the state, do not belong to either party; that in so far as they are in any one's possession, they are in possession of the Government. It is urged on behalf of the plaintiffs that there has been no adverse possession and cannot be any such adverse possession in a case like this such as is contemplated by section 28 of the Limitation Act. On behalf of the

respondent however it is urged that in so far as any right could be exercised by the parties, it has been regularly exercised by the defendant and his predecessors-in-title for well over twelve years. We think it should be made quite clear that the only right which is in dispute before us is the right to take the fallen wood. Under the application of 1867 that was the only right which was given to Madan Gopal. The plaintiffs therefore are not and cannot be concerned with the fruit and if the District Board or the Collector has in the past allowed Badri Prasad to take the fruit, that is no concern of the plaintiffs, for they themselves have no right to it admittedly. As to the fallen wood, there are only two years in which there has been any dispute whatsoever. One was in the year 1900 and the other was in the year 1910. In both these years there were disputes and in both years the Collector gave the value of the fallen wood to Badri Prasad. It is impossible therefore in our opinion to say that these two occurrences show that the defendant has been in adverse proprietary possession of the right which the plaintiffs now claim before us. There is no question of proprietary right in the trees. No doubt the parties litigated in respect thereto in the courts below but one fact is clear and that is that neither party is the owner of the trees and that the sole right in dispute before us is the right to take the fallen wood. We have considerable doubt whether section 28 of the Limitation Act has any application whatsoever to this case but even assuming that it has, it is impossible to hold that by reason of the two disputes in 1900 and 1910, the defendant has established continuous adverse possession of this right as against the plaintiffs. The right is one which clearly can only be exercised on occasion, that is when any wood may fall or be cut from the trees. It does not occur every year or at stated times. It is urged that the plaintiff's suit should have been brought at least within six years of the dispute of 1900, but we do not think the plaintiffs were bound to come into court on the occasion of that invasion of their right. It was again invaded in the year 1910, and they have come into court within six years of that invasion to establish their right to take the fallen wood. We therefore cannot agree with the court below that the suit is barred by limitation in any way at all. It has however been urged before us that the plaintiffs have no right whatsoever even to the wood, under the petition and order of the year 1867 and that this Court therefore should grant them no declaration whatsoever. This is a point which has not been raised before in the course of this litigation. It amounts to asserting that Madan Gopal's right under the transaction of 1867 was purely a personal right which could be transferred neither by inheritance nor by sale, but this has not been the position which the parties have taken up in the courts below. Badri Prasad's claim was actually based on a transfer in his own favour and the litigation having been fought out on the assumption that the right was a transferable

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and heritable one, we can see no necessity whatsoever to allow this point to be raised at this stage of the case. The District Board or the Secretary of State for India are neither of them parties to the present litigation and the decree therein will not affect them in any way. It will be time enough to decide this question when either of these two parties are involved in litigation with the plaintiffs or the defendant. This appeal is decided on the assumption that the right of Madan Gopal to take the fallen wood is a transferable right which descends to his heirs. The result therefore of our findings is this, that the plaintiffs are entitled to a declaration that they are entitled to take the fallen wood of the trees in dispute which were planted by Madan Gopal on the basis of his application of 1867 and that the defendant has no right to interfere with the plaintiffs taking of that wood. There is no necessity whatsoever for any injunction as the exercise of this right can only occur from time to time, and the person who will be in possession of the wood will be the Collector or the District Board until either party claims it. The rest of the plaintiff's claim is dismissed. In view of the exaggerations on either side in the course of this litigation and the fact that both parties claimed originally much more than they were entitled to, we think that the proper order as to costs of this litigation will be that each party shall bear their own costs throughout. We direct accordingly.

Decree modified.

PRIVY COUNCIL.

C. GANAPATHY MUDALIAR (*Plaintiff*)*versus*N. KRISHNAMACHARIAR AND OTHERS (*Defendants*)

Code of Civil Procedure (Act XIV of 1882), section 244—Might and ought—Mortgage—Suit for sale—Decree for sale—Sale under decrees not in compliance with Transfer of Property Act—Does such sale bar mortgagor's right to redeem—Transfer of Property Act (Act IV of 1882), sections 60, 88, 89.

In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by sections 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold, and purchased (with the permission of the court) by the decree-holder. The sale was confirmed. The mortgagor thereafter sued for redemption.

Held: that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent court and such decree had not been appealed it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with those defendants were debarred from a right to redeem.

Held also that the present suit was barred by section 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and should have been raised before the sale was confirmed and if so raised would have been decided by the court executing the decree.

Prasunno Coomar Sanyal v. Kasi Das Sanyal, [1892] 19 I. A., 166, followed.

APPEAL from a decree of the Madras High Court (MILLER and TYABREE, JJ.), dated February 17th, 1914, affirming a decree of the District Judge of North Arcot.

One Kumaraswami Mudaliar, a Hindu governed by the Mitakshara law, executed three mortgages of ancestral property; (1) in 1876 in favour of Varadappa, (2) in 1879 in favour of a vakil named Vijayaraghavachariar and (3) on the 10th May 1881 in favour of Narasingha. Subsequently two sons were born to the mortgagor, namely, the plaintiff-appellant and his brother since

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deceased, in 1881 and 1882, respectively. The first and third mortgages were assigned to the vakil. Subsequently the vakil sued on the third mortgage for sale of the mortgaged property, and made the father and his two sons defendants. At the trial the father objected that he was not the guardian of his two sons but the Judge overruled the objection and made a decree dated 15th April, 1886, for sale of the mortgaged property. On the 16th August, 1886, the decree-holder applied for execution by attachment and sale of the mortgaged property. On the 28th September, 1886, Govindaraju, an uncle of the minors, applied to be appointed guardian of the minors and for an order setting aside the decree, on the ground that the minors were not represented. The court granted the application and ordered a new trial. But Govindaraju did not file any written statement and the case was heard *ex-parte* and the court made a decree, dated 15th November, 1886, against the defendants for sale of the mortgaged property. On further proceedings under the application of the 16th August, 1886, the properties were subsequently sold in execution and were purchased by the decree-holder with the leave of the court. The plaintiff's father died in 1894 and in 1904 the plaintiff obtained the release of his brother's rights and instituted the present suit in 1907 to redeem all the three mortgages in suit. The District Judge held that the plaintiff was properly represented and was bound by the decree and by the execution proceedings and that the suit was barred by section 244 of the Code of Civil Procedure, 1882. Plaintiff's appeal to the Madras High Court was dismissed. He thereupon preferred the present appeal to the Privy Council.

Some respondents, who had purchased portions of the mortgaged property from the mortgagee, did not appear.

Sir William Garth, for the appellant.—The minors here were not parties to the sale proceedings. The sale was in execution of the decree dated April 15th, 1886: it was only under that decree that attachment was made on the application of August 14th, 1886. But that decree was set aside: and in the subsequent proceedings the minors were described as under the protection of their father; they were not properly on the record and are not bound.

Khirajmal v. Daim, [1904] 32 I. A., 23, 38; S. C., I. L. R., 32 Cal., 296, 312;

Musammât Bashir-un-nissa v. Muhammad Ismail Khan, [1909] 36 I. A., 168; S. C., I. L. R., 31 All., 572

In any case the right to redeem has not been extinguished. Under section 60 of the Transfer of Property Act that right continues until it is extinguished by act of the parties or by order of a court. The right can only be barred if certain steps are taken under the Act, and these steps have not been taken. Transfer of

Property Act, 1882, (Act IV of 1882) sections 58, 60, 85, 86, 88 and 89. There is no authority for the proposition that the mere sale under a decree bars the right to redeem, even though the provisions of the Act have not been complied with.

Reference was made to

Mallikarjuna v. Lingamurti, [1900] I. L. R., 25 Mad., 244.

Sir Erle Richards, K. C., for the respondents 1 to 5.—A sale of ancestral property in execution of a decree conveying the right, title and interest of the father of a joint family is binding on the sons.

Sripat Singh v. Tagore, [1916] 44 I. A., 1.

The minors were properly represented and the second decree of the 15th November was substituted for the first decree on the 15th April. The attachment and sale really took place under the second decree. Govindaraju was fully aware of the pending sale. In any case the plaintiff was a party to the re-trial of the suit, and is bound by the decree and the execution proceedings therein. A separate suit is barred by section 244 of the Code of Civil Procedure, 1882.

Prasunno Coommar Sanyal v. Kali Das Sanyal, [1892] 19 I. A., 166; S. C., I. L. R., 19 Cal., 683,

is conclusive on the point. The questions now raised could and ought to have been raised before the sale was confirmed under that section.

Garth, in reply —The sale really took place under an attachment made under the first decree. In order to see what was sold at a judicial sale the court must look at the proceedings which culminated in the sale.

Thakur Barmha v. Jibanram, [1913] 41 I. A., 38, 43; S. C., I. L. R., 41 Cal., 590, 599.

Section 244 of the Code has no application because the minors were not parties to the execution proceedings and were not properly represented therein.

Their Lordships' judgment was delivered by

SIR JOHN EDGE.—This is an appeal from a decree of the High Court at Madras, dated the 17th February, 1914, which affirmed a decree, dated the 9th February, 1910, of the District Judge of North Arcot, by which the suit was dismissed. The plaintiff is the appellant.

The suit was brought in the court of the District Judge of North Arcot on the 16th November, 1907, to redeem three mortgages dated respectively the 12th December, 1876; the 7th January,

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1879; and the 10th May, 1881. The mortgages were of ancestral property, and were made by the father of the plaintiff before the plaintiff or his brother, since deceased, were born. The mortgage of the 7th January, 1879, was in favour of N. Vijayaraghavachariar, a vakil, to whom their Lordships will refer as the vakil. The mortgages of the 12th December, 1876, and the 10th May, 1881, vested by assignment in the vakil. The plaintiff in this suit was born in September 1881; his brother was born in May, 1882

On the 19th March, 1886, the vakil brought in the District Court of North Arcot, a suit for sale on the mortgage of the 10th May, 1881, against the plaintiff's father, the plaintiff, aged 4 years, and his brother, aged 3 years, the brothers being described as "maintained by the first defendant," who was their father. The suit was entered on the files of the court as Original Suit No. 5, of 1886. Their father, who had not been appointed as their guardian for the suit, objected that he was not their guardian, but the District Judge overruled the objection, and on the 15th April, 1886, made a decree in the following terms:—

"It is ordered that plaintiff do recover 10,891 rupees, together with further interest at 6 per cent. per annum from date of plaint to date of payment and costs, to be recovered from the first defendant personally, and by sale of the mortgaged property."

That decree was doubtless intended to be in compliance with the provisions of "The Transfer of Property Act, 1882," but it did not comply with those provisions.

On the 16th August, 1886, the vakil presented to the District Court his petition, under section 230 of the Code of Civil Procedure, 1882, for execution of the decree of the 15th April, 1886. The petition was entered on the files of the court as "Execution Petition No. 57 of 1886 in O. S. (Original Suit) No. 5 of 1886," and by it the petitioner prayed "that the amount may be recovered with further costs, together with further interest, by the attachment and sale of immovable property set out in the schedule herewith filed." In that petition the present plaintiff and his brother were described as minors, defendants "by their guardian the first defendant." In the schedule the vakil disclosed the fact that there existed the mortgages of the 12th December, 1876, and the 7th January, 1879. On the 18th August, 1886, the warrant of attachment was issued, and on the 13th September, 1886, a notice of sale was issued.

On the 28th September, 1886, one Govindaraju Mudali, who was a maternal uncle of the present plaintiff and his brother, applied to the District Court to be appointed their guardian and to have the decree of the 15th April, 1886, set aside, on the ground that their father was not their proper guardian. Govindaraju Mudali appar-

ently contended in support of his application that the debt in respect of which the mortgage of the 10th May, 1881, had been given was not one which the minors or the properties were liable to discharge. On the 10th November, 1886, the District Judge held that the appointment of the father as guardian had been illegal, and in his place appointed Govindaraju Mudali as guardian of the minors, and set aside the decree of the 15th April, 1886, as against them. Govindaraju was ordered to put in a written statement on the 15th November, 1886, on behalf of the minors, but he failed to do so and did not appear. On the 15th November, 1886, the District Judge made a decree that the plaintiff (the vakil) "do recover 10,891 rupees, together with further interest at 6 per cent, per annum from date of plaint to date of payment, and costs, to be recovered from the first defendant personally and by sale of the mortgaged property." That decree did not comply with the provisions of "The Transfer of Property Act, 1882," but it was not appealed and it became final. It was obviously intended to be in supersession of the decree of the 15th April, 1886, and must be regarded as having superseded that decree.

On the 24th January, 1887, the court of the District Judge caused a proclamation of the intended sale to be made under section 287 of the Code of Civil Procedure, 1882. The proclamation is described on the face of it as in O. S. No. 5 of 1886, application No. 57 of 1886 and proclaimed that—

"Whereas the immovable property mentioned in the list attached hereto and belonging to the said defendants (the father and his two sons) has been attached upon a petition being presented for execution of the decree passed in the above suit Take notice that if the amounts specified below be not paid into this court or if no other steps be taken to satisfy the decree, the said property shall be sold in public auction in this court on the 19th September, 1887, and that in that sale the right, title, and interest possessed by the above defendants alone in respect of that property shall be sold."

So far as appears from the documents in the record, the only attachment which had issued was that of the 18th August, 1886.

It appears that Govindaraju Mudali, as the guardian of the minors, had appealed to the High Court at Madras from some order which the District Judge had made on the 20th December, 1886, in original suit No. 5 of 1886. What the order appealed from was does not appear, nor is there anything in the record which suggests what the nature of the order was. However, that appeal not having been disposed of Govindaraju Mudali, at some time between the 24th January, 1887, and the 2nd March, 1887, applied to the High Court for an order to stay the sale of the property.

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attached in execution of the decree of the District Court of North Arcot in original suit No. 5 of 1886. That application was dismissed by the High Court on the 1st August, 1887.

On the 28th February, 1887, the District Court made an order permitting the vakil to bid at the sale. On the 19th September, 1887, the immovable properties in question were sold, subject to incumbrances, by public auction, and the vakil became the purchaser.

The sale was confirmed by the District Judge on the 13th December, 1887, and he, on the 1st February, 1888, gave the sale certificate under his hand and the seal of the court. The vakil died before this present suit; the first respondent is his son. The other respondents are purchasers from the vakil. The father of the present plaintiff died in May 1894. The plaintiff's brother died in September 1904. The present plaintiff, his brother and their father, had constituted a Hindu joint family.

On behalf of the appellant here it was contended that the sale took place in execution of the decree of the 15th April, 1886, and not in execution of the decree of the 15th November, 1886, and that under such circumstances only the right, title, and interest of the father were sold. That contention is based on the fact that the attachment of the 16th August, 1886, was made under the decree of the 15th April, 1886. The sale must have been under the decree of the 15th November, 1886. No one was or could have been misled as to the decree under which the sale was taking place. The proclamation of sale of the 24th January, 1887, was made subsequent to the decree for sale of the 15th November, 1886, and must have been made consequent on that decree, with the knowledge of all parties and without challenge, and that proclamation shows that what was to be sold by auction was the right, title, and interest in the property of the defendants to the suit of the 19th March, 1886, and the certificate of sale shows that the right, title, and interest in the property of the defendants to that suit were sold to the vakil. The present plaintiff and his brother were defendants to that suit, under the guardianship of Govindaraju Mudali, at the time when the decree of the 15th November, 1886, was made and at the time when the sale took place, and thence until the sale was confirmed and the certificate of sale was made.

It has also been contended on behalf of the appellant here that as the provisions of "The Transfer of Property Act, 1882," were not complied with in the suit for sale of the 19th March, 1886, and as no day was fixed by the court on which payment might be made within six months from the date of declaring in court the amount due, the defendants to the suit of the 19th March, 1886, were not debarred from a right to redeem. It appears to their

Lordships that the answer to that contention is that whether or not the provisions of "The Transfer of Property Act, 1882," were complied with, the property and all right title, and interest of those defendants in it were in fact sold to the vakil in execution of a decree of a court which has jurisdiction to entertain the suit in which the decree was made, and that decree was not appealed.

By section 244 of the Code of Civil Procedure, 1882, it was enacted that:—

"244. The following questions shall be determined by order of the court executing a decree and not by a separate suit (namely):—

"(c.) Any other question arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof."

This Board decided in *Prosunno Coomar Sanjal and another v. Kasi Das Sanjal and others*(1), that section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the court which was executing the decree of the 15th November, 1886.

Their Lordships will humbly advise His Majesty that this appeal fails, and should be dismissed. The appellants must pay the costs of this appeal.

A. P. P.

Appeal dismissed.

Douglas Grant:—Solicitor for the appellant.

Chapman Walker and Shephard:—Solicitors for the respondents.

(1) [1892] 19 I. A., 683.

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FULL BENCH.

CHUNNI LAL (*Defendant*)*versus*NARSINGH DAS (*Plaintiff*)**Defamation—Libel in judicial proceeding—Privilege—Liability for damages
in a civil action.*

Defamatory statements made by a party in a petition presented to a Criminal Court are absolutely privileged in a civil action for damages based on libel.

There is no statute in India dealing with civil liability for defamation. The rule to apply is that of justice, equity and good conscience. This has been interpreted by the Privy Council in *Wajihela Rajsanji v. Sheikh Mashidin*, L. R., 14 I. A., 89, to mean the rules of English Law if found applicable to Indian society and circumstances, and there is nothing in the circumstances and society of this country that would make it improper or inadvisable to apply the English Rule of privilege which is well-established in England to India.

Abdul Hakim v. Tej Chandar Mukarji, I. L. R., 3 All., 815, overruled;
Angada Ram Shaha v. Nemai Chand Shaha, I. L. R., 23 Cal., 867, dis-
sented from.

SECOND APPEAL from a decree of L. MARSHALL ESQ., District Judge of Mainpuri confirming a decree of Babu Prem Behari, Munsif.

Suit for damages for defamation. The facts shortly are as follows:—

Chunni Lal, the defendant appellant, was being prosecuted for an offence under section 193, Indian Penal Code, and he had engaged the plaintiff-respondent, a pleader to defend him. For a time Chunni Lal was allowed to remain at large on his own recognizance. On the 22nd August, 1913, however, he was ordered to find a surety in the sum of one hundred rupees. The plaintiff agreed to stand surety and executed the bail bond. But to make his position quite secure, he asked his client to pay him Rs. 100, which Chunni Lal did. The pleader thereupon applied to be permitted to deposit the one hundred rupees in cash. The Deputy Magistrate being in camp, the pleader was ordered to deposit the

* S. A. No. 1473 of 1915.

money in the Shikohabad Sub-Treasury. The plaintiff did so, but by some mistake the proper number of receipts was not granted. On the 4th September, 1913, the case under section 193, Indian Penal Code, was taken up. Chunni Lal engaged another pleader and was acquitted. On 17th September, 1913, Chunni Lal put in a petition in the Deputy Magistrate's court stating that as no intimation had been received by the court about the deposit of the hundred rupees, he was not sure that the money had been deposited at all and praying that enquiry be made from the Tehsildar of Shikohabad. Subsequently Chunni Lal saw the District Magistrate and complained orally. The District Magistrate told him to file a complaint. On 24th September, 1913, Chunni Lal filed a regular complaint against the pleader, Chaube Narsingh Das, charging him with offences under sections 420 and 409 of the Indian Penal Code (cheating and criminal breach of trust). In the meantime, on the 22nd September, 1913, a reply was received in the Deputy Magistrate's court from the Tehsildar of Shikohabad to the effect that the money had been deposited by the pleader on the 22nd August, 1913. Chunni Lal, before filing the complaint, did not take the precaution of enquiring from the Deputy Magistrate's court whether any reply had been received from the Tehsildar of Shikohabad. The District Magistrate, without issuing process to Chaube Narsingh Das, held a preliminary enquiry into Chunni Lal's complaint under sections 420 and 409, Indian Penal Code, and dismissed it under section 203 of the Code of Criminal Procedure. Chaube Narsingh Das then brought a complaint charging Chunni Lal with defamation, under section 499, Indian Penal Code, in respect of the statements made by the latter in his petition of complaint dated the 24th September, 1913. The District Magistrate dismissed Narsingh Das's complaint holding that the ninth exception to section 499 of the Penal Code covered the case. Narsingh Das applied in revision to the Sessions Judge, who was of opinion that the order dismissing the complaint was wrong and referred the case to the High Court. The High Court (Rafiq and Piggott, JJ.), however, did not agree with the Sessions Judge. The pleader, Chaube Narsingh Das, then brought the present civil action claiming Rs. 1,000 damages for libel in respect of the statements made by Chunni Lal in his petition of complaint under sections 420 and 409 of the Penal Code, dated the 24th September, 1913. The court below gave the plaintiff a decree for Rs. 200. The defendant appealed to the High Court.

Peary Lal Banerji, for the appellant.—The statements complained of are defamatory, but it is submitted that they are absolutely privileged. Because a man may be criminally liable, is he necessarily liable for damages in a civil action too? In England, he will not be liable in a civil action; absolute privilege will be allowed to him. There is no reason why the law should be different in India.

[TUDBALL, J.—But there is this difference. In England under precisely similar circumstances a man will not be liable criminally

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also. But, if in India he is liable criminally, why should he not be liable civilly too ?]

The difference in this particular instance between the criminal laws of India and England has no effect. Because a man is criminally liable he is, not necessarily liable civilly also. Let us take, for example, the defence of truth. In England under the Libel Act—as well as in India under the Penal Code—truth in criminal proceedings is a defence only under certain circumstances and within certain well-known limitations. But in a civil action it is a complete defence. So, the defence of absolute privilege may or may not be a good defence in criminal proceedings, but as it is a good defence in civil actions in England, it should be so in India too. The fact of a man being criminally liable for a certain act is no test or criterion for determining his liability in a civil action for damages for that act.

The English Law on the subject is to be found in

Pollock : *Law of Torts*, 6 Edition, pp. 254 and 257 ;

Halsbury's *Laws of England*, Vol. 18, pp. 678 and 738.

[BANERJI, J.—Is there no difference between the position of a witness and that of a party ?]

I submit none.

The following are the leading English cases on the subject:—

Munster v. Lamb, [1883] 11 Q. B. D., 588.

This was a case of a counsel being sued for defamation.

The judgments of BREIT, M. R. and FRY, L. J., are very clear and instructive. This case shows that there is no difference between a witness and a party.

Revis v. Smith, [1856] 18 C. B., 126 ; s. c., 107, 236

This was a case of a witness making statements in an affidavit. In principle there is no difference between this and the case of a party filing a complaint. The case just cited does away with the supposed distinction between *viva voce* statements and those made deliberately.

Henderson v. Broomhead, [1859] 4 H. and N., 569 ; s. c., 118, 618.

This was a case of a party making statements in an affidavit.

Watson v. M'Ewan, [1905] A. C., 480 ;

Hodson v. Pare, [1899] 1 Q. B., 455.

This was a case of a petition instituting proceedings like the present.

Bottomley v. Brougham, [1908] 1 K. B., 584 ;

Lilley v. Roney, 61 L. J. (Q. B.), 727 ;

Dowkins v. Rokeby (Lord), [1873] L. R., 8 Q. B., 255 ;

Seaman v. Netherloft, [1876] 2 C. P. D., 53.

Here a witness persisted in making *voluntary* statements in spite of the fact that the Judge had told him not to make any statement,

and refused to listen to him, and had practically discharged the witness. Yet it was held that the man was privileged.

It is thus settled that in England judge, counsel, witness and party all stand on the same footing.

And it is submitted, that the same privilege should be accorded in India too.

As to the Indian authorities, the first case is that of

Baboo Ganesh Dutt Singh v. Mugnee Ram, [1872] 11 B. L. R., 321, P.C.

The observations relating to the privilege of witnesses in their Lordships' judgment at p. 328 are not *obiter*. Even if they were so, they are entitled to great respect, and no Civil Court can refuse to follow them. In a criminal case it may be different.

The case just cited also shows that in actions for malicious prosecution, the tests of the Indian Penal Code are not applied, although a remedy by criminal proceedings under section 211 of the Penal Code is also open.

The first case in this Court is that of

Chowdhry Goordutt Singh v. Gopal Dass, [1866] 1 Agra H. C. R., 93.

It is not of much help for it held that the proceedings were not judicial.

The next case is that of

Tulshi Ram v. Harbans, [1885] A. W. N., 301.

It is in my favour, although it accords to witnesses a sort of a limited privilege only.

The next case is that of

Abdul Hakim v. Tej Chandar Mukarji, [1881] I. L. R., 3 All., 815.

This is the only case which is really in favour of the plaintiff. But it has not been followed in a large number of cases. Even Subordinate Courts have refused to follow it and this Court has not censured them. The observations which help the plaintiff are entirely *obiter dicta*. The principle on which they are based is that to determine liability in civil actions also, we must go to the Indian Penal Code for guidance. This is not warranted. There is no reason why the principles and tests of the Indian Penal Code should be introduced into a civil action for damages for defamation, especially when the Indian Penal Code is not imported for guidance in any other form of civil action where a criminal remedy is also open, *e.g.*, malicious prosecution.

The next case is that of

Davan Singh v. Mahip Singh, [1888] I. L. R., 10 All., 425.

It has been supposed by some that MAHMOOD, J., has in this case expressed himself as against the view now contended for by me. But that is not so. He only refused to follow the English Law of

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slander which is highly artificial. But the learned Judge does not refuse to follow the English Law as to the absolute privilege of a witness. The judgment has been misunderstood. As a matter of fact, he goes the whole length with BRODHURST, J., so far as the question of the privilege of a witness is concerned.

So that as early as 10 Allahabad, the authority of 3 All., 815 (*Abdul Hakim v. Tej Chandar*) had been shaken.

The next case is that of

Emperor v Ganga Prasad, [1907] I. L. R., 29 All., 685.

There the question was as to the criminal liability of a witness who makes defamatory statements whilst giving evidence. Even on that point RICHARDS, J., differed from KNOX, J. The ruling must be considered to be limited to criminal cases, and is therefore distinguishable. The principal judgment was that of KNOX, J., and he is careful to employ language which cannot be extended to civil actions.

The next case is that of

Babu Prasad v. Muda Mal, [1913] 11 A. L. J. R., 193. •

The case helps me inferentially. The case in 3 All., 815 was not cited nor were the lower courts censured for not following it.

It cannot be argued that the cases in 3 All., 815 and 11 A. L. J. R., 193 are consistent.

Such being the state of the authorities in this Court, it cannot be urged by the other side that acceptance of my arguments would disturb any *stare decisis*.

My contention that in a civil action for damages for libel, the tests of the Indian Penal Code cannot be applied, derives support from the fact that in the well-known Benares caste case

Bishambhar Das v. Gobind Das, [1914] 12 A. L. J. R., 552,

the High Court did not refer to the Penal Code for guidance, nor did the Privy Council. See

Gobind Das v. Bishambhar Das, [1917] 15 A. L. J. R., 629.

There is great conflict in the Calcutta court, but the later rulings are in my favour. Omitting the earlier cases, the first case is

Bhikumber Singh v. Becharam Sircar, [1888] I. L. R., 15 Cal., 264, which favours appellant. The case of

Angada Ram Shaha v. Nemai Chand Shaha, [1896] I. L. R., 23 Cal., 867,

is against me. But the reasoning in this case is unsound and incorrect. The opinion that "we do not think it possible that a statement may be the subject of a criminal prosecution for defamation, and at the same time may be absolutely privileged, as far as the Civil Courts are concerned," is too widely stated, *e. g.*, the

defence of truth. The case has been followed up to a certain stage, but later on the tendency has been to ignore it.

The case of

Kaṅ Nath Gupta v. Gobinda Chandra Basu, [1900] 5 C. W. N., 293, was a criminal case. Besides, it simply follows the case in 23 Cal., 867. The distinction drawn between a witness and a party is obviously erroneous. The Judges base the privilege of a witness on section 132 of the Indian Evidence Act, and the obligation that lies on a witness to answer all questions put to him. But it has been held that the privilege of a witness is much wider, i. e., it extends even to voluntary, absolutely irrelevant and obviously malicious statements.

[BANERJI, J.—Suppose a party gives evidence on his own behalf. Then he will be privileged. But he will not be privileged when he makes a statement in writing in his pleadings?].

That is what this case amounts to. There is no distinction in principle between a witness and a party. In the present case suppose that Chunni Lal had come and stood before the court and, in answer to questions put by the court, had made an oral instead of a written complaint. Then, according to 5 C. W. N., 293 he would have been privileged, while he is not because he has made a written complaint.

[TUDBALL, J.—A complaint may be oral as well as written.]

Yes. The case of

H. P. Sandyal v. Bhaba Sundari Dasi, [1910] 15 C. W. N., 995, is also against me. But that also simply follows the case in 23 Cal., 867. One of the learned Judges however, does not do so without reluctance.

This is the last case which recognises the authority of 23 Cal., 867.

The cases of

Kori Singh v. The King-Emperor, [1912] 17 C. W. N., 297 ;

Kori Singh v. Mr. J. Finch, [1912] 17 C. W. N., 449,

were criminal cases and are of no help. The first one, however, shows that there is a difference between a criminal case and a civil action. The case of

Golap Jan v. Bholanath Khatterji, [1911] I. L. R., 38 Cal., 880, is entirely in my favour. In the case of

C. H. Crowley v. L. O. Reilly, [1912] 17 C. W. N., 554,

MOOKERJI, J., cites the American cases on the subject. In all systems of civilised jurisprudence absolute privilege, as contended for here has been allowed. The leading case in the Madras court is that of

In re P. Venkata Reddy, [1911] I. L. R., 36 Mad., 216, F. B.,

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in which all the Madras authorities on the subject, are collected.
The case of

Re Muthusami Naidu, [1912] I. L. R., 37 Mad., 110,

is also in my favour. They are both criminal cases and the Madras court has extended the principle of absolute privilege even to criminal cases. The Bombay case of

Nathji Muleshvar v. Lalbhai Ravidat, [1889] I. L. R., 14 Bom., 97,
is entirely in my favour. The case of

Queen-Empress v. Babaji, [1892] I. L. R., 17 Bom., 127,

shows that the Bombay court too has extended the doctrine of absolute privilege to criminal cases also.

The Punjab cases of

Ali Khan v. Malik Yaran Khan, [1879] 16 P. R.;

Kundan v. Ranji Das, [1879] 146 P. R.,

are in my favour. The case of

Fateh Muhammad v. The Empress, [1889] 34 P. R., [criminal judgments.],

was a criminal case and has no application to the present case. It is on the same footing as the case in I. L. R., 29 All., 685.

Thus, apart from English cases, the balance of authority in India too, I submit, is in my favour, and the recent cases of all the High Courts support me.

Sir Sundar Lal, for the respondent.—The question is whether a person filing a complaint, however groundless, malicious and false, is entitled to the protection of absolute privilege on the ground of any public policy. Under section 37 of the Bengal, N.-W. P. and Assam Civil Courts Act, (Act XII of 1887), whenever there is no statute law, courts in India have to act according to justice, equity and good conscience. This being a civil suit for damages for defamation, for which there is no statute law, the question is whether it is in accordance with justice, equity and good conscience to hold in India, following English case-law, that a statement of the kind we are considering in this case is protected. It may be protected in England. But the question is whether the English Law should be followed in India. The facts found in the present case clearly show that the statements made by Chunni Lal in his petition of complaint, especially the one to the effect that the pleader had pocketed the money, were most reckless and made without due care and caution. Is such a man entitled to the protection of absolute privilege? For the purpose of deciding this question, the matter to consider is how far has the wide doctrine of absolute privilege to be found in English Law been followed in India and how far should it be followed by this Court.

So far as Indian Law is concerned, the Indian Penal Code has not accepted the wide principle of English Law. Section 499 of the Code gives only a qualified privilege. Thus, so far as criminal matters are concerned, we have a law enacted by the Indian Legislature which does not accept the English Law in its entirety. Why should we not go to it for guidance, rather than to English Law, in order to find out what is in accordance with justice, equity and good conscience? The rule of English Law is based on the theory that parties and witnesses must be absolutely unfettered and without fear of civil and criminal liability of any kind. In India, as section 499 of the Penal Code gives only a qualified privilege, parties and witnesses have to be in fear of at least one form of liability, *viz*: criminal, which is the more serious of the two. Thus the whole reason of the English rule disappears so far as this country is concerned. If such persons are liable criminally, there is no reason why they should be protected when a civil action is brought against them.

[TUDBALL, J.—The difference is this. The Criminal Court may dismiss the complaint without issuing process to the other party, who is thus not varied. But Civil Court can not do that.]

In civil cases also the plaint can be thrown out if it does not disclose any cause of action.

The Indian Legislature has thought it necessary to pass Act XVIII of 1850. If the rule of English Law were applicable to this country in its entirety, judicial officers would have been amply protected by it and there was no need for this enactment. Then, again there is section 132 of the Indian Evidence Act. That also militates against the view that the English Common Law on the subject is applicable to this country.

The question in this country has to be considered not in the light of case-law but in that of principle and legislation so far as it has proceeded in this country.

A. P. Dube, followed on the same side.—The rule of English Law, giving absolute privilege, is a rule of adjective law. It takes away jurisdiction.

Bottomley v. Brougham, [1908] 1 K. B., 584.

Therefore, unless it can be held that there is something in the adjective law of India which takes away the jurisdiction of the courts in such matters, the rule of English Law is of no assistance.

[RAFIQ, J.—The question of jurisdiction does not arise. The appellant does not contend that such a suit does not lie or is not maintainable. He says that his plea of absolute privilege is a complete answer to such a suit.]

Bottomley v. Brougham, [1908] 1 K. B., 584.

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clearly explains that the doctrine of 'absolute privilege' means that the courts are precluded from enquiring into such matters. It cannot be denied that the present action is a suit of a civil nature, and there is nothing in the law of India which expressly or impliedly bars its cognizance by the courts. Under section 9 of the Code of Civil Procedure, therefore, the plaintiff is entitled to have his suit tried, and the English Law has no application.

It has been admitted even by writers of text-books on English Law that the protection created by the English Law for the sake of honest litigants and persons might also protect dishonest and malicious persons. It is for your Lordships to consider whether it is not possible to give in this country only a qualified privilege which will protect only honest and innocent persons.

[TUDBALL, J.—What special difference is there between Indian and English society which makes it undesirable for us to extend to India the doctrine of English Law?]

In England the rule had its origin in a feeling that the conduct of judges and advocates should not be made the subject of an enquiry by a jury. It has been extended to other persons engaged in judicial proceedings, *e. g.*, witnesses, parties and jurors. No such considerations arise here. Besides, there are some very important differences between Indian and English society which are clearly explained by SPENCER, J, in 36 Madras, 216.

[TUDBALL, J.—True, there are such blackguards. But they exist in every country. The rule of English Law has been created in spite of the fact that there are such blackguards there also.]

[BANERJI, J.—Is it right on grounds of public policy to encourage such suits?]

[RAFIQ, J.—Is there any reasons why this rule which has been followed in England for such a long time should not be followed here?]

Education has made much greater progress in England than in India.

[WALSH, J.—That is all the more reason why people in India should have the absolute privilege.]

The weight of authority in India is in favour of giving only a qualified privilege.

He cited and discussed the following cases:—

Gobindhi v. Jodha Bali, [1885] A. W. N., 204 ;

Abdul Hakim v. Tej Chandra Mukerji, [1881] I. L. R., 3 All., 815 ;

Dawan Singh v. Mahip Singh, [1888] I. L. R., 10 All., 425 (at page 460, judgment of Mahmood, J.)

Babu Mal v. Muda Mal, [1913] 11 A. L. J. R., 193;
Bishambhar Das v. Gobind Das, [1914] 12 A. L. J. R., 552;
Queen v. Pursotam Dass, [1865] 3 W. R., 45 (Criminal Rulings);
Shibnath Tulaputro v. Sat Cowree Deb, [1865] 3 W. R., 198;
Bhikumber Singh v. Becharam Sircar, [1888] I. L. R., 15 Cal., 264;
Angada Ram Shaha v. Nemaī Chand Shaha, [1896] I. L. R., 23 Cal.,
 867;
Kari Singh v. Emperor, [1912] I. L. R., 40 Cal., 433;
In re Nagarji Trikamji [1894] I. L. R., 19 Bom., 340;
Sullivan v. Norton, [1886] I. L. R., 10 Mad., 28 (36, judgment of
 BRANDT, J.)

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- [BANERJI, J.—Is the observation in 23 Cal., at p. 871 that, “It is very doubtful whether any remedy for defamation was known to the Indian Law before the passing of the Indian Penal Code in 1860,” correct?]

[WALSH, J.—If that is incorrect, then the whole ruling is incorrect.]

[TUDBALL, J.—As a matter of fact, there are reported cases of the Sudder Dewani Adalat in these provinces of a period anterior to 1860, which show that relief was given in civil actions for defamation.]

Peary Lal Banerji, was not called upon to reply, but cited

Varden Seth Sham v. Luckpathy Royjee Lallah, [1862] 9 M. I. A.,
 303;

Waghela Rajsanji v. Shekh Masludin, [1887] I. L. R., 11 Bom., 551
 (561) P. C.

C. A. V.

The judgment of the Court was delivered by

TUDBALL, J.—This second appeal arises out of a civil action for damages for defamation, the facts of which are briefly as follows:—

Tudball, J.

• The defendant who is the appellant before us was prosecuted in a Criminal Court for an offence under section 193 of the Indian Penal Code. The plaintiff who is a pleader, appeared to defend him. The court allowed bail and the plaintiff stood surety for the defendant to the extent of Rs. 100. Not being sure of his client, however, he asked the court to allow Rs. 100 to be deposited in cash. The prayer was granted. The defendant produced the cash giving it to the plaintiff and it was actually deposited on the same date, August 22, 1913, in the Sub-Treasury at Shikohabad. There was some error in the usual procedure for the depositing of money and the full number of acknowledgments was not issued.

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Tudball, J.

On the 4th September, 1913, the case was heard and the defendant acquitted. On that date, however, he employed another pleader; on 17th September, 1913, he filed a petition stating that no receipt had been issued by the Treasury and he was in doubt as to whether the money had actually been deposited by the plaintiff. He asked for inquiry to be made from the Tahsildar. Inquiry was ordered and made and on September 22nd, 1913, the court received a reply that the money had actually been deposited on August 22nd. Without first inquiring from the court the result of the inquiry ordered, the defendant, on September 24th, 1913, filed a written complaint in the court of the District Magistrate charging the plaintiff with having committed the offences of cheating and criminal breach of trust in respect to the sum of Rs. 100.

The District Magistrate issued no process on this complaint but made a preliminary inquiry and dismissed it on ascertaining the fact as to the deposit. The plaintiff thereupon prosecuted the defendant in a Criminal Court. For reasons with which we are not concerned, the defendant was acquitted.

The plaintiff then filed the suit out of which this appeal has arisen to recover Rs. 1,000 as damages for defamation. The courts below have decreed the claim to the extent of Rs. 200. Hence the present appeal by the defendant.

The plea raised on his behalf is that in a civil action arising out of facts such as have been found in the present case, the defendant has an absolute privilege and is absolutely protected by the law from a civil action for damages for defamation.

For the plaintiff it is urged that in such a case there is no absolute privilege but only a qualified privilege and that as the defendant did not act in good faith he is not protected. There being a conflict of rulings on the point, the case has been referred to this Full Bench for decision.

We deem it necessary, in view of certain arguments that have been raised before us in regard to the criminal law of defamation, to emphasize in the forefront of our judgment that we are "not" here concerned with libel as a criminal offence, but only with the civil wrong and the right to redress in a civil action. The civil and the criminal law and procedure do not in our opinion coincide but are independent of each other. We may quote as an instance one admitted difference between the civil and the criminal law. In a civil action the plea of mere truth is if established a complete defence. In a criminal charge it is not so, for the accused has further to prove the fact that it was for the public good that the imputation was made or published. We therefore restrict ourselves to the civil wrong and the right to redress in a civil

action. Next, it is clear (and is also admitted before us) that the English rule of law on the point for decision is well established and beyond discussion and that under that rule the appellant before us would be absolutely protected. It is unnecessary therefore to discuss the English decisions on a principle which has been accepted for generations and has never been questioned in England. It has been recognised by Indian Judges. It has to be conceded before us that the High Courts of Bombay and Madras have applied it without hesitation and that the latter has even gone to the extent of applying it to criminal cases, on the correctness of which we abstain from expressing any opinion.

There is no statute in India dealing with civil liability for defamation. We have therefore to apply the rule of equity, justice and good conscience. This has been interpreted by the Privy Council in *Wajihela Raj Sanji v. Sheikh Masluddin* (1), to mean the rules of English Law if found applicable to Indian society and circumstances. On behalf of the plaintiff respondent it is urged that in the present instance the rule of English law is inapplicable to the circumstances of this country and that whatever may have been the rule applied prior to 1860, the Legislature in introducing the Penal Code in that year did not apply the rule of English Law to criminal cases and may be said, by implication, to have amended the civil law. Reliance has been placed on the decision of the Calcutta High Court in *Angada Ram Shaha v. Nemai Chand Shaha* (2), and on the dictum in *Abdul Hakim v. Tej Chander Mukerji* (3).

Reference has also been made to several decisions in criminal cases but we decline to discuss them for the reasons already given. In regard to the first part of the argument the learned Advocate for the respondent has failed to show us what there is in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule. It is suggested that the mass of the population is uneducated and more impulsive and sensitive and therefore more likely to take the law into its own hands if it cannot get redress for defamation and that therefore it would not be sound public policy to enforce the English rule. We do not think that these are weighty reasons. The English Law does not seek to protect dishonest parties, witnesses or advocates; but deems it a lesser evil that they should escape than that the great majority of honest parties, witnesses and advocates should be exposed to vexatious actions. Unless it can be said that the great majority of these classes in India is dishonest, there can be no good reason against applying the same rule in this country. Needless to say this has not been urged before us and in this instance we consider that what is sound public policy in England is equally sound

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(1) [1887] L. R., 14 I. A., 89; S. C., I. L. R., 11 Bom., 551.

(2) [1896] I. L. R., 23 Cal., 867. (3) [1881] I. L. R., 8 All., 815.

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policy in India and that the rule of English Law is in accordance with the principles of justice, equity and good conscience.

The *dictum* of the Privy Council in the case of *Ganesh Dat Singh v. Mangnee Chowdri* ⁽¹⁾, supports us; that in 3 All., 815 is based on vague and indefinite grounds.

We cannot agree with the decision of the Calcutta High Court in *Angada Ram Shaha v. Nemai Chand Shaha* ⁽²⁾. It appears to be based upon the assumption that there was no law of defamation in India before the Penal Code. This is not the case for there are reported decisions on the subject in this province as far back as 1852. Moreover the learned Judges applied the test of the Criminal Law to the Civil Law whereas we hold that the two are independent of each other.

Lastly the plea that a criminal enactment can be interpreted as amending the Civil Law by implication stands unsupported. It may be anomalous that a party should be criminally punishable and yet be not civilly liable in a case like the present but it is not the only anomaly in this branch of the law.

We therefore hold that defamatory words used on such an occasion as is alleged by the plaintiff in this suit are not actionable on the ground of absolute privilege and that the present suit fails.

We allow this appeal, set aside the decrees of the courts below and dismiss the suit. In view of the circumstances of the case the parties will abide their own costs throughout.

K. K. V.

Appeal allowed.

(1) [1872] 11 B L R., 321, P. O. (2) [1896] I. L R., 23 Cal., 867.

RAM SAMBHARI TEWARI

versus

RAJMAN NAIK AND OTHERS *

CRIMINAL.

1918

Feb. 26.

RICHARDS,
C J.

Criminal Procedure Code, (Act V of 1898), section 438—Reference by Sessions Judge to High Court—Acquittal by Magistrate—Recommendation by Sessions Judge for re-trial—No appeal by Government against order of acquittal—Delay—Re-trial not ordered.

Where certain persons having been tried for an offence under section 147 read with section 347 of the Indian Penal Code were acquitted by the Magistrate on 4th December 1916, and a revision having been filed against the order by the complainant (there being no appeal filed by the Local Government) the Sessions Judge referred the case to the High Court on 4th January, 1918, recommending a re-trial, *held*, that having regard to the long lapse of time, a re-trial was inadvisable.

CRIMINAL REFERENCE, made by W. R. G. MOIR Esq., Sessions Judge of Gorakhpur.

The applicant was not represented.

W. Wallach, for the opposite party.

Eleven persons were charged by Ram Sambhar with having on the 31st of July, 1916, attacked him, forcibly dragged him to and confined him in a temple for the purpose of extorting a promissory note from him, and having extorted the same from him. The accused were tried under sections 147, 347 of the Indian Penal Code by a Magistrate of the first class.

It appeared that in the initial report to the police there was no mention of assault or beating or wrongful confinement, what was stated therein was that the accused got Ram Sambhar to execute a promissory note for Rs. 226, although he neither owed them any money nor was paid the amount by them; and that when he remonstrated with them about it they showed fight. On that ground as well as on other grounds the Magistrate thought the case was a very doubtful one, that the story for the prosecution had been much exaggerated, and that the question really reduced itself to whether or not the complainant had been paid Rs. 226 in consideration of his execution of the promissory note. He held that in all probability the note was executed in a proper manner but owing to some

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dispute arising the money was not paid. On these grounds the Magistrate acquitted the accused on 4th December, 1916.

The Local Government did not appeal, but the complainant filed a revision in the court of the Sessions Judge. The Sessions Judge in his order observed that the Magistrate, having set forth that there were two versions of the occurrence, had entirely disbelieved that of the defence, that the Magistrate had not said in what respect he considered the prosecution story to be exaggerated, and that probably some of the facts had been suppressed in the recording of the initial report so as to make the offence non-cognizable by the Police. In the opinion of the Sessions Judge the case was one in which there should be a re-trial, and by his order of reference to the High Court, dated 4th January, 1918, he recommended that the case should be re-tried.

The following judgment was delivered by

Richards,
C. J.

RICHARDS, C. J.—It appears that eleven persons were tried and acquitted for offences under section 147 read with section 347 of the Indian Penal Code. The order of acquittal is dated as far back as the 4th of December, 1916. Government did not appeal against the order of acquittal and I think having regard to the long lapse of time that it would be inadvisable to open up the matter now. I accordingly direct that the record be returned.

B. K. M.

Record returned.

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March, 13.

RICHARDS,
C. J.
BANERJI, J.

ANANDI KUNWAR (*Plaintiff*)

versus

RAM NIRANJAN DAS AND ANOTHER (*Defendants*)*

Code of Civil Procedure (Act V of 1908), Order XXI, rule 68—Suit for declaration that property not saleable—Execution of decree—Valuation of suit.

Where a suit is brought for a declaration that certain property attached in execution of a decree is not saleable, the proper valuation to put on the suit for purposes of jurisdiction is not the value of the property but the amount of the decree for which execution was taken out.

SECOND APPEAL from a decree of B. J. DALAI, Esq., District Judge of Benares, confirming a decree of Maulvi Shah Munir Alam, Additional Subordinate Judge.

* S. A. No. 987 of 1916.

In execution of a decree for Rs. 2,259 odd passed against the appellant's husband the decree-holders attached certain property as belonging to the judgment-debtor. Thereupon the appellant who claimed ownership of the property brought a suit for a declaration that the said property was not saleable in execution of the said decree. She valued the property at Rs. 5,200. The court of first instance dismissed the suit, holding that the property really belonged to the husband. The plaintiff appealed to the District Judge, who confirmed the decree. The plaintiff filed this second appeal.

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Narmadeshwar Upadhyay, (with *Surendra Nath Sen*), for the appellant, submitted that the District Judge had no jurisdiction to entertain the appeal inasmuch as the value of the subject-matter of the suit was above Rs. 5,000. It was the property, and not the decree, that formed the subject-matter of the suit; the valuation of the suit would, therefore, be governed by the former and not the latter. The principle of the decision of the Privy Council in the case of

Radha Kunwar v. Reoti Singh, [1916] 14 A. L. J. R., 1002, P. C.,

fully applied to this case, and the observations at page 1007 to the effect that the subject-matter of the dispute was simply the value of the property which the appellant claimed were entirely applicable to the facts of the present case. The plaintiff had nothing to do with the decree, and it was immaterial for her claim what the amount of the decree might be.

B. E. O'Connor, for the respondents, referred to

Khetra v. Mumtas Begam, [1915] I. L. R., 38 All., 72.

It was submitted that having regard to the later Privy Council case cited above, the case in I. L. R., 38 All., 72, could not be deemed to have been correctly decided.

B. E. O'Connor and *Haribans Sahai*, for the respondents, were not called upon.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff sought a declaration that certain property was not saleable in execution of a certain decree. It appears that the principal defendants had a decree against the plaintiff's husband. In execution of that decree they attached certain property alleging it to be the property of their judgment-debtor. The decree was for in or about Rs. 2,000. The plaintiff in the present suit objected to the attachment. The objection was overruled and the plaintiff had to bring the present suit. The court of first instance dismissed her claim holding that the property was the property of the judgment-

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debtor and dismissed the plaintiff's suit. The plaintiff has now preferred this second appeal. The first and main objection urged is that the District Judge had no jurisdiction to hear the appeal because the value of the property was over Rs. 5,000. • This objection does not come very well from the plaintiff considering that it was she herself who preferred the appeal to the District Judge. If the argument held good it would mean that the judgment of the court of first instance had become final and the probabilities are that no court would allow an appeal now to be presented from the judgment of the first court. We think however that the value of the subject-matter of the suit and the appeal was below Rs. 5,000. What the plaintiff claimed was a declaration that the property was not saleable in execution of the decree, that is for the realisation of the amount of the decree. The defendants were only concerned to the extent of the amount due under their decree. They did not care whether the plaintiff could keep the property after their decree had been satisfied. This very point was decided in the case of *Khetra Pal v. Mumtaz Begom* (1). We have been referred by Mr. Upadhyaya to the case of *Radha Kunwar v. Reoli Singh* (2). This ruling it seems to us supports the view that we take in the present case. There it was held that though the mortgage-decree, which was sought to be satisfied, was far above Rs. 10,000, the value of the property to the decree-holder and to the judgment-debtor was below Rs. 2,000, and their Lordships of the Privy Council held that this must be taken to be the value of the subject-matter of the appeal. We consider that the appeal lay to the District Judge. It was for that court to decide questions of fact and we think that the findings arrived at conclude the present appeal. It is accordingly dismissed with costs.

B. K. M.

Appeal dismissed.

(1) [1915] I. L. R., 38 All., 72.

(2) [1916] 14 A. L. J. R., 1002 ; s. c., I. L. R., 88 All., 488.

RAM BARAN RAI AND ANOTHER (*Plaintiffs*)*versus*HAR SEWAK DUBE AND OTHERS (*Defendants*) *

Regulation XVII of 1806, section 8—Mortgage by way of conditional sale—Redemption—Right when lost—Service of notice on mortgagor—Foreclosure proceedings.

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PIGGOTT J.
WALSH, J

In a suit for redemption of a mortgage by way of conditional sale made in the year 1866 it was pleaded that the right had been extinguished, inasmuch as in the year 1876 the mortgagee had served a notice, under the seal and official signature of the District Judge, upon the mortgagor warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The service of the notice was sought to be proved by means of certain records of the court:—*Held* that the records of the court were not *prima facie* proof of the fact of service of the notice and consequently the right to redeem was not lost. *Badal Ram v. Taj Ali*, [1907] 4 A. L. J. R. 717, followed.

SECOND APPEAL from a decree of W. R. G. MOIR ESQR., District Judge of Gorakhpur, confirming a decree of Sayed Muhammad Said-ud-din, Munsif of Bansgaon.

Jasan Rai executed a mortgage by conditional sale on 27th December, 1866. His heirs brought a suit for redemption of the mortgage. The main defence was that by virtue of proceedings taken by the mortgagee under section 8 of Regulation XVII of 1806 the mortgage had been foreclosed in 1877 and that the mortgagees were in proprietary possession ever since. The plaint stated that an application had been made by the mortgagee for foreclosure but that he did not obtain any decree for foreclosure. The evidence produced by the defendants of the proceedings under Regulation XVII of 1806 consisted of a copy of the notice or *parwana*, dated 13th December, 1876, issued by the District Judge of Gorakhpore, to Jasan Rai, and a copy of the final order of foreclosure passed by the said Judge on 22nd December, 1877, which recited that an application under section 8 of the Regulation had been made by the mortgagee on 21st November, 1876, that a notice had been issued on 13th December, 1876, to the mortgagor giving him one year within which to pay up the amount due, that from the Nazir's report it appeared that Jasan Rai was away from home and that the notice and the copy of the application had been served on his son Ram Baran Rai on 25th December, 1876, that proclamation had been duly made, and that the amount due had not been paid or tendered

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by the mortgagor. The court of first instance held that by reason of these proceedings and the non-payment of the amount due within the year of grace allowed by the notice the right of redemption had been foreclosed, and the mortgagees had become absolute owners. On appeal it was the plaintiff's contention that the proceedings were defective and invalid and were not duly proved as required by law. The lower appellate court held that the admission in the plaint of the fact that the mortgagee had applied under section 8 of the Regulation showed that the mortgagor had had notice thereof, and besides, that the order of the District Judge dated 22nd December, 1877, was sufficient evidence of service of the notice; and that, as the money had not been paid or tendered, the mortgage had been foreclosed and the mortgagees' possession from 1877 was proprietary and adverse. The suit was dismissed accordingly, and hence this second appeal.

Peary Lal Banerji, for the appellants.—Even assuming that all the proceedings, relied upon by the defendants, under the Regulation were regular and valid, and that they have been properly proved, the title of the mortgagees would not be complete. Those proceedings being of a ministerial nature merely, something else would have to be done to effectively foreclose the mortgage. To do that the mortgagee had to follow up the proceedings with a suit for possession, or, if he was already in possession, with a suit for declaration of his title and possession as full owner. I rely on the observations at bottom of page 350 and top of page 351 of the report of

Forbes v. Ameroonissa Begum, [1865] 10 M. I. A., 340.

No such suit was brought by the mortgagees in the present case. Further, the proceedings themselves were defective and invalid. It is for the mortgagee to show that he strictly complied with all the conditions and procedure prescribed by the Regulation. Non-compliance in any one respect would make the foreclosure ineffective and would not extinguish the equity of redemption. The provisions of section 8 of the Regulation are imperative.

Madhopersad v. Gajudhar, [1884] I. L. R., 11 Cal., 111, P. C.

The period of one year allowed by section 8 of the Regulation should be calculated from the date of service of the notice upon the mortgagor:

Mahesh Chandra v. Tarini, [1868] 1 B. L. R., (F. B. rulings), 14;

Norender Narain v. Dwarka Lal, [1877] I. L. R., 3 Cal., 397, P. C.

Here, assuming that the proper service of the notice has been duly proved, the date of service was 25th December, 1876, and the date of the final order was 22nd December, 1877; so that the order was passed before the expiry of one year. Moreover, the notice had to state from what date the year would begin to run and this was not done in the present case.

Madhopersad v. Gajudhar, (cited above); at top of p. 121.

Service of the notice has not been duly proved; it has to be established by evidence. The mere recital in the Judge's order, or the endorsement of the Nazir on the back of the notice, that the mortgagor had been duly served is not legal proof and not even *prima facie* evidence of due service.

Norender Narain v. Dwarka Lal, [1877] I L. R., 3 Cal., 397, P. C.

Besides, on the defendants' own showing, the notice was not served on the mortgagor Jasan Rai but on his son.

The use made by the lower appellate court of the pleadings in the plaint was not at all justified. There was no admission at all of due service of the notice or of compliance with any of the formalities prescribed by the Regulation. In this connection there are some important observations at pp. 406, 407 of the case in I. L. R., 3 Cal., 397, and at p. 118 of the case in I. L. R., 11 Cal., 111.

The defendants have not proved that before commencing the proceedings under the Regulation they made a previous demand of payment; the omission to make such demand vitiates the proceedings altogether.

Karan Singh v. Mohan Lal, [1882] I. L. R., 5 All., 9.

A recital in the application for foreclosure itself of a previous demand having been made is no proof thereof.

Silla Bakhsh v. Lalta Prasad, [1886] I. L. R., 8 All., 388.

The case of

Badal Ram v. Tej Ali, [1907] 4 A. L. J. R., 717,

was a case of a suit for redemption like the present, and fully supports me.

No question of adverse possession arises in this case. The foreclosure proceedings being invalid, the right of redemption was not extinguished thereby, and the mortgage subsists. Mere assertion of an adverse title will not enable a mortgagee in possession to convert his possession as mortgagee into adverse possession as owner, or in other words, to cut down the period of redemption from 60 years to 12 years.

Sheopal v. Khadim Hossein, [1875] 7 N.-W. P. H. C. R., 220. F. B.

Ali Muhammad v. Lalta Bakhsh, [1878] I. L. R., 1 All., 655.

Lakshmi Narayan Tewari (with *Haribans Sahai*), for the respondents.—It has been contended by the appellant that inasmuch as the mortgagee did not follow up the proceedings under the Regulation with a suit to establish his title, the foreclosure failed to be effective. Reliance was placed for this proposition upon certain passages in the judgment of the case reported in 10 .

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M. I. A., 340; but there are other passages at pp. 351 and 350 which lay down that where proceedings are taken under section 8 of the Regulation the only issue, in so far as the right of redemption is concerned, thereafter left to be considered is whether the payment or deposit had or had not been made before the expiry of the year of grace. In the present case admittedly there was no such payment or deposit. It has been held in later cases, after consideration of the passages mentioned above, that the mortgagee's title became absolute as soon as the year of grace expired without payment having been made, and that it was not necessary for the mortgagee to institute a suit thereafter for perfecting his title.

Ali Abbas v. Kalka Prasad, [1892] I. L. R., 14 All., 405, F.B.;

Batul Begam v. Mansur Ali Khan, [1901] I. L. R., 24 All., 17, P. C.

The right of redemption was extinguished by the expiry of the year of grace, *ipso facto*; the final order was not a necessary ingredient. Even without the final order, and the recording of a final order is not a requirement prescribed by section 8 of the Regulation, the equity of redemption would be extinguished by lapse of the year without the deposit. Any real or alleged irregularities in the final order are, therefore, immaterial, and cannot be made the basis of any valid arguments against the respondents.

Regarding most of the cases cited by the appellants a distinction is to be drawn between two classes of suits which may follow proceedings taken under the Regulation; the first being suits instituted by the mortgagee with the object of getting a pronouncement from the court of the completeness of his title, and the second being suits brought by the mortgagor for redemption. The questions that arise for determination in the two classes of suits are different, and the *onus* of proof is on a different party. In a suit for redemption brought after the close of proceedings under the Regulation the only question for determination is whether or not the deposit was duly made. This was clearly pointed out in the case in 10 M. I. A., 340. It was with reference to a suit by a mortgagee to recover possession that it was laid down in the case in I. L. R., 3 Cal., 397 that it was essential to prove strict compliance with the conditions laid down by the Regulation; *vide* top of p. 405, "in an action of this kind *etc.*" In a suit for redemption brought many years after the completion of the proceedings under section 8 it would be very hard on the mortgagee to throw upon him the burden of proving everything. That was never intended by the Privy Council. With the exception of the case in 4 A. L. J. R., 717, all the other cases cited by the appellants related to suits brought by a mortgagee to enforce foreclosure; they are, therefore, distinguishable.

The case of

Badal Ram v. Taj Ali, [1907] 4 A. L. J. R., 717,

has extended to suits for redemption the rule that was laid down by the Privy Council with special reference to suits for enforcement of foreclosure brought by a mortgagee. It is submitted that there is no warrant for this extension. On the other hand, such extension would appear to be contrary to the intention of the Privy Council.

As regards the question of proof of service of the notice, the lower appellate court has found that it has been proved. In second appeal that finding cannot be challenged on the ground of insufficiency of evidence. Further, the *dictum* against the propriety of presuming in favour of the due performance of all the requirements of section 8 of the Regulation was laid down with reference to suits by mortgagees and is not applicable to the present case.

Personal service on the mortgagor himself was not indispensable.

Field : Regulations of the Bengal Code, p. 377 ;

Madho Singh v. Mahtab Singh, [1871] 3 N.-W. P. H. C. R., 325.

If it be held that the *onus* of proof in the present case lay on the mortgagees, the case may be remanded for a finding as to previous demand, service of notice *etc.*, as was done in the case in I. L. R., 5 All., 9.

Peary Lal Banerji, was not heard in reply.

The judgment of the Court was delivered by

PIGGOTT, J.—This was a suit in which the plaintiffs claimed redemption of a mortgage by conditional sale effected on the 27th of December, 1866. The plaintiffs are the son and grandson of the original mortgagor, and the defendants are the sons and grandsons of the original mortgagee. The fact of the mortgage is admitted, and we find that it was never pleaded that the said mortgage, if redeemable at all, was redeemable only for a larger sum than that tendered by the plaintiffs. The defendants, however, contended that the equity of redemption had been extinguished by reason of certain proceedings taken in the year 1876 by the mortgagee under section 8 of Regulation XVII of 1806. Both the courts below have found in favour of the defendants on this point and have added a finding that the present suit is barred by limitation. This latter finding as it stands is difficult to accept. The suit was one for redemption and was brought within the statutory period of limitation. Either the equity of redemption has been extinguished, or it has not. Of course, if it has been extinguished, the suit fails, not by reason of any bar of limitation, but because the plaintiffs have failed to prove their cause of action, namely a subsisting right to redeem. If on the other hand the equity of redemption has not

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been extinguished, the suit is obviously within time. The essential question for determination is whether the proceedings taken by the mortgagee in the year 1876 had the effect of extinguishing the equity of redemption. This must depend in the first instance upon whether the mortgagee caused the mortgagor, or his legal representative, to be served with a copy of his own written application for foreclosure and also with a notice or *parwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The evidence by which it is sought to prove these facts consists of certain records of the proceedings of the court of the District Judge of Gorakhpur. There is abundant authority to support the proposition that such records cannot be accepted as *prima facie* proof of the fact of service. It has been contended before us on behalf of the respondents that most of the decisions on the point were pronounced in cases in which the mortgagee had come into court asking for a decree for possession, or a decree declaring his proprietary title, after he had taken the requisite proceedings under Regulation XVII of 1806. There is however a Bench decision of this Court in which the same principles have been applied to a suit for redemption exactly on all fours with the suit now before us. We refer to the case of *Badal Ram v. Taj Ali*(1). We have been asked to consider the decision in that case; but we do not ourselves see any adequate reason to dissent from it, and in any case we prefer to follow it on the principle of *stare decisis*. The evidence relied upon by the learned District Judge as proving that the equity of redemption was extinguished by reason of the proceedings taken in 1876 was not evidence which could be accepted as establishing the facts sought to be proved on behalf of the defendants, and the decision of the District Judge on this point is based upon an erroneous view of the law and is open to interference by this Court under section 100 of the Code of Civil Procedure. We may note that the Bench case to which reference has already been made was also decided in second appeal. These considerations are sufficient to dispose of the present appeal. We set aside the decrees of both the courts below, and in lieu thereof we give the plaintiffs a decree for redemption, to be drawn up in the form prescribed by Order 34, rule 7 of the Code of Civil Procedure, allowing redemption of the property in suit on payment of the sum of Rs 393-1-0 rupees three hundred and ninety-three, and anna one only, on account of principal and interest, within three months from this date. The plaintiffs will be entitled to their costs in all three courts.

B. K. M.

Decree modified.

(1) [1907] 4 A. L. J. R., 717.

KING-EMPEROR

versus

BHAGWANA^c

Criminal Tribes Act (XXVII of 1871), section 23—Accused entering dwelling-house through an open door and abstracting things—Theft—Lurking house-trespass or house-breaking by night, ingredients for offence wanting—Accused previously convicted of dacoity—Sentence for transportation for life illegal.

Where an accused person belonging to a criminal tribe with two previous convictions for dacoity finding the door of a dwelling-house open walked into it and abstracted certain things in a room upstairs but before he could remove them alarm was given by one of the occupants of the room and he was caught, *held* that he was guilty of theft and not of lurking house-trespass or house-breaking by night and he could not be sentenced to transportation for life under section 23 of the Criminal Tribes Act.

CRIMINAL APPEAL against an order of S. MAHOMED ALI, Esq., Sessions Judge of Moradabad.

S. N. Sinha, for the accused.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

RICHARDS, C. J.—The accused has been convicted under section 457 of the Indian Penal Code read with section 23 of the Criminal Tribes Act. The accused beyond all question belongs to a criminal tribe. He has been twice previously convicted of dacoity. From the evidence on the record there can be no doubt that the accused in the present case entered a dwelling-house and proceeded to steal clothes and utensils belonging to certain students. He removed some of the articles preparatory to taking them away but before he actually got away the alarm was given and he was caught. The learned Sessions Judge was of opinion that under section 23 of the Criminal Tribes Act he had no option except to sentence the accused to transportation for life. Mr. Sinha on behalf of the accused argues that on the facts proved the accused was not guilty of an offence punishable under section 457. He contends that on the assumption that the accused is guilty at all he is only guilty under section 380. Section 380 is not one of the sections referred to in section 23 of the schedule attached to the Criminal Tribes Act. Section 457 provides that whoever commits "lurking house-trespass by night" or "house-breaking by night," has committed an offence under that section.

Lurking house-trespass is committed when a person enters premises of the nature described in section 442 having taken precautions to conceal such house-trespass in the manner mentioned in section 443. There does not appear to be any evidence that the

^cCr. App. No. 110 of 1918.

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accused in the present case took any such precautions. The evidence is that he was found by one of the students who was awakened by the noise in removing the articles. House-breaking is defined by section 445. There does not appear to be any evidence that the accused effected his entrance into the house in any of the six ways mentioned in the section. On the other hand it is quite consistent with the evidence that he found the door open, walked into the house and went upstairs to where the students were sleeping, he commenced to steal. We think under these circumstances the accused could not be properly convicted under section 457, and that his conviction ought to have been under section 380 and therefore the Sessions Judge was not bound to sentence the accused to transportation for life.

The accused is evidently a dangerous man. We have already mentioned that he has been twice previously convicted for dacoity. We alter the conviction from a conviction under section 457 read with section 23 of the Criminal Tribes Act to a conviction under section 380 read with section 75 and we reduce the sentence from a sentence of transportation for life to a sentence of ten years' rigorous imprisonment with effect from the date of his original conviction.

Conviction altered.

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 TUDBALL, J.
 ABDUL
 RAOOF, J.

MITHAN LAL (*Plaintiff*)

versus

CHHAJJU SINGH (*Defendant*)*

Usufructuary mortgage of zamindari—Theka granted by mortgagee at a certain rate of rent to last during term of mortgage—Equity of redemption sold for arrears of rent—Mutation not made in purchaser's favour—Subsistence of theka—Suit for arrears of rent under theka—Maintainable.

On July 23rd, 1908, defendant made a usufructuary mortgage of his zamindari in favour of the plaintiff on the same day the plaintiff granted a *theka* of the mortgaged property to the defendant at a certain rate of rent, to last during the term of the mortgage. The rent under the lease having fallen into arrears a suit was brought against the defendant on June 26th, 1912 and in execution of the decree made in the suit, the equity of redemption was put up for sale on March 20th, 1913. It was purchased by a third person, and the mortgage was proclaimed at the time of sale. The purchaser did not take steps to have mutation effected in his favour and the records continued as before. The plaintiff now sued the defendant for arrears of rent under the *theka* for a period partly prior and partly subsequent to March 20th, 1913, at the rate fixed therein. The defendant contended that after the 20th March, 1913, he was not liable to pay any rent, he having become an ex-proprietary after the date of the sale :—*Held*, that whether rightly or wrongly, the mortgage must, under the circumstances, be assumed to be subsisting, and as such the lease also must be deemed to subsist and the defendant, as *thekadar*, was liable for rent as prescribed in the *theka*.

* S. A. No. 757 of 1916.

SECOND APPEAL from a decree of L. JOHNSTON Esq., District Judge of Meerut, modifying a decree of Pandit Brij Krishna Raina, Assistant Collector, First Class of Bulandshahr.

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The defendant usufructually mortgaged his zemindary to the plaintiff on 23rd July, 1908. On the same day the plaintiff executed a lease of the mortgaged property to the defendant, who remained in possession as *thekadar* paying rent to the plaintiff under the lease. On 26th June, 1912, the plaintiff sued him for arrears of rent, obtained a decree and in execution thereof put up the defendants' equity of redemption to auction sale. At that sale, held on 20th March, 1913, the equity of redemption was purchased by Bhuttu Mal.

The present suit was brought by the plaintiff for arrears of rent against the defendant for a period partly prior and partly subsequent to the 20th of March, 1913. The defendant denied his liability for this latter period, on the ground that his equity of redemption had been sold. The Assistant Collector held that the purchase by Bhuttu Mal of the equity of redemption did not affect the lease at all, which was subsisting; and the suit was decreed in full. On appeal, the District Judge held that on the sale of the equity of redemption the defendant became the ex-proprietary tenant of the land, and that as no rent had been fixed by the Collector after the accrual of the ex-proprietary rights the plaintiff could not sue for rent for the period subsequent to the 20th of March, 1913. The plaintiff appealed to the High Court.

Sital Prasad Ghosh, (with him *Uma Shankar Bajpai*), for the appellant, submitted that the usufructuary mortgage of 1908 was a transfer within the meaning of section 10 of the Tenancy Act, and consequently the defendant then became by virtue of the law the ex-proprietary tenant of the plaintiff. The District Judge was in error in holding that a fresh ex-proprietary right accrued to the defendant upon the sale of the equity of redemption.

It was not necessary that there must be an order fixing rent under section 36 of the Land Revenue Act in all such cases, and there was nothing to prevent the parties coming to an agreement as to the amount of rent for a particular ex-proprietary holding, provided only that the rent was not greater than that indicated by section 10 of the Tenancy Act. What the law sought to provide was that an ex-proprietary tenant should not be permitted to contract himself out of the benefits conferred upon him by section 10; and it was not suggested by the defence in the present suit that the rent fixed in the lease was in excess of the statutory rent.

The case of

Prag v. Sital Prasad, [1914] I. L. R., 36 All., 155, was not against the appellant; on the other hand, it was really in his favour. The judgment of Mr. TWEEDY in the case of

Musammatt Ram Kuari v. Badri Singh, [1913] S. D. B., No. 7 of 1913,

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went further than the law on the subject and ought not to be accepted.

Haribans Sahai, for the respondent.—Ex-proprietary rights arose in favour of the defendant on two occasions, (1) when he made the usufructuary mortgage and (2) when his equity of redemption was sold. The mere fact that he did not claim ex-proprietary rights on the first occasion could not operate to prevent the accrual of such rights for all time to come. He became, by operation of law, an ex-proprietary tenant on the sale of the equity of redemption, and unless the rent was fixed by the Collector the appellant could not sue for arrears of rent. Whatever may have been the law under Act XII of 1881, it is now clear, having regard to the provisions of section 10 of the present Tenancy Act and section 36 of the Land Revenue Act that the rent of an ex-proprietary tenant cannot be fixed by private arrangement.

In any case, having regard to the Full Bench ruling in

Debi Prasad v. Bhagwan Din, [1912] 10 A. L. J. R., 437,

the defendant became the ex-proprietary tenant of all the proprietary body, and the present suit is not maintainable.

Then, reading together the two deeds of 23rd July, 1908, and having regard to the fact that the net rent reserved by the *theka* was equal to the interest on the mortgage money, the meaning is clear that the lease subsisted only so long as the defendant continued to be the mortgagor. When the equity of redemption was sold the defendant was no longer bound to pay the rent fixed by the lease; he was thereafter cultivating the land as an ex-proprietary tenant and was liable to pay only the statutory rent. The parties could not contract themselves out of the law. I rely on the cases of

Prag v. Sital Prasad, [1914] I. L. R., 36 All., 155;

Musammat Ram Kuari v. Badri Singh, [1918] S. D. B. No. 7 of 1913;

Moti Chand v. Khwaja Ikram-ullah, [1916] 15 A. L. J. R., 150, p. c.

In any case an issue ought to be remitted to find out whether the rent reserved is or is not in excess of the statutory rent.

The judgment of the Court was delivered by

Tudbilla, J.

TUDBALL, J.—This is a plaintiffs' appeal. The facts out of which it has arisen are briefly as follows:—The defendant was the owner of a certain zamindari share, the area of which was some 13 bighas odd. On the 23rd of July, 1908, he gave a usufructuary mortgage of this zamindari to the plaintiff. On the same date the plaintiff gave him a lease of the same zamindari share on payment of a sum of Rs. 70/14/ per annum *plus* Rs. 23/11/ Government demand *etc.* The defendant remained in possession as *thekadar*

paying his rent to the plaintiff under the lease. On the 26th of June 1912, the plaintiff sued him on the basis of that agreement for arrears of rent and obtained a decree and in execution of his decree for the arrears of rent due under the lease, he attached and put to sale the defendant's equity of redemption. This was sold on the 20th of March 1913, and was purchased by one Bhuttu Mal. At the time of the sale the plaintiffs' mortgage and one other mortgage were also notified. The price paid for the property at the sale was Rs. 40. Bhuttu Mal did not apply for mutation of names and the Government record still stands as it was on the date of the original mortgage. The plaintiff has now, on the basis of the lease sued his *thekadar*, the defendant, for the rent for a period which commenced prior to the 20th of March 1913, and runs up to a date subsequent to that date. The defendant in his written statement merely pleaded that he was liable for the rent up to the 20th of March 1913, but that for the period subsequent to that he was no longer liable under the lease because his equity of redemption had been sold and purchased by Bhuttu Mal. The court of first instance in the course of its judgment made the remark that "the mortgagor's right to redeem had been put to auction by the plaintiff, decree-holder who had purchased it for Bhuttu Mal on the 20th of March 1913." It is quite clear that the defendant had nowhere pleaded that Bhuttu Mal was the *benamidar* of the plaintiff or that Bhuttu Mal had purchased the property for and on behalf of the plaintiff. There was no issue on this point. There was no allegation or denial; no evidence and no finding. The court of first instance held that the purchase by Bhuttu Mal of the defendant's equity of redemption did not affect the case at all, that the lease subsisted and that the defendant was liable under the lease. It accordingly decreed the suit. The lower appellate court on the defendant's appeal has held that after the 20th of March 1913, the defendant became the ex-proprietary tenant of the land because the equity of redemption had been sold; that he was entitled to take up his position as an ex-proprietary tenant and as no rent had been fixed, he was not liable to pay any rent for the period subsequent to the 20th of March 1913. The plaintiff appeals. It is quite clear to us that the Judge of the court below has misunderstood the nature of the plaintiff's claim. It is based on the *theka* which was given to the defendant on the 23rd of July 1908. We will assume that the defendant is the ex-proprietary tenant of the land. He is equally a *thekadar* under the contract of the 23rd of July 1908. If the period of that contract has come to an end, then of course the plaintiff's claim must fail because the *theka* no longer subsists, but so long as the *theka* subsists the plaintiff is entitled to recover from his *thekadar* the rent which the latter has agreed to pay. He may as an ex-proprietary tenant be a tenant of the land under himself as *thekadar*. If the *theka* had been given to an outside person, there

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is no question that so long as it subsists the *thekadar* would be liable for the rent. The lower court in its judgment has stated that Bhuttu Mal *appears* to have been a *benamidar* for the plaintiff. It has, however, come to no decision on the point nor could it do so for the simple reason that the issue had not been raised, no evidence taken upon it, and there had been no decision on it. The point would have been material if it had been raised because the lease was to subsist only so long as the mortgage subsisted. If the defendant had pleaded and had proved to the court that the mortgage had come to an end, then the plaintiff's claim would have failed, but he is not allowed to raise a question of fact in second appeal on which there were no pleadings, on which there was no issue and to which no evidence was directed. The case must be decided on the assumption, right or wrong, that the mortgage still subsists and that Bhuttu Mal is the owner of the equity of redemption which was purchased in his name. This being so the lease must still subsist and whether the defendant be or be not the ex-proprietary tenant of the land, he is liable as *thekadar* to his lessor. In this view we must allow the appeal, set aside the decree of the lower appellate court and restore that of the court of first instance. The plaintiff will have his costs in all courts. The court of first instance granted the plaintiff a decree for what it has called "usual interest." This interest will run from the date of the suit up to the date of realization, and at the rate of 6 per cent. per annum simple.

B. K. M.

Appeal decreed.

CRIMINAL

1918

March, 22.

BANERJI, J.

CHHOTE LAL

versus

EMPEROR*

Criminal Procedure Code (Act V of 1898), section 437—Further enquiry—Warrant case—Charge framed—Accused called upon to plead—Accused pleaded not guilty—Accused not convicted—Order tantamount to acquittal—Jurisdiction—Revision.

Where in a warrant case the charge having been framed the accused was called upon to plead and he pleaded not guilty and the trying Magistrate did not convict him, *held* that the effect of the order was that the accused had been acquitted (though the Magistrate wrote "discharged") and that the District Magistrate had no jurisdiction to order a further enquiry.

* Cr. Rev. No. 95 of 1918.

CRIMINAL REVISION from an order of A. C. WALKER, Esq.,
District Magistrate of Shahjahanpur.

Gulzari Lal, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

BANERJI, J.—Chhote Lal, the applicant, was charged with having rescued his father, who had been arrested under the orders of the Revenue Court in execution of a decree passed by that court. The Magistrate who tried him recorded the evidence for the prosecution, framed a charge against him and called upon him to plead. The record shows that the accused pleaded not guilty but refused to call witnesses. A date was fixed for the hearing of the case after the charge had been framed and the plea of not guilty had been entered; and on that date, for reasons stated in the judgment, the Magistrate trying the case passed an order of “discharge.” This order was set aside by the District Magistrate and a further enquiry was ordered. The present application has been filed against the order of the District Magistrate directing a further enquiry by another Magistrate. It is contended that the order of the Magistrate who tried the case, though it is in terms an order of discharge, is in substance and reality an order of acquittal, and that therefore the District Magistrate was not competent under section 437 to order further enquiry. Under the section last mentioned the Magistrate of the district is authorised to order further enquiry in a case of dismissal of a complaint under section 203 or section 204 of the Code of Criminal Procedure, or in a case in which the accused has been discharged. The real question therefore in this case is whether the order of the trial Magistrate passed on the 18th of June, 1917, was an order of “acquittal,” because if it was an order of “acquittal” further enquiry could not be ordered by the District Magistrate. Section 253 of the Code of Criminal Procedure provides that if upon taking all the evidence and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out, which if un rebutted would warrant a conviction, the Magistrate shall discharge him. It is thus clear that an order of discharge should be made *before* a charge has been framed. Section 254 provides for the framing of a charge if the Magistrate is of opinion that there is ground for presuming that the accused has committed the offence with which he is charged. The present case was a ‘warrant case’ and therefore section 253 and the following sections applied to the case. Under section 255 the court is required to ask the accused after a charge has been framed and read out and explained to him whether he is guilty or has any defence to make. In the present case it appears from the record that after the charge had been framed the accused was called upon to plead.

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and he pleaded not guilty. The only order which the Magistrate could have passed after the accused had pleaded to the charge was either an order of acquittal or an order of conviction. In the present case the accused was not convicted. Therefore he must be deemed to have been acquitted under section 258. It is true that the Magistrate in his judgment used the word "discharged" but that was a misuse of the word. The only order which he could have passed, if he did not convict, was an order of acquittal, and therefore the order passed on the 18th of June 1917, must be deemed to be an order of acquittal. This being so, the District Magistrate was not competent under section 437 to order further enquiry and the order made by him for such enquiry is illegal. I accordingly set aside the order of the District Magistrate, dated the 14th of August, 1917

Order set aside.

CIVIL

1918

March, 22.

TUDBALL, J.

ABDUL

RAOOF, J.

KUNJ BEHARI LAL (*Defendant*)*versus*THE BHARGAVA COMMERCIAL BANK (*Plaintiff*)*

Contract Act (IX of 1872), section 176—Money advanced on pledge of ornaments—Sale by pawnee—Reasonable notice of sale to pawnor—Meaning of.

Section 176 of the Contract Act does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The expression 'reasonable notice of the sale' means an intimation of an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor; all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right is analogous to that of a seller's right to re-sell the goods sold and the two rights must be exercised in more or less the same method.

A pawnee gave to the pawnor a notice that unless the articles pledged were redeemed within a fortnight, he would sell them without further reference, but omitted to specify the actual date, time and place of the sale. He then sold the articles but the debt was not fully paid off. In a suit for the balance the pawnor contended that the notice was not reasonable because of the omission to specify the actual date, time and place of the sale:—*Held* that the notice was reasonable.

S. A. No. 950 of 1916.

SECOND APPEAL from a decree of D. R. LYLE Esq., District Judge of Agra, confirming a decree of Babu Chatur Behari Lal, Munsiff.

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Suit to recover balance of money due.

KUNJ
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In 1912, the plaintiff Bank advanced a loan of Rs. 1,700 to the defendant on the security of certain ornaments which were pledged with the Bank for that purpose. From January 1914 onwards the Bank began to press for re-payment and gave repeated notices of their intention to sell the ornaments in satisfaction of their dues. The defendant, on various occasions, asked for and obtained time for payment. Ultimately on the 15th September, 1914, the Bank gave notice that if the account was not settled within a fortnight they would sell the ornaments without further reference. Money not having been paid, the Bank sold the ornaments on the 5th October, 1914. The sale proceeds having proved insufficient to discharge the debt in full, the present suit was brought to recover the balance. The defendant pleaded that proper notice had not been given and the ornaments had been sold at an under-value. He urged that he should be given credit for the full value of the pledge. The lower courts held that the notice given was reasonable, and though the sale had been at some under-value yet the Bank not being guilty of fraud or any other irregularity was not liable for the loss suffered by the defendant. The suit was accordingly decreed.

Defendant appealed.

Kailas Nath Katju, for the appellant, submitted that on a true construction of section 176 of the Indian Contract Act the pawnee was bound to give reasonable notice not only of his intention to sell but of the actual sale itself. Under section 177 the pawnor had a right of redemption up to the moment of the actual sale of the goods pledged. This provision of the law would become nugatory if it were open to the pawnee to sell the goods whenever he liked provided he had given reasonable notice of his intention to sell. The power of private sale is one liable to be gravely abused to the serious injury of the pledgor and the Legislature might well have intended, having regard to the conditions prevailing in this country that the sale of a pledge should only take place in the presence of the pledgor, or with notice to him of the date and time of sale so that he might have an opportunity of being present at the sale if he wished to do so. The language of the section itself pointed to that conclusion. Notice was required of "the sale," and not of "the intention to sell." If the Legislature had intended otherwise it could easily have used more apt and explicit language, as it had actually done in section 107 of the Act, and section 69 of the Transfer of Property Act. The fact that the language of section 176 was different from section 107 of the Contract Act made it clear

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that the same thing was not intended. The presumption was that to convey the same meaning the Legislature would use the same language throughout the same Statute. Reference was also made to the passage in STORY on Bailments, 5th ed., section 310, p. 322, that the pawnee "may file a bill in equity against the pawnor for a foreclosure or sale, or he may proceed to sell, *ex mero motu*, upon giving due notice of his intention to the pledgor," and it was argued that the framers of the Indian Contract Act would, had they intended to adopt STORY's view of the law, have used similar language.

Narain Prasad Asthana, (with him Mangal Prasad Bhargava), for the respondent, was not called upon but referred to CUNNINGHAM and SHEPARD, Contract Act, 10th ed, p. 410.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—The facts of this case are simple. The appellant defendant pawned to the respondent Bank certain gold and silver ornaments as security for a loan in the year 1912. In January, 1914, the Bank pressed the defendant for payment and stated that they had an offer of Rs. 1,480 for the ornaments and that if the defendant did not pay within a week the ornaments would be sold for the value offered and that a suit would be brought for the balance. The defendant in reply asked for full particulars of the offer and also asked for time for payment. In his reply he stated that the ornaments were worth more than Rs. 2,400 and that he would hold the Bank responsible if they were sold for less than their value. The Bank on the 26th of February, 1914, sent in a statement of account and a list of the ornaments pawned and again gave the defendant fifteen days' time within which to pay, otherwise the Bank would sell. The Bank did not carry out its threat. On the 9th of May, 1914, the defendant again asked for 15 days' time as he had a chance of paying off the debt. The correspondence continued and again on the 18th of August, 1914, the Bank wrote to the defendant stating that it had an offer of Rs. 1,500 for the ornaments and would proceed to sell. On the 25th of August, the defendant asked for further time. On the 12th of September the Bank agreed and then on the 15th of September it again wrote to the defendant saying that unless the money was paid within 15 days the jewellery would be sold without further reference to him. The Bank did not sell on the 30th of September but it actually waited till the 5th of October and then carried out the sale. A suit was then brought for the balance and both the courts below have decreed the claim. One point was urged in the court below and that is that the notice given on the 15th of September was not a reasonable notice of the sale within the meaning of section 176 of the Contract Act. It was contended that notice of the actual date, time and place of the intended sale should have been given to the defendant. This plea was repelled by the court below. It has again been raised before us and this is the only point for our

decision. It is urged that under section 177 the pawnor has a right to redeem at any subsequent time before the actual sale of the goods, that unless he is given full information of the date, time and place of the sale, it is impossible for him to redeem, if the property were sold at some other date, time or place. No ruling on the point has been cited. In our opinion section 176 does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The words are, "He may sell the thing pledged on giving the pawnor reasonable notice of the sale." This, in our opinion, means an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. For instance it would be open to the pawnee to put up the property to auction sale and to sell it to the highest bidder. It would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser. It is quite clear that all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act, and we take it that the two rights must be exercised in more or less the same method. The seller's right to re-sell under section 107 may be exercised after giving notice to the buyer of the intention to re-sell after the lapse of a reasonable time. The language of the two sections is slightly different but their meaning is practically the same. In our opinion in the circumstances of the present case the respondent Bank gave the appellant notice, and a very reasonable notice indeed, of the intended sale. We think the decision of the court below is correct. We therefore dismiss the appeal with costs.

Appeal dismissed.

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Feb. 12.

PIGGOTT, J.
WALSH, J.BANARSEE DAS (*Defendant*)*versus*SHEODARSHAN DAS SHASTRI (*Plaintiff*)*

Grant of property to a priest and his heirs—Grant not in favour of idol—Grantees capable of dealing with property as his own—One member of joint family alienating property—Other members may impeach—A stranger competent to do so.

A grant of property under a deed made to a priest of a temple and his heirs for his services in connection therewith is not grant in favour of the idol of the temple, and the grantees are competent to deal with such property as their private property.

Where a member of a joint family makes an alienation of property belonging to the family, purporting to act on behalf of the family, the other members can call it in question on the ground that it was made without authority or without valid necessity or not for their benefit. But a person who is a stranger to the family and does not claim through the joint family is not competent to do so.

FIRST APPEAL from a decree of MAULVI KHWAJA ABDUL ALI, Subordinate Judge of Agra.

Lalit Mohan Banerji, for the appellant.

B. E. O'Connor and Peary Lal Banerji, for the respondent.

The following judgments were delivered.

Piggott, J.

PIGGOTT, J.—The suit out of which this appeal and the connected Appeal No. 317 of 1915 arise, was brought to enforce a mortgage deed of the 10th of January 1881. The property hypothecated was the equity of redemption in a revenue free grant in village Gadaya Latifpur and 500 Bighas of revenue free land in another village called Khankara. It is recited in the deed itself that the latter of these two properties was already mortgaged with possession to the same mortgagees under a deed of the 15th of June 1866. Part of the consideration of the simple mortgage now in suit was the redemption of this older usufructuary mortgage on the land in village Khankara. Out of the total consideration of Rs. 10,801 for the deed in suit a sum of Rs. 7,184 was calculated as due on the usufructuary mortgage of the 15th of June, 1866, and was set apart for the redemption of the said mortgage. One effect therefore of the deed in suit was that the mortgagors became entitled to re-enter into possession of the land in village Khankara.

* F. A. No. 170 of 1916.

which had hitherto been in the possession and enjoyment of their mortgagees. It is further stated in the deed in suit that the revenue free grant in village Gadaya Latifpur was also mortgaged with possession* to the same mortgagees under a deed of the 18th of October, 1865. It is only the equity of redemption which is hypothecated under the deed in suit. It is admitted that this mortgage of the 18th of October, 1865, has never been redeemed. The relief sought in the present suit is to bring to sale the equity of redemption in respect of the revenue free grant in village Gadaya Latifpur and the entire right, title and interest of the mortgagors in respect of the land in village Khankara. The mortgagors under the deed are as follows :—

1. Mahant Lachman Das, disciple of Mahant Hari Das.
2. Khubi Ram and Ram Ratan, sons of Gulab Das.
3. Hargobind, son of Hardeo.

The evidence on the record shows that the properties now in question in villages Gadaya Latifpur and Khankara were in the possession in the year 1826 of one Mahant Kesho Das, described as priest of the temple of Sitaramji. They were held by him under revenue free grants made by the Maharatta Government. This Kesho Das appears to have had a number of *Chelas* or disciples and it seems clear from the record that he himself belonged to a celibate order of religious ascetics. Kesho Das died somewhere about the year 1828 and, under circumstances which will require to be further considered, he was succeeded in possession of the properties in suit by two persons, Hari Das and Gulab Das. The former of these took the title of Mahant, lived as a celibate and would seem to have succeeded Kesho Das in the office of priest. Gulab Das was a married man and brought up a large family, seven sons of his being shown in the pedigree the correctness of which has been admitted. Hari Das, however, adopted as his *Chela*, and as his eventual successor in the Mahantship, Lachman Das, one of the sons of Gulab Das. This is the Lachman Das whose name appears as the first of the mortgagors in the deed in suit. Of the remaining mortgagors two are sons of Gulab Das, while Hargobind is a grandson of Gulab Das, his father Hardeo having presumably died before the execution of the deed in suit. There is a recital in the same deed to the effect that three other persons interested in the mortgaged property as descendants of Gulab Das are “not present here,” and the executants of the deed undoubtedly purport to act for and on behalf of these alleged absent members of the family and to deal with the property as a whole, including the shares of the said absent members. The three persons thus specified are Har Prasad, an own brother of the executant Hargobind, Bhola, another grandson of Gulab Das, whose father Baldeo we must presume to have died prior to the execution of this document, and Bal Kishen another son of Gulab Das.

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There remains one other son of Gulab Das called Bhupal, who is not accounted for in the above statement of facts. His name neither appears as an executant of the mortgage deed in suit nor in the recital of those members of the family on whose behalf the executants of the deed purport to act. In the absence of any evidence to the contrary it seems a fair presumption that Bhupal had died prior to the execution of this deed, and there is no evidence on the record to prove the contrary. The nearest the defendants have been able to get is the production of certified copies of certain village records which purport to show Bhupal as alive in the year 1879. This does not prove that he was alive in 1881, and does not seem to me to outweigh the presumption of his death which may reasonably be drawn from the wording of the deed in suit. It is an admitted fact in the case that Lachhman Das adopted as his *chela* another grandson of Gulab Das, namely Raghunath Das, son of Khubi Ram, one of the executants of the deed in suit. This Raghunath Das similarly became a celibate Mahant and succeeded Lachman Das in the office of Mahant in connection with the temple of Sitaramji. Raghunath Das has since departed from the tradition of the family by adopting as his *chela* a person named Banarsi Das who is an outsider, that is to say, not a descendant of Gulab Das, and in respect of whom it is alleged, though the matter has not been enquired into in the present case, that he is disqualified from succeeding to the Mahantship by the fact that he is a house-holder and a married man. At any rate, on the 29th of May 1907, Mahant Raghunath Das executed a deed by which he purported to transfer all his rights, including both his personal property and his office as Mahant and whatever interest he possessed as priest, manager or trustee of the temple of Sitaramji, to the aforesaid Banarsi Das. A suit was brought by Banarsi Das on the strength of this document, in which he impleaded all the descendants of Gulab Das, together with certain persons alleged to be transferees of property appertaining to the temple, but not the mortgagees under the deed now in suit or any representative of the said mortgagees. The suit was resisted upon a variety of grounds, and after it had been dismissed by the court of first instance it came before this Court as F. A. No. 307 of 1910, decided on the 28th of October 1912. The learned Judges of this Court expressly declined to determine the question whether the property in suit in that litigation, which included the property now in suit, was or was not trust property belonging to the temple of Sitaramji. Their decision proceeded upon this line of argument:—either the property in suit was trust property, as alleged by Banarsi Das, that is to say, appertained to a trust of which Mahant Raghunath Das was, or had been, the sole manager and trustee, or it did not. If it did not Banarsi Das obviously had no case at all: assuming for the sake of argument that it did, there was no evidence on the record to satisfy the court that Raghunath Das had any right to nominate his successor at his own free will and pleasure, still less to transfer the

office of Mahant, with the rights and duties of trustee and manager of the temple property, to another person during his own life-time.

The present suit was instituted on the 29th of March 1910, that is to say, before the declaratory suit brought by Banarsi Das had been decided, even by the court of first instance. The foregoing recital of facts is, however, necessary to the understanding of the pleadings in the present suit; and in the view which I take of the case a proper appreciation of these pleadings is absolutely essential to the determination of the questions raised by these appeals. It may be said at once that the plaintiff is a transferee of the rights of the original mortgagees under the deed in suit, and also under the usufructuary mortgage of October the 18th, 1865. The determination of the present suit has, as a matter of fact, been delayed by the circumstance that a plea, raised by the defendants, against the validity of the plaintiff's document of transfer was accepted in the first instance by the trial court; but the decision on this point was taken to this Court in appeal and was disposed of by this Court on the 17th of November 1913, (*vide*, F. A. No. 21 of 1912 the record of which has been before us), with the result that the validity of the plaintiff's document of title was affirmed. It seems just worth while to note at once that the plaintiff is himself the trustee and manager of another religious endowment, connected with another temple at Bindraban, and that the money which he has embarked on this speculation presumably comes from the surplus profits of the trust in his hands. It is entirely superfluous therefore to allow any considerations as to the feelings of the Hindu public with regard to the sanctity of temple endowments to interfere with the consideration of the questions of law involved in this suit. If the plaintiff succeeds he will bring this property to sale for the benefit of another religious endowment. Nor is it necessary that we should trouble ourselves over much with any considerations as to the general equities of the case. The plaintiff is a speculator who has bought up a disputed claim for what it may be worth; while the defendants are in the position of persons who have raised money upon property under a representation that they had every right to do so, and who are now seeking to repudiate the debt on the ground that the property hypothecated was not theirs to deal with.

The array of defendants as originally impleaded was as follows:—

The first defendant was Banarsi Das, who is described in the plaint simply as "disciple of Raghunath Das." The next six defendants were representatives of the family of Gulab Das, being his grandsons, great-grandsons or great-great-grandsons, together with the widow of a deceased descendant, who was presumably impleaded as a matter of precaution. The eighth defendant was stated to be an auction-purchaser of whatever rights Raghunath Das had possessed in the property in suit; while the ninth defendant was the successor-

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in-title of the original mortgagee, who had transferred his rights to the plaintiff. Subsequently, three more defendants were added; two of these were alleged to be also transferees of the rights of Raghunath Das in the property in suit; and Raghunath Das himself was also impleaded, apparently at the suggestion of the court. He is described as "Mahant Raghunath Das, a disciple of Mahant Lachman Das, *Gaddi-nashin* and managing trustee of the temple of Thakur Sri Sitaramji Maharaj, placed at mauza Gadaya Latifpur." In the petition by which Raghunath Das was impleaded the plaintiff carefully refrained from admitting that Raghunath Das was in any way a necessary party to the suit. He admitted him to be the managing trustee of a certain temple; but his case was throughout that the property in suit formed no part of the endowment of that temple, or of the trust property in the hands of Raghunath Das. The property in suit was alleged by the plaintiff to be the personal property of the original mortgagors, and Banarsi Das was impleaded, instead of Raghunath Das, on the ground that the latter's deed of the 29th of May, 1907, whatever might be its effect as regards the trusteeship and the trust property, did operate to transfer in favour of Banarsi Das whatever rights Raghunath Das possessed in any personal property of his own. In a petition which he presented to the court after he had been impleaded, Raghunath Das disclaimed all interest in the litigation. He apparently intended to support the contention of Banarsi Das that the property in suit was not merely trust property, but appertained to an endowment in favour of the temple of Sitaramji of which Raghunath Das had been the sole trustee and manager, until he transferred his rights to Banarsi Das. Those defendants who resisted the suit raised a variety of pleas; but the point to be noticed for my present purpose is that there was a marked difference in the position taken up by Banarsi Das, on the one hand, and by the descendants of Gulab Das on the other. Both these parties took the plea that the property in suit was trust property appertaining to the temple aforesaid, and as such inalienable; but they were as much at variance amongst themselves as they were with the plaintiff. Banarsi Das expressly pleaded that the property in suit appertained to a trust of which he was himself the sole manager, by appointment in succession to Raghunath Das; he pleaded that "Radha Ballabh and other defendants, the heirs of Gulab Das, have no interest in the property." On the other hand, those of the descendants of Gulab Das who contested the suit denied that Banarsi Das had any interest in the matter. They not merely denied that he had succeeded to the interests of Raghunath Das, whatever they may have been, in the property in suit; but they set up a trust under which the descendants of Gulab Das were joint trustees along with whatever Mahant for the time being had succeeded to the rights of Hari Das and of Lachman Das. They pleaded, and in view of the position taken up by them they were clearly entitled to plead, that Raghunath Das was

a necessary party to the suit, and that his absence from the array of original defendants was a fatal objection to the maintainability of the entire suit, inasmuch as he had been impleaded after the expiration of the special period of limitation prescribed by section 31 of the Indian Limitation Act (No. IX of 1908), within which the present suit was instituted. The learned Subordinate Judge fixed a number of issues, and one of these issues was whether Banarsi Das or the defendant Raman Das (a grandson of Hargobind, one of the executants of the mortgage deed in suit) was the lawful successor to Mahant Raghunath Das. In the end, however, the court below came to the conclusion that this was an issue which arose only as between two of the defendants and did not require to be decided in order to the determination of the suit. He overruled on various grounds all the pleas raised by all the defendants, except the plea taken by the descendants of Gulab Das to the effect that the shares of those members of the family who had not joined in the execution of the mortgage deed in suit were not affected by the mortgage and could not be brought to sale in satisfaction of the same. On this basis he has given the plaintiff a decree for the full amount claimed by him, but enforceable only as against an undivided 17/24ths share of the property in suit. All the defendants except Banarsi Das have submitted to this decree, and I regard it as most important to insist upon the fact that the appeal now before us is by Banarsi Das alone. On the other hand the plaintiff has filed a separate appeal No. 317 of 1915, in which he asks that the decree of the court below be modified by making it enforceable as against the whole of the mortgaged property. This appeal I propose to deal with in a separate judgment.

The memorandum of appeal presented by Banarsi Das is a somewhat prolix and argumentative document, but it has been agreed before us that in substance only three points are raised.

(1) It is contended that the property in suit is trust property, belonging to the idol worshipped in the temple of Sitaramji at Gadaya Latifpur, and to no other person whatsoever, so that the executants of the mortgage-deed in suit had no right to alienate the same and it cannot be brought to sale in execution of the mortgage decree.

(2) It is contended that Mahant Raghunath Das was a necessary party to the suit, and that the suit must fail on the mere ground that he was impleaded after the expiration of the prescribed period of limitation.

(3) A plea is taken, in the alternative, to the effect that, on the view of the facts taken by the court below and assuming that the joint family formed by the lineal descendants of Gulab Das were owners, or part owners, of the property in suit, then it should be held as a matter of law that the executants of the mortgage-deed

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had no right to hypothecate either their own shares or the shares of any person in the joint ancestral family property, and that this ground alone would be sufficient to warrant the dismissal of the plaintiff's suit.

I propose to take these points in the reverse order, because the last two can, in my opinion, be very briefly disposed of. I do not think there is any force in the third plea, and I propose to deal with it more in detail in my judgment on the cross-appeal filed by the plaintiff. For the purpose of the appeal now under consideration it is sufficient to say that this plea is not open to Banarsi Das. He is not, and never was, a member of the joint family formed by the descendants of Gulab Das. If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole, make an alienation of joint family property, it is of course open to those members of the family who did not join in the alienation to contend that it was made without authority, that it was not made for valid necessity, or for the benefit of the joint family, and that it is not enforceable. As against a person like Banarsi Das, who is not a member of the joint family and does not claim through the joint family, the alienation is good.

In dealing with the question of limitation I have one further point to note. A document which is on this record at page A 12 shows that Raghunath Das died on the 19th of January, 1913, during the pendency of this suit in the court below. The plaintiff made no attempt to have any person brought on the record as successor to Raghunath Das; and from his point of view he was obviously right in not doing so. He had contended throughout that Raghunath Das was not a necessary party to the suit and that any interest which he had ever possessed in the property in suit had passed to other hands. Banarsi Das in his memorandum of appeal to this Court says that he files his appeal in the capacity of trustee of the *wagf* property belonging to Thakur Sitaramji, representing Raghunath Das in that capacity. He has never applied to this Court to be brought upon the record as successor to Raghunath Das. Had he made such an application it seems clear to me that it could not have been granted without some further enquiry, seeing that the right of succession to the office of Mahant and to the trusteeship held by Raghunath Das was a matter in controversy in this very suit. The document to which I have already referred does no doubt afford some evidence in support of the contention that Banarsi Das, whatever his rights may be, has succeeded in obtaining effective possession of the temple and of any property appertaining to the temple other than the property now in suit. At the same time it seems clear that no litigant has a right to assume to himself the position of legal representative of a deceased litigant, without making an application to the court in proper form and obtaining the orders of the court thereon. In the suit itself the position taken up by Banarsi

Das was that he had already taken the place of Raghunath Das as manager and trustee of the temple in virtue of the transfer of the 29th of May, 1907. The plaintiff impleaded Raghunath Das as manager and trustee of the temple but denied that the property in suit had any concern with the trust of which Raghunath Das was the manager. The question of limitation therefore, if it can be raised at all by Banarsi Das in this appeal, depends for its determination on the decision of the court in respect of the main question. If the property in suit is found to belong to a trust of which Mahant Raghunath Das was, on the date of the institution of this suit, the sole trustee and manager, the suit will fail on its merits, and it must also be held to be barred by limitation on the ground that the trustee was impleaded after the expiration of the limitation period. On a contrary finding it would follow that Mahant Raghunath Das had, on the date of the institution of the suit, no interest in the property in question and was not a necessary party. This was the position taken up by Raghunath Das and by Banarsi Das himself in the court below, and I very much doubt if the appellant can be permitted to resile from it now. I may say further that, after carefully considering the memorandum of appeal filed by Banarsi Das in connection with this question of limitation, I am by no means satisfied that it is incumbent upon us at all to hear Banarsi Das on the merits. He does not appeal in his personal capacity as Banarsi Das, defendant No. 1 in the suit. He expressly claims to appeal as the representative of Raghunath Das, the person subsequently impleaded as defendant No. 10 in the suit. He has no doubt adopted this attitude in the hope that it may lead force to his plea of limitation; but he has neglected to observe that he is not entitled to appeal as a legal representative of a deceased defendant, without first obtaining an order of the court bringing him on to the record in that capacity. He has not amended his pleadings in any way in consequence of the decision of this Court in F. A. No. 307 of 1910, and must be taken to stand by the position originally taken up by him that the trusteeship of the temple had been transferred to him prior to the institution of this suit by the deed of the 29th of May, 1907. In the absence of any amended pleading on his part or of any application from him asking to be brought upon the record as the legal representative of Mahant Raghunath Das, after the death of the latter, and of any order to this effect from the Court, it seems to me that his appeal as filed is not maintainable at all.

It is only because this point was not properly brought out in the course of arguments before us that I prefer to pass on to the consideration of the main plea raised by Banarsi Das, instead of throwing out his appeal on this ground alone. With regard to this question whether the property in suit forms part of a religious endowment, there is a great deal of evidence of one kind or another on the record and I quite admit that portions of that evidence have not

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been satisfactorily dealt within the judgment of the court below. At the same time it seems to me that the issue as between Banarsi Das and the plaintiff (and these are the only parties with whom we are concerned in this appeal) lies within a very narrow compass. I find no force in the contention, pressed upon us in argument, that the property in suit never belonged to Mahant Kesho Das, but was from the very outset a religious endowment, the true owner of which was the idol of Thakur Sitaramji worshipped in a particular temple. It is admitted that the revenue free grants by the Maharatta Government in respect of the lands in both the villages in suit were at one time in existence in writing, but the grant in respect of village Gadaya Latifpur is not forthcoming. I find nothing on the record to lend colour to the suggestion made on behalf of the appellant that this document is in the hands of the plaintiff and is being wilfully kept back by him. It is expressly referred to in one of the older documents on the record as having been lost. What is described in the judgment of the court below as "the original *sanad of muafi* mauza Khankara, dated 10th *Jamadi-ul-awwal* 1321 *Hijri*" is on this record and has been produced by the plaintiff. It is a very ancient document and, partly in consequence of the defective processes employed in our courts for the binding of records, is now in an extremely damaged condition. The official translators of this Court have been compelled to report that they are unable to prepare any intelligible translation of the document. The learned Judge of the court below is a Mohammedan gentleman: I have no doubt that he was quite capable of reading the document in question with comprehension, and it would appear that he was able to do so while its condition was less dilapidated than it is at present. He states in his judgment that this *sanad* confers the property as a personal grant or *muafi* from generation to generation; and I can see no reason why we should not be content to accept this account of its contents. There is nothing unusual or inconsistent with Hindu religious ideas in the making of a grant to the Mahant of a temple, for the personal enjoyment of himself and of his successors after him. No doubt the person making the grant is influenced by the fact that the grantee is the priest of a temple and performs religious services in connection therewith, but that is no reason why a grant made for the enjoyment of the Mahant personally should be construed as a grant in favour of the idol as a juristic personality. Moreover, there is one consideration which seems to me decisive against the appellant as regards this part of the case. The one document in the appellant's favour, without which he would have no arguable case at all, is the *Bhetnama* (deed of endowment, or of dedication) executed by Mahant Kesho Das on the 9th of May, 1826. At the time when he made that grant Kesho Das obviously regarded himself as having full right of disposal in respect of the property dealt with therein. The appellant himself asks us to regard this

document as creating an endowment in favour of the temple, or of the idol as a juristic personality; and this position is inconsistent with the suggestion that the endowment was already in existence, or that the idol was already the owner of the property and Mahant Kesho Das nothing more than a trustee. The one difficult point in the case is the meaning and the legal effect of this document itself. The learned Subordinate Judge has brushed it aside somewhat lightly with the remark that it was never acted upon. I freely concede to the appellant that this is not a satisfactory way of dealing with it. If the court has before it a document which undoubtedly created a trust or religious endowment, it is not a sound position to take up that the document became of no effect as soon as the trustee or trustees appointed thereunder began to commit breaches of trust in respect of the properties thus placed in their hands. I think the document requires to be considered, both in connection with the pleadings of the parties to this appeal, and in connection with the available evidence bearing on the position of Kesho Das at the time, and the events immediately following on his death. We have it from Mahant Kesho Das that he had a good many *Chelas* or disciples, and he was obviously anxious to arrange that the property in his hands should pass peaceably after his death into the hands of the two particular persons whom he desired to nominate as his successors. It is to be noted that he described them somewhat differently in the deed in question. He speaks of Hari Das as "my disciple," and of Gulab Das as "my adopted son". Seeing that Kesho Das was certainly a very old man when he executed this document and that he died within two years of its execution, I think that we may take it that Gulab Das was already a family man in the year 1826, was married and had begotten children. The fact that he is described as "my adopted son," and not as "my disciple," suggests that Mahant Kesho Das himself was doubtful whether Gulab Das would be accepted by Hindu religious feeling as a qualified successor to himself in the office of Mahant and of temple priest. At the same time he was obviously anxious to make provision for Gulab Das and his family and to insure for their benefit a right to share in the profits of the property in question. It must be remembered, further, that he held this property under revenue free grants. Those grants might or might not be confirmed by the British Government. The property itself, that is to say, the share in Gadaya Latifpur and the land in village Khankara, Mahant Kesho Das might perhaps dispose of by will so as to secure peaceable succession to the same for the benefit of his legatees; but the value of the property would be greatly diminished if the Government refused to continue the revenue free grant and proceeded to assess the land to revenue. I take it that these considerations dictated the peculiar form of the document which we have to consider. It is curiously worded, and one part of it is difficult to reconcile with another. In one place

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the Mahant purports to make a gift or dedication of the property in question (which by the way includes other property besides that now in suit) to Thakur Sitaramji as a juristic personality, and merely to appoint Hari Das and Gulab Das to perform the worship and services of the idol. Further on however, he speaks of them as his "donees," and says that, while they should be careful to keep up the worship and services of the Thakurji, they are to regard themselves as owners of the gifted property and to enjoy the same as such. Another point which was not noticed in the course of argument before us, but which seems to me of some significance, is that the idol of Thakur Sitaramji spoken of in this document does not seem to be identical with the idol of which, according to the plaintiff, Mahant Raghunath Das was the managing trustee on the date of the institution of the suit. The latter is in a temple at mauza Gadaya Latifpur; but in the deed of 1826 Mahant Kesho Das describes himself as priest of the temple of Sitaramji situated in mohalla Pulan in the town of Bindraban, and there is nothing in the document to suggest that the "Thakur Sitaramji" subsequently referred to is any other than the idol worshipped in this temple in the town of Bindraban. After the death of Mahant Kesho Das the question of the continuance of this revenue free grant in favour of his legatees or successors was considered by the British Government and was the subject of a good deal of correspondence, extracts from which are to be found printed in this record. The revenue free grant was continued; but it is beyond question that neither the temple, nor the idol of Thakur Sitaramji regarded as a juristic personality, was ever entered in the revenue papers as the holder of the grant. At page A 6 of the record is an extract from the register of revenue free grants relating to village Khankara. The name of the holder of the grant there given is "Hari Das Bairagi." There is a note that it was granted for the love of God and for the expenses of Thakurji in "Gadaria Ilaka Farrah." The name "Gadaria" in this place would seem to be a variant of the name of Gadaya Latifpur. A similar paper of the year 1868, relating to this latter village shows that the British Government finally remitted the revenue assessable on this village in favour of Hari Das and Gulab Das, heirs to Kesho Das. The word '*heirs*' is to my mind of great significance. Under the heading 'designation of the tenure' appears the following entry:—"for the maintenance of the priest and the expenses of the temple of Thakur Sitaramji." In the mortgage-deed of October the 18th, 1865, Gulab Das and Lachhman Das, the successor of Hari Das, speak of the property in Gadaya Latifpur as constituting a *muafi* in perpetuity granted by Maharaja Sri Madho Rao Sahib Bahadur of Gwalior for generation after generation and upheld as such by the British Government, and as having been "in our proprietary possession up to this day." They unquestionably assume to themselves the right to deal with this grant as their own and to alienate it in such

manner as they think proper. At the same time, while putting the mortgagees in possession, they reserved themselves the right to receive one rupee daily from the mortgagees, "for the expenses of the temple of Sitaramji Maharaj situated in the village aforesaid." Now there has been much litigation arising out of this stipulation, and the question of the position of the mortgagors and mortgagees under this deed of 1865 does not come to us precisely as *res integra* in the present litigation. The documents which especially require consideration are a judgment of the District Judge of Agra, dated February the 19th, 1892, at page 10 R of this book, and a judgment of the same court, dated July the 12th, 1912. With regard to the former of these documents it is to be remarked that the decision of the District Judge was not affirmed by this Court on appeal: there was an order of remand which resulted eventually in a judgment (which the parties have neglected to print) by which the decision of the District Judge was considerably modified. The net result of this litigation has been that this allowance of one rupee *per diem* has been held not to appertain to any trust or endowment, either in favour of the temple or in favour of the idol worshipped therein, but to be a personal right reserved to themselves by the mortgagors. Further, it has been held that the successors of the original mortgagors are entitled to recover this allowance piecemeal in certain definite shares; that is to say, a right to receive one-half of the allowance has been affirmed in favour of the successor to the Mahantship, the other half the heirs of Gulab Das have been permitted separately to recover for the benefit of the joint family to which they belong. The decision of the District Judge of Agra in the litigation of 1912 seems to me of particular importance. I do not say that it operates as *res judicata* as between Banarsi Das and the plaintiff. But even as between them it is relevant evidence, as an instance in which a certain right was contested and was affirmed by the court. In that litigation the present plaintiff, as successor of the original mortgagees, was arrayed on one side along with Raghunath Das, while the descendants of Gulab Das, who were claiming a half share in the arrears of the daily allowance, were arrayed upon the other. In deciding that the heirs of Gulab Das were entitled to receive the half share claimed by them, the learned District Judge expressly proceeded upon a finding that the mortgagors in the deed of 1865 had hypothecated their personal property, and not endowed property belonging to the temple for the services of which it was said that the allowance ought to be expended. It seems to me that this finding is conclusive as between the plaintiff on the one hand and the descendants of Gulab Das on the other, and this may be the reason why the latter have not seen fit to contest this appeal. The position of Banarsi Das is not quite the same; but we must limit ourselves to a consideration of the case as it stands between the appellants and the respondents now before us on their own pleadings,

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and on the evidence on the record it seems to me that Banarsi Das has no substantial case. The one document in his favour is the *Bhetnama* of May the 9th, 1826, and that document, if it is evidence of any kind of trust, is no evidence at all of the particular trust alleged and contended for by Banarsi Das in this case. On any possible interpretation of that deed, it does not create a trust the benefits of which are to go wholly to the temple of Thakur Sitaramji, still less to a temple of that deity situated in Gadaya Latifpur; still less does it create a trust of which the sole manager and trustee shall be the Mahant of the temple for the time being. If this document can be construed as creating any sort of a trust, then it is a trust for the maintenance of the worship of the idol in a certain temple, but principally for the benefit of the trustees themselves, and these trustees are Mahant Hari Das and his successors after him and Gulab Das and his descendants after him. If I felt that this appeal could not be disposed of without going further into the question of the possible creation of a trust of this nature, and the legal consequences which would follow in the event of such a trust being proved, I should have a good deal more to say; but I do not think this question is now in issue. Mahant Banarsi Das (as I observe that he now calls himself) set up a trust for the benefit of the idol Thakur Sitaramji, of which he was himself the sole manager and trustee. The plaintiff admitted the existence of a trust in favour of the idol of which Mahant Raghunath Das was the sole manager and trustee, but denied that the property in suit appertained to that trust. So far as the parties now before us are concerned, they went to trial on this issue and the one piece of evidence which can be seriously relied on in favour of Banarsi Das is the document of 1826, which is no evidence that the property in suit belongs, or ever belonged, to a trust exclusively in favour of the idol in question, or of which the Mahant of the temple for the time being was the sole trustee. All the other evidence on the record is entirely against Banarsi Das, and in favour of the contention that the mortgagors of 1881 were right in saying that they had a power of disposal in respect of the property dealt with by the deed in suit.

If it be suggested that I am taking too narrow a view of the pleadings, and that Banarsi Das should be allowed at this stage to set up, at least by way of an alternative pleading, the alleged rights of the descendants of Gulab Das, by way of *jus tertii* although he had expressly denied the existence of those rights in his written statement, even then it seems to me that the position is clear. If Banarsi Das can be heard to plead the rights of the descendants of Gulab Das, he cannot raise on their behalf any plea which would not be open to them. And in my opinion they are precluded by the decision of the District Judge of Agra, of July the 12th, 1912, from asserting that the property now in suit, or rather the half share in that property with which they are con-

cerned, is not their personal property. They have obtained, as against the present plaintiff, a decree which proceeded upon an express finding to the above effect, and which without that finding would have been impossible. On these grounds I am of opinion that there is no force in this appeal, and that it must be dismissed with costs.

WALSH, J.—I agree in the order dismissing the appeal. I do so with some hesitation solely because I entertain an uncomfortable feeling that the deed of 1826 created a religious endowment of property which could not thereafter be legally alienated under any circumstances except for the purposes of such endowment, and that we are impliedly sanctioning what may be described as a prescriptive right to divert trust property from its original purpose without the approval of any court. I think the property and those in possession of it have long ceased to pay any but a perfunctory and inconsiderable tribute either in spirit or in cash to the wishes of the original founder of the endowment.

I recognize, however, the force of my brother's observation with reference to the feelings of the Hindu public in this particular case, and having regard to the special circumstances and to the special form in which the case now comes before us in appeal, I think that the order proposed does substantial justice between these parties.

By THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

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versus

MAHMUD ALI*

Breach of Contract Act, (XIII of 1859)—Contract for supply of stones by person dealing in same—Whether governed by the Act.

Where a person who dealt in stones entered into a contract with another to supply stones and took money in advance for that purpose but failed to supply the stones according to the terms of the contract, held that the breach of Contract Act did not apply to him, the case being one of an ordinary contract to supply stones and the money not having been advanced on account of work to be performed by an artificer, workman or labourer.

* Cr. Ref. No. 184 of 1918.

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CRIMINAL Reference made by E. F. OPPENHIEM Esq., District Magistrate of Banda.

The parties were not represented.

The following judgment was delivered by

BANERJI, J.—Bhagwan Din is alleged to have taken an advance of Rs. 20/, from Mahmud Ali upon an agreement to supply him with certain stones from time to time according to the terms of a contract entered into by him with Mahmud Ali. He having failed to supply the stones an application was made to a Magistrate under Act XIII of 1859 and the Magistrate made an order against Bhagwan Din. The learned District Magistrate is of opinion that the Act did not apply to a case like the present and has accordingly referred it to this Court with the recommendation that the order of the Magistrate be set aside. I agree with the view taken by the learned District Magistrate. The Act, as the preamble shows, is an Act for the granting of relief for fraudulent breach of contract on the part of artificers, workmen and labourers who have received money in advance on account of work which they have contracted to perform. Section 1 of the Act clearly shows that it applies to cases where an artificer, workman or labourer has received money from a master or employer and has wilfully and without lawful or reasonable excuse neglected or refused to perform or get performed any work which he has contracted to perform or get performed. In the present case the contract was not a contract by an artificer, workman or labourer. The money was not advanced on account of work to be performed by an artificer, workman or labourer, and the person by whom the money was advanced was not his master or employer. The present case was that of an ordinary contract by a person who dealt in stones to supply certain stones to another person. The Act has therefore no application in a case of this kind and the learned Magistrate who tried the case was in my opinion wrong in holding the Act to be applicable. I accept the recommendation of the learned District Magistrate and set aside the order of the Magistrate of the First Class dated 26th November, 1917. Any sum which may have been paid in pursuance of the said order should be refunded.

PRIVY COUNCIL.

GANGA PERSHAD SINGH RAI BAHADUR (*Defendant*)*versus*ISHRI PERSHAD SINGH AND OTHERS (*Plaintiffs*)*Transfer of Property Act, (Act IV of 1882) section 59—Mortgage—Mortgage-deed—Attestation—Direct evidence of execution required.*

The requirement as to attestation contained in section 59 of the Transfer of Property Act, 1882, (Act IV of 1882) is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the act.

When, therefore, the only evidence was that the attesting witnesses were on one side of a *pardah* and the executant of the deed a *pardah-nashin* lady, on the other; that her son took the deed behind the *pardah*, returned with it bearing a signature purporting to be hers, and said it had been signed by her, and that the witnesses thereupon attested:—

Held, that the terms of the Statute had not been complied with and that the mortgage was void.

Shamu Patter v. Abdul Kadir Ravuthan, [1912] 39 I. A., 218; S. C., I. L. R., 35 Mad., 607, followed.

Padarath v. Ram Nain Upadhia, [1915] 42 I. A., 163; S. C., I. L. R., 37 All., 474, distinguished.

It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the courts below; and their Lordships declined to assent to respondents' prayer for such a remand in the present case.

APPEAL from a decree of the Calcutta High Court, dated August 12th, 1909, reversing a decree of the Additional Subordinate Judge of Durbhanga.

The plaintiff-respondents sued to recover Rs. 12,875 due on a registered mortgage bond, dated 1893 executed by Musammat Sharbat Koer as certificated guardian of Balmukund Das. The latter, who had since come of age, confessed judgment, but the suit was opposed by the present appellant, who had purchased the mortgaged properties in execution of a money decree, and who contended *inter alia* that the suit was time barred.

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February, 1.

VISCOUNT
HALDANE,
SIR JOHN
EDGE,
MR AMER
ALI,
SIR W.
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The Subordinate Judge found this issue in respondents favour and dismissed the suit. His finding was based on the ground that the suit was brought more than six years after due date and the bond was not valid as creating a mortgage charge. The material part of his judgment is as follows:—

The bond in suit is dated 23rd August, 1893, and the time of re-payment of the debt was stipulated to be within 6 months from the date of the bond. The time of 6 months so fixed ended on the 23rd February, 1894, and from this date the period of limitation must have begun to run. To enforce the mortgage-charge created under the bond the limitation was 12 years from the due date, and to obtain a personal decree for a money-debt under the bond the limitation was 6 years from that date, and there can be no dispute about these propositions of law. The suit on the bond was instituted on the 23rd February, 1906, that is to say, after a lapse of 6 years from the due date and within 12 years from it. It is evidently clear, therefore, that if the bond was not valid as creating a mortgage-charge, the entire suit of the plaintiffs would fail as being barred by limitation. The question, therefore, arises whether the bond in suit can operate as a mortgage-bond.

The defendant No. 4 contends under section 59 of the Transfer of Property Act, that the execution of the bond not having been duly attested as required by that section, it cannot operate as a mortgage-bond. The executant of the bond was Sharbat Koer, the certificated guardian-mother of the defendant No. 1. The section 59 of the Transfer of Property Act provides that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Attestation means the attestation by witnesses of the execution of the bond (*vide* Indian Law Reports, Vol. 27, Cal., pages 190 to 194). The execution of a document means and includes the signing and sealing and delivery of it. The question is, therefore, whether the bond in suit was attested as required by the section 59 of the Transfer of Property Act, as failing which the mortgage purporting to have been created by it could not be effected. The ruling reported at 2 C. W. Notes (note portion), page CCCXIX, lays down "that in order that a mortgage-deed may be validly attested under section 59 of the Transfer of Property Act, it must be attested by two witnesses each of whom has seen the deed executed &c." The plaintiffs have examined in this suit two attesting witnesses of the bond. These witnesses are Ajodhya Pershad and Jharkhandi Pershad, but both of them say in plain terms that they did not see Sharbat Koer sign the bond. Jharkhandi further says that none of the attesting witnesses of the bond saw Sharbat Koer sign the bond. The witness Ajodhya says that he did not see her (Sharbat Koer) sign the bond. From these statements it is transparently clear that the attesting witnesses did not see the bond being executed by

Sharbat Koer, and this being so, no mortgage was, in view of the terms of section 59 of the Transfer of Property Act, effected by the bond..

* * * * *

The result is, therefore, that the plaintiffs have failed to prove the execution of the bond as required by section 59 of the Transfer of Property Act, and, consequently, the bond cannot be taken to have effected a mortgage. Now, that the bond is not a mortgage-bond and the plaintiffs are not entitled to sue upon it to enforce a mortgage-charge and now that the suit to enforce a money-debt is out of time having been brought after a lapse of 6 years from the due date, the whole suit on the bond is barred by limitation.

On appeal the High Court (STEPHEN and DIGAMBAR CHATTERJEE, JJ.), reversed this decision and decreed the suit. They held there was due attestation of the bond. "To hold otherwise," they said, "would be to upset what we believe is a frequent practice in cases of the execution of deeds by *purda-nashin* ladies, and in many cases to make attestation of their signatures almost impossible."

Hence this appeal.

De Gruyther, K. C., for the appellant.—The bond here was not duly attested: no one saw the *purda-nashin* lady Sharbat Koer sign. To have a valid mortgage in India two witnesses at least must see the executant sign:

Shamu Patter v Abdul Kadir Ravuthan, [1912] 39 I. A., 218; S. C., I. L. R., 35 Mad., 607.

[*Dunne*.—The effect of that judgment has been much whittled down in a later case].

The subsequent case is

Padarath v. Ram Nain Upadhia, [1915] 42 I. A., 163; S. C., I. L. R., 37 All., 474.

There it was found the witnesses had seen the actual hand of the lady signing and recognised her voice. The facts here are widely different. (He was stopped.)

Dunne, K. C., for the respondent.—No issue on this precise point was raised: it arose incidentally on a question of limitation: the debt was time-barred unless covered by a mortgage. There is evidence that the lady executed and that witnesses were present; only they were on one side of the *pardah* and she on the other.

[SIR W. PALLIMORE.—If the document went in blank and came out signed, and no one else were there but the lady, and the son said he did not sign, it might be sufficient].

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I submit I am entitled to a remand on account of the change in the authorities.

I submit 39 I A., only lays down that an attesting witness must be present at the execution itself, as distinguished from one who receives an acknowledgment afterwards. *Sight* only comes in from English cases, where there are no *purda-nashins*.

Their Lordships' judgment was delivered by

VISCOUNT HALDANE.—This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others. The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by section 59 of the Transfer of Property Act, 1882. Section 59 enacts that:—“Where the principal money sum secured is 100 rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses.” Now the question is:—What is meant by the word “attested”? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called Musammat Sharbat Koer, who was the guardian of her son, Balmukund Das, and she executed the mortgage on his behalf. She was a *purda-nashin* lady, and the account given by the respondent's own witnesses of what happened was this:—She was behind the *purda* when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the *purda* and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of section 59. Now at one time there seems to have been a good deal of difference of opinion as to what “attested” meant. It will be observed that the words are not “attested and acknowledged,” as is the case in some statutes, but “attested” only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter v. Abdul Kadir Ravuthan and others* (1). In that case it was held, settling the law as to the interpretation of the words to which their Lordships have referred in section 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the

(1) [1912] 39 I. A., 218; S. O., I. L. R., 35 Mad., 607.

present case, at any rate, much nearer. It was a case of *Padarath and others v. Ram Nain Upadhia and others* (1) The head-note is as follows:—

“A mortgage-deed purported to be executed by two *parda-nashin* ladies. It appeared from the evidence of two of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognised their voices.”

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said:—“Here is the deed which my mother has executed.” That, in their Lordships’ opinion, is not enough to satisfy the terms of the statute. The mortgage is therefore void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about *parda-nashin* ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the courts below.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the courts below.

T. L. Wilson & Co.,:—Solicitors for the appellant.

Ranken Ford & Chester:—Solicitors for the respondents.

A. P. P.

Appeal decreed.

(1) [1915] 42 I. A., 163; S. O., I L. R., 37 All., 474.

CIVIL

1918

GANGA
PERSHAD
SINGH

v.
ISURI
PERSHAD
SINGH

Viscount
Haldane.

HIGH COURT

CRIMINAL

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Feb. 26.

KNOX, J.
WALSH, J.

MAHA RAM AND OTHERS

versus

EMPEROR*

Indian Christian Marriage Act (V of 1872), sections 5, 68—Marriage, scope of—Solemnisation of marriage according to caste rites between a Native Christian and a bhangi girl—Person not authorised—Whether punishable.

Maha Ram belonging to the *bhangi* (sweeper) caste was baptised when an infant. When he grew up Maha Ram dressed like a Christian and used to attend a Christian School, but there was nothing which went to show what he acknowledged or formally recognised as an object of faith or belief, Maha Ram married a *bhangi* girl, and Bachhan and Mangli were "Mans" or priests of the sweeper class who solemnised the marriage according to *bhangi* rites. Bachhan and Mangli were Christians. They were not persons authorised to solemnise marriages under section 5 of Act V of 1872, and the Marriage Registrar of the district was not present. Bachhan and Mangli were convicted of an offence under section 68 of the Christian Marriage Act, and so was Maha Ram under section 68, read with section 109 of the Penal Code.

Held that the conviction was bad as Maha Ram was not a Christian at the time of his marriage, and that to Bachhan and Mangli section 68 of the Act did not apply, because it applies to Christian marriages only.

Per Knox, J.—Section 3 of the Christian Marriage Act interprets the expression "Native Christian." The meaning given to this latter expression is different from the meaning given by the Act to the expression "Christian." It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the Legislature contemplated applying section 68 to Christians, i. e., a person professing the Christian religion and had wished to comprehend within it a Christian descendant of a native India, it would have been easy to provide for this in section 68. That no such provision was made confines section 68 strictly to persons who at the time of marriage were persons professing the Christian religion.

Baptism of a person as an infant when he has no possibility of saying to the world what is the faith to which he belongs or the fact that when grown up he puts on Christian costume and attends a Christian School

* Cr. A. No. 873 of 1917.

cannot make such a person, a person professing the Christian religion within the meaning of the Act.

PER WALSH, J.—Having regard to the history of the Legislation on the subject, the Indian Christian Marriage Act must be held to apply to Christian marriages alone. The Act, however, does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so. Section 68 refers to a class of persons, namely, those who solemnize or profess to solemnize a Christian marriage under this Act, not being authorized by section 5 to do so. The Legislature could not have intended to sweep into the net of the Criminal Law, through an indirect piece of Legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnisation or celebration. This would be contrary to the ordinary mode of interpretation of a statute. The question does not turn upon the word “solemnize” so much as upon the object and scope of the Act.

CRIMINAL APPEAL from an order of E. E. P. ROSE Esq., Additional Sessions Judge of Mainpuri.

The facts of the case are briefly as follows :—

Maha Ram accused, was a Christian; that on the 3rd June, 1917, he was married to the daughter of one Shib Lal a *bhanghi* (sweeper) and that Bachchan and Mangli accused were “*mans*” or so called priests of the sweeper class who solemnized the marriage according to *bhanghi* rites.

Bachchan and Mangli were charged and convicted under section 68 of the Indian Christian Marriage Act, (Act XV of 1872, as amended by Act XII of 1891) of an offence of solemnising, in the absence of Marriage Registrar, the marriage of Maha Ram, a Christian, with a female sweeper according to *bhanghi* rites. Maha Ram accused was convicted of the abetment of the aforesaid offence. The assessors gave it as their opinion that Maha Ram was not a Christian and therefore no offence under section 68 of Act XV of 1872 had been committed. The learned Sessions Judge was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year.

The accused persons appealed.

Nehal Chand with him (*Baleshwari Prasad*), for the appellant.—Act No. XV of 1872 is an Act to consolidate and amend the law relating to the solemnisation in India of the marriages of persons professing the Christian religion. This Act is based on 14 and 15 Vic. Ch., 40; and 58, Geo. III, Ch. 84 (both statutes relate to

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marriages in India and are no longer in force) and Act V of 1852 and V of 1865; the last two Acts were repealed by this Act.

For the scope of the Act, the Gazette of India 1872, Supp. p. 805, was referred to.

"There was little doubt that the intention of the Bill, as introduced, was simply to deal with the forms and ceremonies of marriage; it was to be what it called itself—A Bill to regulate the law for the solemnisation of marriage, not a Bill to regulate the *Marriage Law*."

The history of the Legislation thus clearly shows that doubts had arisen as to the validity of certain marriages and it was clearly intended to facilitate such marriages and validate them. The object of the Act was not to prevent people marrying as they wish but to provide certain forms and ceremonies if they want to be married as Christians and at the same time to guard them by providing strict penalties for non-compliance with those ceremonies.

The whole Act shows that it deals with Christian marriages alone. If they are not solemnized by one of the persons mentioned in section 5, they are made void by section 4.

It is submitted that the Act does not prohibit even a Christian from marrying otherwise than under the Act, if he wishes to do so.

The offence charged here is that the accused "solemnized" a marriage in the absence of the Marriage Registrar. Now it is not suggested that the Marriage Registrar is authorised to attend Hindu marriages, and it is to be noted that no person other than a Christian can be appointed a Marriage Registrar. (*Vide* section 7.) If, therefore, a Hindu does marry a Christian girl according to the custom of the caste both he and the officiating priest render themselves liable to imprisonment or transportation for ten years.

Again a *Sunni* Musalman can validly marry a *kitabia* (*i. e.*, a Jew or a Christian), according to his law in the permanent form and with Mohammedan rites. If section 68 of the Christian Marriage Act be interpreted as widely as has been done by the Madras High Court, a *Kazi* who performs a marriage between a Musalman male and a Christian female according to Musalman rites is liable to the punishment of transportation for ten years. Whereas a Christian Minister or Marriage Registrar who performs a marriage with Christian rites between a Musalman male and a Christian female is not subjected to any such penalty and performs a perfectly valid act.

The Act cannot be said to violate the principle of religious neutrality followed almost without exception by the Indian Legislature. A construction, which credits the Legislature with such violation should, if possible, be avoided.

The Madras High Court has consistently held against me.

Queen-Empress v. Fischer, [1891] I. L. R., 14 Mad., 342 ;

Queen-Empress v. Yohan, [1892] I. L. R., 17 Mad., 391 ;

Queen-Empress v. Paul, [1896] I. L. R., 20 Mad., 12 ;

In re Kolandaivelu, [1916] I. L. R., 40 Mad., 1030.

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The order referring the case to the Full Bench supports the appellant's contention, and is adopted as part of the argument for the appellant.

It is submitted that section 68 provides penalties for a person, who, not being authorised by section 5 of the Act to solemnize marriages, solemnizes or professes to solemnize in the absence of a Marriage Registrar, a marriage (purporting to be a Christian marriage under the Act) between persons one or both of whom is or are a Christian or Christians.

The next question is whether Maha Ram was a Christian at the time of his marriage.

Under section 3 of the Act the expression "Christian" means persons professing the Christian religion.

As regards the meaning of the word "profession" *Murray's Oxford Dictionary*, Vol. VII was referred to, the expression being explained in these words :—

"To affirm or declare one's faith in or an allegiance to ; to acknowledge or formally recognise as an object of faith or belief (a religion, principles, rule of action, God, Christ, a saint *etc.*)"

After discussing the evidence it was contended that merely because a person had been baptised when three years old, or that he had attended a Christian school would not make him a person professing the Christian Religion. In the case of Maha Ram there was no evidence if at any time he acknowledged or formally recognised Christianity as his religion.

On the contrary on the eve of his marriage, he resisted all pressure and persuasion to be married as a Christian by a Christian ceremony, and he actually performed "*Devi ki Puja*" at the time of his marriage.

R. K. Sorabji (with him *A. E. Ryves*), for the Crown:—The intention of the Legislature was clear. Section 4 expressly says that "any marriage between persons, one or both of whom is or are a Christian or Christians shall be solemnized in accordance with the provisions of the next following section ; and any such marriage solemnized otherwise than in accordance with such provisions shall be void," and section 68 merely provides a penalty for solemnising or professing to solemnise such a marriage contrary to the provisions of the Act.

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The intention of the Legislature was that the country should not be flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance.

This result would be equally produced by a state of concubinage; the interpretation sought to be put on the section on behalf of the accused would tend to encourage concubinage.

Upon the evidence as regards Maha Ram's profession of Christianity great stress was laid on the fact that Maha Ram accused who took all the advantages supplied by a Christian school was estopped by his conduct from asserting that he was not a Christian.

The following judgments were delivered.

Knox, J.

KNOX, J.—Maha Ram who described himself as son of Kallu, by caste a sweeper, Mangli son of Sunder, sweeper, and Bachhan son of Laiq, sweeper, have been convicted of an offence under section 68 of Act No. XV of 1872. In the case of Maha Ram section 109 of the Indian Penal Code is to be read with section 68 of Act No. XV of 1872.

The case for the prosecution is that Maha Ram is a Christian; that on the 3rd of June, 1917, he was married to the daughter of one Shib Lal a *bhangi* and that Bachhan and Mangli were "Mans" or so called priests of the sweeper class who solemnized the marriage according to *bhangi* rites. The assessors gave it as their opinion that Maha Ram was not a Christian and that therefore no offence under section 68 of Act No. XV of 1872 had been committed. The learned Sessions Judge, however, was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year. The appellants have been represented in this Court by learned Counsel. The contention on behalf of the appellants is that section 68 of the Christian Marriage Act does not apply; that Maha Ram was not a Christian at the time of his marriage; and that it is not proved that Bachhan and Mangli solemnized the marriage. The first point, therefore, that arises for consideration is whether Maha Ram was at the time of the marriage a Christian.

Act No. XV of 1872, (and specially the section concerned is a section imposing what may amount to a very severe punishment), has under the well-known rules for construction in such cases, to be so construed that no cases be held to fall within it which do not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it but rather care must be taken that no one is brought within it who is not within its express language: *The London County Council v. Aylesbury Dairy Company* (1). As ABBOTT, C. J., pointed out in *Proctor v. Manwaring* (2), it is not competent to a court to extend the words by construction.

(1) [1898] 1 Q. B., 106. (2) [1819] 3 Barn. and Ald., 145.

Now Act No. XV of 1872 was an Act to consolidate and amend the law relating to the solemnisation in India of the marriages of Christians. This was the legislative intent and it will have to be seen that the interpretation placed upon the words in this section is one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature.

The term "Christian" is interpreted in section 3 of the Act and runs as follows:—

"The expression *Christians* means—persons professing the Christian religion."

The use of the word "means" in this passage shows that the definition is a hard and fast definition and that no other meaning can be assigned to the expression than is put down in the definition: *Gough v. Gough*(¹), and *Bristol Tram Coy. v. Mayor &c. of Bristol* (²).

In several sections of the Act, as for instance, sections 23, 37 *etc.* another term is used, namely, "*Native Christians*," also there is a part of the Act which is entitled "Marriage of Native Christians" and which extends from section 60 to section 65 of Act No. XV of 1872.

Section 3 interprets the expression "Native Christian." The meaning given to this latter expression is different from the meaning given by the Act to the expression "Christian." It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the Legislature had contemplated applying section 68 to a Christian, *i.e.*, a person professing the Christian religion and had wished to comprehend within it a Christian descendant of a native of India, it would have been easy to provide for this in section 68. That no such provision was made confines section 68 strictly to persons who at the time of marriage were persons professing the Christian religion. It is important to notice this as occasionally in the argument on behalf of the prosecution an attempt was made to contend that section 68 applied not only to a Christian but also to a Native Christian. I am unable to accept this contention and I hold that the issue which I have to decide is whether Maha Ram at the time when he was married to the daughter of Shib Lal was or was not a person professing the Christian religion. Again I repeat the word "means" which is to be found in section 3 is an inclusive term and therefore no one except a person who professes the Christian religion comes within the purview of section 68.

This drives me back upon the necessity of deciding who is a person who professes the Christian religion.

I have not been referred to nor have I been able to find any precedent which lays down clearly what meaning is to be attached to the words "profession of Christianity."

(1) [1891] 2 Q. B., 665.

(2) 59 L. J., Q. B., 449.

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Murray in the Oxford Dictionary Volume VII (1909) interprets the word "profess" thus:—

"To affirm or declare one's faith in or an allegiance to; to acknowledge or formally recognise as an object of faith or belief (a religion, principle, rule of action, God, Christ, a saint *etc*").

In the case before us we have not to deal with a person of an immature age or one who for any reason is unable to give a reasonable account of the faith that he holds, *e.g.*, an orphan of tender years in a school *etc.* For several years Maha Ram has been a grown up lad mixing in village in school life. There must have been many opportunities for observing and noting what he acknowledged or formally recognised as an object of faith or belief and I should expect to have been referred to abundant evidence on this point. He is the son of one Kallu.

Regarding Kallu the evidence is that he was elected to the position of elder in the Presbyterian Church; that he was ordained by the Presbytery; that he can under certain circumstances administer sacraments; that he is a moderator every year; that he has been confirmed, that he sits upon session as *Sirpanch* of a local Church; that he was an officiating elder up to and after the marriage of Maha Ram; that he was an out-spoken preacher; that he prayed and preached Christianity; that he taught Christianity in his own village and in adjoining villages; that on one occasion when a *thanadar* said he would not believe Kallu to be a Christian unless he prayed, Kallu offered up prayers in public. All this is strong *prima facie* evidence of his having been a person who professed the Christian religion.

The same might be said of evidence given regarding Bachchan and Mangli. It does not go into as many details but it gives specific instances where these men "professed" the Christian religion. I have searched in vain for similar definite and specific information in the case of Maha Ram. There is evidence which points the other way for whatever it is worth. It seems to me of very little value and so I do not go into it.

The evidence upon this point given by the Crown consists of evidence given:—

- (1) The Rev. A. W. Moore, a Minister of the Presbyterian Church and a Missionary in-charge of the Mission at Mainpuri;
- (2) Isa Das, the own brother of Maha Ram;
- (3) Sundar, who says that he became a Christian some five years ago;
- (4) Behari;
- (5) The Rev. W. T. Mitchell Missionary at Mainpuri;
- (6) Madan Lal, a petition-writer.

The evidence of the Rev. A. W. Moore is to the effect that Maha Ram is a Christian and that Bachchan and Mangli are also Christians. When cross-examined as to the meaning of this word Mr. Moore says:—"we call a man Christian though not confirmed or professing the Christian religion"; further on while saying that Bachchan and Mangli had both to his knowledge professed Christianity he does not make the same statement regarding Maha Ram. All that he says about Maha Ram is that his name was entered in the Baptismal Register which sacrament was apparently administered at the time when Maha Ram was a babe 3 years old; that he never up to the time of his marriage told the witness that he was not a Christian, and that though he has seen him since his marriage he has not denied that he is a Christian. When the witness on one occasion said to him that judging by the clothes he wore no one would take him for a Hindu he laughed and said "no." The witness got Maha Ram entered in the Industrial School at Farrukhabad to learn carpentry. He was at the school up to within 2 or 3 days of the wedding. The school is for Christian boys only and witness sent him there as a Christian. This is all upon the point. It does not appear then from the evidence of this witness that Maha Ram ever took part in Church ceremonies such as prayers and the like.

The next evidence in point of importance is that of Rev. W. T. Mitchell. He baptised Maha Ram when he was 3 years old. In his examination-in-chief this witness says that Maha Ram when he was in the school at Mainpuri professed to be a Christian; that he took part in Church ritual a little before March 1915, but the witness does not specify what part or what particular ritual. In cross-examination this witness says that while all the brothers and sisters of Maha Ram had been baptised they have, with the exception of one brother the witness Isa Das, been married according to *bhanghi* rites. They have not strictly adhered to the tenets of Christianity.

Isa Das the brother of Maha Ram gave it as his deposition that Maha Ram is a Christian. He never knew that Maha Ram had renounced Christianity. In cross-examination he had to admit that he lived apart from Maha Ram and that one of his sisters was married according to *bhanghi* rites.

The rest of the evidence for the Crown is of little importance. It is, however, abundantly apparent from it that Maha Ram had given it out that he intended to have his marriage solemnized according to *bhanghi* rites. Much attempt was made to dissuade him and his father from doing this but the persuasions were in vain and it appears from the evidence of Mr. Moore that in a marriage solemnized according to *bhanghi* rites idolatry takes place and *Devi ka puja* or the worship of the goddess *Devi* is gone through.

In brief then it would appear from the above evidence that no distinct "profession" of the Christian religion is attri-

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buted to Maha Ram beyond the fact that he dressed as a Christian, that when he was at the school at Fatehgarh he wrote one or more letters in which he called himself *Mahbub Masih*. He had never been admitted to sacrament and according to the witness Moore such admission depends upon a confession of faith. This Maha Ram has never been shown to have made. His brothers and sisters with the exception of Isa Das are all persons who have been married with *bhang* rites and at such a marriage an open profession of idolatry is made before witnesses.

I am not prepared to hold that a person is a person professing the Christian religion within the meaning of Act No. XV of 1872 simply because he is baptised as an infant when he has no possibility of saying to the world what is the faith to which he belongs nor do I attach any particular value to the fact that he attends a Christian school. The learned Counsel for the Crown wished me to hold that a person who took the advantages supplied by a Christian school was estopped by his conduct from professing that he was not a Christian. The dressing as a Christian seems also to me very far from being conclusive on this point especially in a class of persons who belong to the *bhang* class. The furthest point urged in this direction by the prosecution is perhaps the writing of letters under the title of Mahboob Masih; but no letter was produced nor was it shown that letters so written were at all of a public nature. On the other hand we have undoubtedly a profession in the case of his performing *Devi ka puja* at the time of his marriage. That act was undoubtedly a profession, an act entirely inconsistent. I might add repugnant, to the view that the person performing it was a person professing the Christian religion. I am not satisfied therefore that at the time when this marriage was solemnized Maha Ram was a Christian.

Holding as I do that Maha Ram was not a Christian at the time of this marriage it follows that no offence under the Act was committed on the 3rd of June, 1917, either by the so-called principals Mangli and Bachchan or by the abettor Maha Ram.

I do not consider it necessary to go into the question whether section 68 of Act No. XV of 1872 was intended to penalise marriages other than those intended to be or purporting to be marriages under the Indian Christian Marriage Act, 1872. It seems extremely doubtful whether it was so but as I have said before the question does not arise for decision in this case.

Walsh, J.

WALSH, J.—I entirely agree. I should hold, apart altogether from the general history of Maha Ram to which my brother has referred, that when a person on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony, and, having by birth and connection other religious associations, deliberately decides to marry a sweeper, according to sweeper rites, and does public worship to Hindu gods in the

presence of his relations and friends, he is not "a person professing the Christian religion."

Mr. Sorabji contended that Maha Ram was "estopped" from denying his Christianity. Apart from the fact that the principle of estoppel has no place in the criminal law, the idea of a "Christian by estoppel" is a contradiction in terms.

The wider question, as to the real ambit of section 68 of the Indian Christian Marriage Act of 1872, is really involved in what we have decided and I propose to state my views about it for the following reasons. The case for the prosecution was argued mainly upon that ground; the learned Sessions Judge who decided this case obviously did not like it, but felt himself bound to follow the decision in 40 Madras; there has already been a division of judicial opinion on the subject; the question is one of public importance; I entertain no doubt upon it, and I think that prosecutions like the present should be discouraged.

It is important to consider the scope and object of this legislation. It is a consolidating and amending Act, replacing the English Acts of 1818, and 1851, relating to marriages in India, and the Indian Acts of 1852, 1865, and 1866, dealing with the same subject. These were enabling statutes providing special conditions appropriate to the special circumstances and difficulties which are likely from time to time to confront those in India who wish to be married by Christian marriage. The history of the legislation shows that doubts had arisen as to the validity of certain marriages, and it was clearly intended to facilitate such marriages and to validate them and at the same time to guard them by strict requirements. The legislation is not unlike the Foreign Marriages Act in England. The object of the Act is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. The Act is to be called the Indian Christian Marriage Act, and in my opinion it deals with Christian marriages, and Christian marriages alone. In future such marriages can only be lawfully effected under this Act. If they are not solemnized by one of the persons described in section 5, they are made void by section 4. The Act does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so.

We therefore start with this that there is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony. His marriage may not be valid by English Law as a Christian marriage in India, but it is not forbidden to him. It would be a startling result of this Act, if such a person being free to choose, and not prohibited from marrying otherwise than by a Christian

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marriage, should find himself liable to transportation for abetting the person who marries him.

An analysis of Part VII of the Act, which deals with penalties, shows that such penalties are in the main directed against the offence of either one party or the other, or the officiating celebrant, or the official who may lawfully authorize the celebrant, wilfully and falsely doing some act in pretended pursuance of the statute which probably would, and certainly might, render the whole proceeding invalid. Omitting section 68 for the moment, every other offence dealt with is an act done which the Act requires to be done, and which is done either by a person lawfully authorized but by unlawful means, or by lawful means by an unauthorised person.

Turning to section 68 it is to be noted that the section does not make it criminal for a professing Christian to marry by a ceremony which is void under section 4. It is confined solely to the persons who solemnize the marriage, and the Act makes it criminal for a person to solemnize a marriage who is not authorized by section 5 to do so. But section 5 only authorizes a person to solemnize Christian marriages, and no body can solemnize Christian marriages in India who is not authorized by that section. Section 5 itself uses the word "Marriages" in the widest possible sense. "Marriages" it enacts, "may be solemnized in India," by certain specified persons. But this does not mean that no other marriages may be solemnised in India. That would be an impossible contention. It must, therefore, mean "marriages under this Act," or in other words "Christian marriages." I read section 68, therefore, as referring to a class of persons, namely those who solemnize or profess to solemnize, a Christian marriage under this Act, not being authorized by section 5 to do so. I cannot believe that the Legislature could have intended to sweep into the net of the criminal law, through an indirect piece of legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnization or celebration. This would be contrary to the ordinary mode of interpretation of a Statute, and would produce far-reaching and almost ludicrous results. I do not think the question turns upon the word "solemnize" so much as upon the object and scope of the Act. The case of *Queen-Empress v. Paul* (1), decided in 1896 turned on the word "solemnize." The Sessions Judge had acquitted on the ground that the part taken by the Hindu priest did not amount to solemnization. He seems to me to have been feeling for a way of evading the construction of the Act now contended for and to have seized on the word "solemnization." The appellate court disagreed, but I think their minds were diverted from the real difficulty. They went on to hold that the con-

(1) [1896] I. L. R., 20 Mad., 12.

tracting parties themselves ought to have been convicted, of abetment. As I have said, this is a startling result, and satisfies me that there must be a fallacy in the reasoning which reaches it. I have carefully considered the recent case *In re Kolan v. Daivalu*(1), decided by the Chief Justice and two Judges on a reference by NAPIER, J. I cannot agree with it. I see no answer to the reasoning in NAPIER, J.'s referring order, while the Chief Justice slips into an apparent error. "Section 68" he says "merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act." This is not so. It provides a penalty for any person who does under section 5 what he is not authorized to do, namely solemnize a Christian marriage.

Mr. Sorabji urged that the intention of the Legislature was clear. They did not want the country flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage not regularized by any form of marriage, and the interpretation contended for might be said rather to encourage concubinage. On the other hand as was pointed out by the Government Advocate who appeared at our request so that the view of Government might be presented to us, the Madras High Court in 1910 held that such a marriage as the present may be valid by Hindu Law if a custom is established governing such marriages. See *Mathusami v. Masilamani* (2). In that case the bride was a Roman Catholic. She removed the cross from her neck, and her forehead was smeared with holy ashes by a Brahman priest. The trial court spoke of "the prevalence of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion." The validity of the marriage was upheld by the Madras High Court. This seems to me an additional ground for differing from the decision of the so-called Madras Full Bench in 40 Mad. The result seems that, at present according to the law in Madras, a valid Hindu marriage may be a criminal offence, both on the part of the principals and on the part of those who celebrate it. I cannot accept this consequence, which illustrates very forcibly the importance of holding to the principle which my Brother KNOX has reiterated, of not straining a criminal enactment beyond what is included in its express terms.

BY THE COURT.—We admit this appeal. We find Mangli and Buchohan not guilty of the offence charged *i.e.*, an offence under section 68 of Act No. XV of 1872, and Maha Ram of abetment of the aforesaid act and direct that they be released. We understand they were permitted to give bail; if they did give bail, the bonds will be discharged.

B. P.

Appeal allowed—Conviction quashed.

(1) [1916] I. L. R., 40 Mad., 1030. (2) [1910] I. L. R., 33 Mad., 342.

XVI 54 R

CRIMINAL

1918

MAHA RAM

v

EMPEROR.

Walsh, J

CIVIL

1918

March, 19.
TUDBALL, J.
ABDUL
RAOOF, J.

GAŪRĪ SAHAI (Plaintiff)

versus

A. C. BAHREĒ (Defendant)*

Rules for Subordinate Court, rules 21, 25—Pleader's fee calculated at 5 per cent—Plaint returned for presentation to proper court—Question of jurisdiction raised by defence—Question decided in favour of defendant—Costs awarded to defendant.

A suit was brought in the court of the Subordinate Judge. The defendant raised the plea that the court had no jurisdiction to entertain the suit. An issue being raised it was decided first at the instance of the plaintiff. The plaint was ordered to be returned for presentation to the proper court, and the Subordinate Judge gave the defendant costs, calculating the pleader's fee at 5 per cent.—*Held*, on appeal, to the High Court, that the pleader's fee had been properly calculated under Rule 21 of the Rules for the Subordinate Courts, the decision having been given after contest, and on the merits of that contest.

FIRST APPEAL from an order of BABU GOPAL DAS MUKERJI, Subordinate Judge of Budaun

Lakshmi Narain, for the appellant.

Nehal Chand, for the respondent.

One of the pleas in defence to a suit was that it was not within the jurisdiction of the court in which it was brought. At the request of the plaintiff's pleader the question of jurisdiction was taken up first, and it was decided against the plaintiff. The court ordered the plaint to be returned for presentation to the proper court, and awarded half the costs to the defendant. In the formal order pleader's fees were calculated at the usual rate of 5 per cent. The plaintiff objected that the calculation should be made at $1\frac{1}{4}$ per cent. The court overruled this objection. The plaintiff then filed an appeal from the order returning the plaint, but the appeal was confined to the question of the correctness of the costs. At the hearing of the appeal.

Nehal Chand, for the respondent, raised a preliminary objection and submitted that although an appeal lay under Order 43, rule 1 (a), Civil Procedure Code, from an order returning a plaint for presentation to the proper court, yet inasmuch as the present appeal was not at all directed against the correctness of that order, but related merely to an order for costs, it was really not an appeal under Order 43, rule 1 (a) and could not be brought in that garb.

* F. A. F. O. No. 148 of 1917.

Lakshmi Narayan, for the appellant, was not called upon to reply to the preliminary objection, but he mentioned the case of

Vasudev Ramchandra v. Bhavan Jivraj, [1891] I. L. R., 16 Bom., 241.

Proceeding with the appeal, he submitted that the suit not having been decided "on the merits after contest," as provided for in Rule 21 of Chapter XXI of the Rules for the Civil Courts, pleader's fees should not have been calculated at the rate of 5 per cent. Rule 25 of that Chapter applied to the present case. A decision on a question of jurisdiction was not a decision on the merits. The suit had yet to be decided on its merits, although by a different court. The trial of the question of jurisdiction could not and did not affect the merits of the case. Moreover, the "contest" mentioned in Rule 21 aforesaid clearly meant contest on the merits, and there had been no contest on the merits as yet.

Nehal Chand, was not heard in reply on the appeal.

The judgment of the Court was delivered by

TUDBALL, J.—The facts of this case are simple. The plaintiff-appellant filed a suit against the defendant. Notice was issued, a written statement filed and issues were framed. One of the issues raised the question of the jurisdiction of the court. It was pleaded by the defendant that the learned Subordinate Judge had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the pleader's fee was calculated at 5% according to Rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts. The plaintiff objected, on the ground that this rule did not apply but that Rule 25 of that Chapter did apply. The lower court has held that the case falls within Rule 21. On behalf of the appellant it is urged that the case was not decided on the merits; but it was clearly decided after contest and on the merits of the contest so far as that contest went. We do not think that Rule 25, which applies to appeals from orders and other cases, is intended to cover a case of the present kind. In our opinion Rule 21 clearly applies in this case. There is therefore no force in the appeal. We accordingly dismiss it with costs.

B. K. M.

Appeal dismissed.

CIVIL

1918

GAURI SAHAI
v.
A. C.
BAHREE.

Tudball, J.

CRIMINAL

1918

March, 20. *Gambling Act (III of 1867), section 13—Confiscation of money gained—Order illegal.*

BANERJI, J.

MATURWA

versus

EMPEROR.*

Under section 13 of the Gambling Act a Magistrate is not authorized to order the confiscation of money gained by an accused person in the gambling; only the instruments of gaming may be so seized. *Emperor v. Tota*, I. L. R., 26 All., 270, followed.

CRIMINAL Reference made by J. H. CUMING Esq., Sessions Judge of Saharanpur.

The referring order was as below :—

On the findings of fact of the learned Magistrate the conviction is right. The place was a public place and I have been shown by the learned counsel for the applicant the game which was played, and am of opinion that it was distinctly a gambling one, and in no sense a game of skill. As to the sentence, the appellant has been three times fined, that it would have been idle to go on fining him.

The learned Magistrate has, however, ordered confiscation of the money which was found in the applicant's possession. Apart from the apparent clearness of the section itself, the ruling in *Emperor v. Tota* (1), is authority that this is illegal. The case will, therefore, have to be reported to the Hon'ble High Court, after the usual reference to the learned Magistrate, with the recommendation that this part of the learned Magistrate's order be set aside. The rest of the learned Magistrate's order should hold good.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Banerji, J

BANERJI, J.—The accused in this case was convicted under the Gambling Act. The Magistrate who convicted him ordered confiscation of the money which was found in his possession. The learned Sessions Judge has reported the case to this Court with the recommendation that this portion of the learned Magistrate's order should be set aside as not being in conformity with law. It is clear from the language of section 13 of the Gambling Act that all that could be confiscated were the instruments of gaming. This was so held in the case to which the learned Sessions Judge refers. Acceding therefore to the recommendations of the learned Sessions Judge, I set aside so much of the order of the Magistrate as directs the confiscation of the money found in the possession of the accused and direct that it be refunded to him.

* Cr. Ref. No. 156 of 1918.

(1) [1904] I. L. R., 26 All., 270.

HAMIDA BIBI (*Defendant*)

versus

FATIMA BIBI (*Plaintiff*)*

CIVIL

1918

March, 18.

Limitation Act (IX of 1908), section 14—Due diligence—Joint tenants—Decree for arrears satisfied by plaintiff—Suit for contribution filed in the Small Cause Court—Plaint ordered to be returned for presentation to proper court—Plaintiff refusing to take back plaint—Revision to High Court dismissed—Plaintiff waiting for three months thereafter—Time between filing suit and taking back plaint not allowed.

TUDBALL, J.
ABDUL
RAOOF, J.

A decree for arrears of rent having been passed against the plaintiff and the defendants who were joint occupancy tenants, was realised from the plaintiff alone to a large extent on August 19th, 1910. The plaintiff thereafter brought a suit against the defendants for contribution. The suit was instituted on May 20th, 1913, in the Court of Small Causes. On November 27, 1913, the Small Cause Court ordered the return of the plaint for presentation to the proper court. The plaintiff refused to take it back, and on February 19, 1914, filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915, the plaintiff having applied for the return of the plaint it was so returned to her on June 30, 1915 and was filed on the same day in the Munsiff's Court. The Munsiff dismissed the suit as time-barred. The lower appellate court reversed the Munsiff's decree, and held the suit within time, allowing to the plaintiff the period between May 20, 1913 and June 30, 1915 :—*Held* that the plaintiff was not entitled to the interval between May 20, 1913 and June 30, 1915, being allowed to her, inasmuch as she could not be deemed to have been prosecuting her case with due diligence in view of the fact that she waited for more than three months after the dismissal of the revision before she applied for the return of the plaint.

FIRST APPEAL from an order of BABU RAM CHANDRA CHAUDHRI, Subordinate Judge of Allahabad.

The plaintiff and the defendants were joint occupancy tenants. A decree for arrears of rent was passed against them. In execution thereof the major portion of the decretal amount was realised from the plaintiff on 19th August, 1910. On 20th May, 1913, the plaintiff brought a suit in the Court of Small Causes for contribution against the defendants. That court held that it had no jurisdiction to entertain the suit, and on 27th November, 1913, directed the plaint to be returned to the plaintiff for presentation to the proper court. The plaintiff refused to take back the plaint, and on 19th

* F. A. F. O. No. 70 of 1917.

CIVIL

1918

HAMIDA BIBI

v.

FATIMA BIBI.

February, 1914, applied to the High Court for revision of the order of the Small Cause Court. The High Court dismissed the application for revision on 16th March, 1915. On 15th June, 1915, the plaintiff applied to the Court of Small Causes for return of the plaint. The plaint was returned on 30th June, 1915, and on the same day it was filed in the court of the Munsiff. That court dismissed the suit as having been filed beyond time. On appeal the lower appellate court held that the period from the institution of the suit in the Court of Small Causes upto the dismissal of the revision by the High Court should be deducted under section 14 of the Limitation Act, and holding that the suit was within time remanded it for trial on the merits. The defendants appealed to the High Court from the order of remand.

Mukhtar Ahmad, (for *Haidar Mehdi*), for the appellants.—The lower appellate court was wrong in excluding the time occupied by the revision in the High Court. The language of section 14 clause (1) of the Limitation Act does not warrant the exclusion of the time during which a proceeding has been pending in a court of revision. The section enumerates a court of first instance and a court of appeal; there is no mention of a court of revision. The High Court is not a 'court of appeal' with respect to Small Cause Court suits. The plaintiff is not entitled to claim an exemption from limitation, unless such exemption is expressly provided for.

Again, the period between the order of the Court of Small Causes returning the plaint, and the filing of the revision ought not to be excluded. No period of limitation being prescribed for filing a revision, it is possible for a revision to be filed after the lapse of a long time; and to exclude the time between the date of the decision sought to be revised, and the filing of the revision, would lead to unreasonably long periods of time being excluded.

Further, no time subsequent to the 16th March, 1915, should have been excluded. The plaintiff has been guilty of *laches* throughout. The suit was filed beyond time and was rightly dismissed by the court of first instance.

S. M. Sulaiman, (with him *Lalit Mohan Banerji*), for the respondent.—By the use of the words, "a civil proceeding whether in a court of first instance or in a court of appeal," in section 14 (1) of the Limitation Act, a much wider scope has been intended and given than if the words "an original suit or an appeal" had been used. The section has been interpreted to operate in favour of the exclusion of the time during which an application for revision has been pending.

Seth Mulchand v. Seth Samir Mal, [1882] 2 A. W. N., 59;

Venkatragayya Appa Row v. Muruga Sriramulu, [1912] 17 I. O., 593; (Mad.).

As regards the time intervening between the decision of the Small Cause Court and the filing of the revision, it is submitted that

the whole proceeding from the institution of the suit to the decision of the revision must be taken to be a continuous proceeding, and the period in question should also be allowed. No question of an unreasonably long period arises in the present case.

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FATIMA BIBI

Excluding the period between the institution of the suit in the Court of Small Causes and the final decision therein by the High Court in revision, it is clear that on the 15th of June, 1915, namely the date on which the plaintiff applied for return of the plaint, the suit would have been within time. The delay subsequent to that date was not due to the plaintiff; the plaint was actually returned on 30th June, 1915, and was filed on the same day in the Munsiff's court. The plaintiff ought not to be penalised for the delay in actually returning the plaint to her.

Mukhtar Ahmad, was not heard in reply.

The judgment of the Court was delivered by

TUDBALL, J.—This is an appeal against an order of remand passed by the court below. The question was one of limitation and the application of section 14 of the Limitation Act. The parties to this suit were co-tenants in a holding. A suit was brought against them for rent and a decree was obtained (against them jointly) on the 6th of July, 1910. On the 19th of August, 1910, the plaintiff paid the decretal debt. On the 20th of May, 1913, some ninety days before the expiry of the period of limitation which is fixed by article 99 of the second Schedule she instituted a suit in the Small Cause Court. An objection was taken that the court had no jurisdiction and on the 27th of November, 1913, the Small Cause Court held that it had no jurisdiction and directed the plaintiff to take back the plaint and file it in the proper court. The plaintiff refused to take back the plaint. On the 19th of February, 1914, that is nearly ninety days after the order of the Small Cause Court, she filed an application in the High Court for revision of the order. This application was dismissed by this Court on the 16th of March, 1915. The plaintiff then apparently took a rest. She waited until the 15th of June, 1915, that is for full three months and then applied to the court for the return of the plaint. There was some delay and she received it on the 30th of June. On that same date she presented the plaint in the court of the Munsif. The court of first instance held that the suit was barred by limitation. The lower appellate court has allowed to the plaintiff the period from the 20th of May, 1913, to the 30th of June, 1915, under section 14 of the Limitation Act and has held that the suit is within time. Assuming without deciding that the period from the 27th of November, 1913, to the 16th March, 1915, may be allowed to the plaintiff under section 14 of the Act, we fail to see that she has been prosecuting her case with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the

Tudball, J.

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plaint. We also cannot agree that the plaintiff was justified in refusing to take back her plaint from the Court of Small Causes because she wished to file an application in revision to this Court. If she had taken back her plaint as she could easily have done without any prejudice to the prosecution of her revision, it would have been in her hands directly the revision was dismissed and she could have at once filed it in the court of the Munsif. On the contrary she preferred to wait for three months before she asked for the return of it. We do not think that she is entitled to any allowance for any period after the 16th March, 1915. If the period up to that time be allowed to her, her suit should have been filed on or before the 16th of June, 1915. It was not so filed and we therefore agree with the court of first instance that the suit is barred by limitation. We allow the appeal, set aside the order of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

B K. M.

Appeal allowed.

CRIMINAL

1918

April, 4.

BANERJI, J.

DEO SARAN TEWARI (*Applicant*)*versus*EMPEROR (*Opposite-party*)*

Criminal Procedure Code (Act V of 1898), sections 195, 487—Penal Code (Act XLV of 1860), section 174—Accused guilty of disobedience of order to appear—Magistrate convicting accused—Conviction illegal.

A person was ordered by a Magistrate to appear before him which that person failed to do. He was thereupon convicted by that Magistrate under section 174 of the Indian Penal Code and fined Rs. 10:—*Held* that having regard to section 487 of the Criminal Procedure Code the Magistrate whose order had been disobeyed could not try the case, it being a case within the purview of section 195.

CRIMINAL reference made by W. R. G. MOIR, Esq., Sessions Judge of Gorakhpur.

The parties were not represented.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The accused in this case was convicted under section 174, Indian Penal Code, on a charge of non-attendance in the court of Mr. W. Gurney in obedience to a lawful summons. The case was tried by Mr. Gurney himself and he convicted the accused and sentenced him to a fine of Rs 10 This proceeding was illegal having regard to the provisions of section 487 of the Code of Criminal Procedure.

The case was one of those referred to in section 195, Indian Penal Code and therefore could not be tried by the officer whose order was disobeyed. I accordingly set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Conviction set aside.

* Cr. Ref. No. 228 of 1918.

FAZAL RAB (*Applicant*)*versus*MANZUR AHMAD AND OTHERS (*Opposite parties*)*

Code of Civil Procedure (Act V of 1908), Order XXI, rules 89, 92—Court, meaning of—Deposit by judgment-debtor in the treasury—Whether deposit in accordance with rule—Auction-sale not set aside—Jurisdiction—Revision.

CIVIL

1918

March, 5.

RICHARDS,

C. J.

BANERJI, J.

The word "court" in rules 89 and 92 of Order 21 of the Code of Civil Procedure means the Civil Court.

The provisions of rule 89 are an indulgence to a judgment-debtor, and an auction-purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. Whether or not the section has been so complied with is clearly a question which a court has jurisdiction to decide, and, in the exercise of such jurisdiction, if the court has come to an erroneous conclusion, its decision cannot be interfered with in revision by the High Court. Hence where a judgment-debtor deposited the purchase-money *plus* five per cent compensation for payment to the auction-purchaser in the treasury owing to the Civil Court being closed, and the court below refused to set aside the sale because on the court re-opening the money had not been withdrawn and re-deposited in the Civil Court, *held* that the court had exercised its jurisdiction and even though the decision might be erroneous, it could not be interfered with in revision. *Held* also that an appeal by the auction-purchaser lay from an order refusing to set aside a sale.

CIVIL REVISION from an order of BABU KUNWAR SEN, Subordinate Judge of Allahabad.

The facts are shortly as follows :—

The applicant was a judgment-debtor. In execution of a simple-money decree against him, his non-ancestral *zamindari* property was sold by the Collector on behalf of the Civil Court. The sale was held on the 20th September, 1916. The Civil Courts being closed on account of the long vacation in October, 1916, the applicant made an application to the Collector for leave to deposit the sum necessary for getting the sale set aside under Order 21, rule 89 and on such leave being granted deposited the requisite amount in the treasury on the 16th October, 1916. On the 11th November, 1916, the day on which the Civil Courts re-opened he applied to the Munsiff under Order XXI, rule 89, Civil Procedure Code and stated that he had already deposited the money in the treasury. The Collector also sent an intimation of the said deposit to the Civil

* Civ. Rev. No. 190 of 1917.

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Court and asked for further instructions. In December, the Munsiff directed the Collector to transfer the said amount to the Civil Court account in the treasury. The auction-purchaser opposed the application of the judgment-debtor on the ground that as money had not been deposited in court along with the application, it was incompetent. The Munsiff set aside the sale. On appeal, the Subordinate Judge reversed the order, and confirmed the sale. The judgment-debtor applied to the High Court in revision.

Kailas Nath Katju (with him *Peary Lal Banerji*), for the applicant, submitted that the applicant was in fact being punished for his abundant caution and diligence. He had deposited the money well within time with the Collector, who was an officer of the court and the money was in deposit in the treasury at the disposal of the court. The view taken by the lower appellate court that the applicant should have withdrawn the money from the treasury and re-presented it in the Civil Court on the 11th November was too narrow and technical and calculated to defeat the ends of justice. Even in that case the money would have been actually deposited in the treasury where it already was. Moreover the court had received an intimation of the deposit from the Collector within time, and a direction as to transfer in the account-books was a pure formality. It was true that the provisions of Order XXI, rule 89 of the Code of Civil Procedure were by way of an indulgence to the judgment-debtor and must be strictly complied with, but in this case the judgment-debtor had acted *bona fide* and with due diligence, and the sale had been rightly set aside by the court of first instance. As to the jurisdiction of the High Court to interfere in revision it was submitted that the lower appellate court had acted without jurisdiction inasmuch as the provisions of Order XXI, rule 89 were mandatory, and having been duly complied with the court had no discretion in the matter but was bound to set aside the sale. A refusal on the part of the court to do so was in effect a refusal to exercise jurisdiction and in any event the court had acted in the exercise of its jurisdiction illegally and with material irregularity. Reference was made to

Birj Mohan Thakur v. Rai Uma Nath Chowdhry, [1892] I. L. R., 20 Cal., 8,

and to the judgment of WOODROFFE, J. in

Shew Prasad Bungshidhur v. Ram Chander Haribux, [1913] I. L. R., 41 Cal., 323, 341.

It was further submitted that the auction purchaser had no right of appeal to the lower appellate court against the order of the primary court. He had got his money back *plus* five per cent. as a compensation and was not a party to the execution proceedings. He had bought subject to the contingency of the sale being set aside on payment by the judgment-debtor under Order XXI, rule 89.

S. M. Sulaiman (with him *T. N. Chaddha*), for the auction-purchaser, submitted that the provisions of Order XXI, rule 89, were stringent and must be strictly complied with to the letter. The money was not deposited in court. The Collector was only a sale officer and not the court.

Kailas Nath Katju, was heard in reply.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts connected with this application may be stated very shortly. There was a decree for about Rs. 1,000. Certain property of the judgment-debtor was directed to be sold. The sale was held by the Collector on behalf of the Civil Court. The sale took place on the 20th September, 1916. The property was put up to sale and fetched Rs. 850. On the 15th October the judgment-debtor came to the Collector and stated that he was anxious to have the sale set aside and to save the property; that he could not deposit the decretal amount *plus* 5 per cent compensation to the auction purchaser as the Civil Court was closed but he was anxious to lodge the money in the Treasury. The money was accepted by the Collector. On the 11th November which was the day on which the Civil Court opened the judgment-debtor applied to have the sale set aside and stated how the money had been already deposited in the Treasury. There was a Rubkar from the Treasury to the effect that the money had been deposited. In December following the Civil Court directed that the money should be transferred to the account of the Civil Court. The court of first instance, thereupon, set aside the sale holding that the money had been deposited within thirty days. The auction purchaser appealed and the lower appellate court held that the money had not been deposited within thirty days or on the 11th November which was the day on which the Civil Court opened and accordingly the rule had not been complied with and the auction purchaser was entitled to the benefit of his purchase. The judgment-debtor has applied in revision. There is no appeal from the orders of the lower appellate court refusing to set aside the sale. It is contended in the first place that the money was in fact deposited within the meaning of the rule and that consequently the lower appellate court had no jurisdiction to refuse to set aside the sale and in the second place that the court of first instance having set aside the sale no appeal by the auction purchaser lay to the lower appellate court.

Rule 89 provides "where immoveable property has been sold in execution of a decree, any person, either owing such property or holding an interest thereon by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in court (a) for payment to the purchaser a sum equal to 5 per cent. of the purchase money and (b) for payment to the decree-holder an amount specified in the proclamation of sale as that for the recovery

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of which the sale was ordered, less any amount which may, since the date of such proclamation of sale have been received by the decree-holder."

Rule 92, clause 2 provides "that where in an application under Rule 89 the deposit required by that rule is made within thirty days from the date of the sale the court shall make an order setting aside the sale."

The question which the court below had to decide was whether or not the money had been deposited in court. It is quite clear that court means the Civil Court. This was a question which admittedly the lower appellate court had not only jurisdiction but was bound to decide. It is somewhat difficult to say whether the court was not technically right in holding, unfortunate though the judgment-debtor may have been, in strictness that the money was not deposited in court within thirty days or on the 11th November which was the first day the court opened. It was not until December following that the money was accepted in the Civil Court by ordering the transfer of the deposit to the Civil Court account. It has been decided by their Lordships of the Privy Council that the High Court is not entitled to create what are really appeals put forward in the shape of revisions and accordingly even if we thought that under the exceptional circumstances of this case the lower appellate court might very well have upheld the court of first instance, this would not justify us in interfering with the decision of the lower appellate court in revision.

In this connection it must be remembered that the deposit of the purchase money *plus* 5 per cent. compensation of the decretal amount to the auction purchaser is an indulgence to the judgment-debtor. The auction purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the court below had jurisdiction to decide, that it exercised its jurisdiction and that even if we thought it had come to an erroneous conclusion we would not have been entitled to interfere in revision.

As to the second contention, namely that an auction purchaser has no right to appeal. The Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction purchaser and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

K. N. K.

Application dismissed.

MOHAMMAD ILTIFAT HUSAIN (*Decree-holder*)

versus

ALIM-UN-NISSA AND OTHERS (*Judgment-debtors*).^{*}

Code of Civil Procedure (Act V of 1908), Or. 34, r. 6—Application for decree thereunder—Whether application in execution—Limitation—When right to apply accrues—Limitation Act (IX of 1908), Sch. I, art. 181.

An application under the provisions of Order 34, rule 6 of the Code of Civil Procedure is an application in the original suit for a new decree and it cannot be regarded as an application in execution. Such an application is governed as to limitation by article 181 of Schedule I to the Limitation Act and must be made within three years from the date when the right to apply accrued. *Held* therefore that where the entire mortgaged property was sold in 1911 in execution of a decree for sale on a mortgage, and the mortgagee made a fresh application under Order 34, rule 6 of the Civil Procedure Code in 1915 (an application for a similar decree having been made in 1913), *held* that the application was time-barred, and the application not being an application in execution of the original mortgage-decree, the intermediate application did not save limitation.

EXECUTION SECOND APPEAL from a decree of W. T. M. WRIGHT, Esq., District Judge of Budaun, confirming a decree of Babu Kishrod Gopal Banerji, Subordinate Judge.

Iqbal Ahmad and *Mukhtar Ahmad*, for the appellant.

S. A. Haidar, and *Muhammad Yusuf*, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.:—This appeal arises out of an application under Order 34, rule 6. This rule applies to cases in which after the mortgaged property has been sold the mortgagee comes to Court and asks for a personal decree for the balance left due. The rule provides that "where the net proceeds of any such sale are found to be insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a decree for such amount. In the present case the original mortgage decree was obtained in February, 1906, the mortgaged property consisted of two villages. In the events which happened the mortgagee became entitled to the equity of redemption of one of the villages the result being that the two interests (that is the interest of the mortgagee and the interest of the mortgagor) vested in one person. This operated to discharge the mortgage to the extent of the value of the property acquired by the mortgagee. In the year 1911 the other

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RICHARDS,

C. J.

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C. J.

^{*}E. S. A. No. 296 of 1917.

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 Richards,
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village was put up to sale and purchased by the decree-holder. Accordingly the mortgaged property and all rights in respect of it were exhausted in the year 1911, and it was on this basis that the application for a personal decree was made. The application was made in the year 1915, but there was another application for a similar decree in the meantime (1913). If the present application can be regarded as an application for execution of the original mortgage decree, then perhaps the application which was made in 1913 would save limitation. If on the other hand the present application is not an application for execution of the original mortgage decree but is an application for a fresh decree, then the application should have been made within three years from the time when the right to make such application accrued, and the article which governs the application is article 181 of the Limitation Act. We find it impossible to hold that an application for a decree under the provisions of Order 34, rule 6 is an application for the execution of the original decree which was a decree for the sale of certain property we think that it is an application in the original suit for a new decree and that it cannot be regarded as an application in execution. In a somewhat similar case *Behari Lal v. Bisheshar* (1), MR. JUSTICE CHAMBER seems to have expressed the view that article 181 governs an application for a decree under Order 34, rule 6. In this view the order of the court below dismissing the application was correct, although the reasons for the court's decision may be open to question. We dismiss the appeal with costs.

Appeal dismissed.

(1) [1912] 9 A. L. J. R., 569.

Code of Civil Procedure (Act V of 1908), Or. 34, rule 6—Order refusing to pass decree thereunder—Decree—Ad valorem court-fee payable.

An order refusing to make a decree under Order 34, rule 6 of the Code of Civil Procedure must be regarded as a "decree" within the meaning of the definition of that term in that Code, and *ad valorem* court-fees must be paid on the memorandum of appeal presented to the lower appellate court and that presented to the High Court.

In the above appeal the appellant paid Rs. 2 as court-fee on his memorandum of appeal filed in the High Court having described it as an *execution second appeal*. The following report was thereupon made by the Stamp Reporter:—

This is an appeal against the decrees of the courts below refusing to grant the decree-holder appellant's application for a personal

decree under Order 34, rule 6 of the Code of Civil Procedure, on the ground that it was time-barred. On the authority of the ruling of this Court to be found in

Tajammul Husain Khan v. Mohammad. Husain Khan, [1918] 14 A. L. J. R., 328.

ad valorem court-fee must be paid both in the lower appellate court and in this Court on the value of the relief sought. Accordingly a court-fee of Rs. 295 must be paid in each court on Rs. 5,456 the value of the appeal in each court. A court-fee of annas eight having been paid in the lower appellate court and of Rs. 2 in this Court, there is therefore a deficiency of Rs. 295-2, Rs. 590 minus Rs. 2-8-0 minus Rs. 587-8.

Objection having been taken to the above report the question was referred to the Taxing Officer who ordered the matter to be laid before the Bench hearing the appeal.

The following order was thereupon passed by

RICHARDS, C. J.—A report has been submitted by the office that the appellant was liable for additional court-fees in the lower appellate court calculated upon the value of the subject matter of the appeal. The application was for a decree under Order 34, rule 6 made in the original mortgage suit. The application, of course, could be made on an 8 anna stamp, but the question is what should the fee be which either side would have to pay if they were dissatisfied with the ruling of the court to which the application was made. In the present case the court made an order dismissing the application for a decree under Order 34, rule 6. In the case of *Tajammul Husain v. Muhammad Husain Khan* (1) Mr. Justice TUDBALL held that the defendant against whom a decree under Order 34, rule 6 had been made was obliged to pay an *ad valorem* court-fee on the decree which had been made against him. The learned Judge was of opinion that the decision appealed against was clearly a "decree" within the meaning of the Code of Civil Procedure. We think that the view taken by MR. JUSTICE TUDBALL was correct. The only difference between that case and the present is that the court of first instance instead of granting a decree under Order 34, rule 6 refused to make such decree. We think that an order refusing to make a decree under Order 34, rule 6 must be regarded as a "decree" within the meaning of the definition of that term in the Code of Civil Procedure. We think that the report of the office as to the liability of the appellant for payment of *ad valorem* court-fees in the first appeal was correct and that the amount must be paid by the appellant.

Order accordingly.

(1) [1918] 14 A. L. J. R., 328.

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April, 25.

RICHARDS,
C. J.
BANERJI, J.MOHAMMAD ZAKI (*Plaintiff*)*versus*THE MUNICIPAL BOARD OF MAINPURI (*Defendant*)**Receiver—Right to continue suit—Permission to sue in forma pauperis granted
—Suit filed before insolvency—Subsequent insolvency.*

Where a person obtains leave to sue *in forma pauperis* in a suit commenced before his insolvency, the Receiver appointed on an adjudication of insolvency is entitled to continue the suit as the insolvent might have done.

CIVIL REVISION against the decree of PANDIT PIARE LAL KATARA, Subordinate Judge, Mainpuri.

Baleshwari Pershad, for the appellant.

A. E. Ryves, for the respondent.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—We think that the order of the court below was clearly wrong. One Nisar Ali brought a suit and made an application to sue *in forma pauperis*. Eventually he was permitted to bring the suit in this way. Meanwhile he was adjudicated an insolvent. The Receiver in the insolvency wished to continue the proceedings. The learned Subordinate Judge points out that he had never given leave to the Receiver to sue *in forma pauperis* and that the Receiver not being personally liable either to the Government or to the defendants he ought to pay court-fees. He accordingly made an order that the Receiver should pay the court-fees on the plaint and on all the applications. We think that once Nisar Ali obtained leave to sue *in forma pauperis* in a suit which had been commenced before his insolvency, the Receiver was entitled to continue the suit just as Nisar Ali could have done and in this respect the order of the court below was wrong. The court is, of course, entitled to order the Receiver to give security for the costs as required by Order 22, rule 8. This matter is not now expressly before us. We have only to consider the legality of the order passed by the Subordinate Judge. We allow the application set aside the order of the court below and remand the case to that court with directions to re-admit the case and deal with it according to law as pointed out by us. Costs here and heretofore will be costs in the cause.

Appeal allowed.

Cause remanded.

*Civ. Riv. No. 230 of 1917.

DHARA SINGH (*Defendant*)*versus*GAYAN CHAND (*Plaintiff*).*

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April 22.

RICHARDS,
C. J.
BANERJI, J.*Code of Civil Procedure (Act V of 1908), section 115—Revision—Mistake of law made by lower court—Jurisdiction.*

Where a court has jurisdiction to determine a particular matter, and in the exercise of its jurisdiction, it makes a mistake in law, this does not entitle the party against whom the decision is to apply to the High Court in revision.

A suit was brought on a promissory note. The defendant pleaded minority at the date of execution. The court of first instance dismissed the suit. On appeal the lower appellate court held that the defendant having knowingly misrepresented his age, he was estopped from pleading infancy and was bound in equity to refund the money and the suit was decreed. Inasmuch as a second appeal did not lie to the High Court, the suit being of the nature cognizable by a Court of Small Causes, the defendant applied in revision against that decree :—*Held* that no revision lay, the lower court having merely made a mistake of law in deciding the case.

CIVIL REVISION from a decree of BABU BANSGOPAL, Subordinate Judge of Meerut, reversing a decree of Babu Kashi Parshad, Munsiff of Ghaziabad

This was a suit on a promissory note executed by the defendant in the plaintiff's favour. The defendant pleaded infancy and want of consideration. The court of first instance found that the note was for consideration but at the time of its execution the defendant was 19½ years of age and as a guardian had been appointed by the court he was a minor. It, therefore, dismissed the suit. On appeal the learned Subordinate Judge held that inasmuch as at the date of execution of the promissory note the defendant knew that, by reason of the appointment of a guardian his minority had been extended to 21 years, yet he deliberately took the money from the plaintiffs who did not know that a guardian had been appointed, and as the defendant had fraudulently concealed this fact he was guilty of legal fraud and misrepresentation and was estopped from pleading infancy, and in any case was in equity bound to restore the money. The suit was therefore decreed. The defendant applied to the High Court in revision.

Radha Kant Malaviya (for *Baldev Ram Dave*), for the plaintiff.

*Civ. Rev. No. 196 of 1917.

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Having regard to the provisions of section 115 of the Code of Civil Procedure, the application in revision was not maintainable.

Kailas Nath Katju (for *Tej Bahadur Sapra*), for the defendant, submitted that the decision of the lower appellate court was clearly wrong and entirely opposed to the authorities binding on him. He cited the following cases :—

Jagar Nath Singh v. Lalta Parshad, [1908] I. L. R., 31 All., 21;

Mahomed Syed Ariffin v. Yech Ooi Gark, [1916] 2 App. Cas., 575, P. C.;

R Leslie Ltd. v. Sheill, [1914] 3 K. B., 607.

The lower appellate court had acted illegally inasmuch as it was its duty to follow the rulings of the High Court and the Privy Council and not to ignore them.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—A preliminary objection has been taken to the hearing of this application. The suit was brought upon a promissory note. The defendant pleaded that he was a minor at the date of the note. The Munsif held that he was a minor and dismissed the suit. In appeal the Subordinate Judge found that the defendant was a minor but that he had fraudulently misrepresented his age to the plaintiff and on this ground reversed the decision of the Munsif and decreed the suit. The preliminary objection is that the suit being of the nature cognizable by a Small Cause Court, the Code does not provide for a second appeal and that the defendant is not entitled to apply in revision under the provisions of section 115. It is quite clear that the court had jurisdiction to determine the matter and in exercise of its jurisdiction, if it made a mistake in law this does not entitle the party against whom the decision is to come here in revision. We may mention that the court was clearly wrong in holding the minor liable on the promissory note on the finding of fact arrived at by it. We reject the application but under the circumstances we make no order as to costs.

K. N. K.

Application rejected.

NATHU AND ANOTHER (*Defendants*)*versus*MUSAMMAT TULSHA (*Plaintiff*)

CIVIL

1918

April, 2.

RICHARDS,
C. J.

BANERJI, J.

Hindu widow—Sale of husband's estate in her possession in lieu of debt of husband—Debt extinguished by contract when under the liability was taken over by another person—Legal necessity—Whether sale valid.

Where a Hindu widow in possession of her husband's estate as heiress executed sale-deeds to third persons in lieu of her husband's debt which had been agreed to be discharged by a relative of the husband, with the creditor's consent but the obligation was not fulfilled by the relative, held that since the date when the liability to discharge the debt was undertaken by the relative, the debt had ceased to be the debt of either the husband or the widow, and the non-fulfilment of the obligation would not revive the debt so as to make it a good consideration for the alienation of the property.

SECOND APPEAL from a decree of H. J. BELL, Esq., District Judge of Jhansi, confirming a decree of Babu Pratap Singh, Subordinate Judge.

Suit for possession.

The following recital of facts is taken from the judgment of the lower appellate court:—"The property of which recovery is sought in this suit is immovable property that Gillay left when he died in 1890 A. D. He left him surviving his widow, Musammat Sardaran and two daughters named Musammat Tulsha, the plaintiff, and Musammat Bari Bai. In 1892 one Har Prasad sued Musammat Sardaran as heir of Gillay to recover Rs. 1,924 alleged to be due to him on account of Gillay's debts to him. Har Prasad allowed the suit to be dismissed by default because Kunji, a relative of Gillay, undertook to be responsible to Har Prasad for the money, and accordingly on the 10th of December, 1892, executed a simple unregistered money bond in favour of Har Prasad for a sum of Rs. 1,925, payable in instalments beginning on the 7th of April, 1894, and ending on the 30th of March, 1903. On the 8th of July, 1896, Har Prasad obtained a decree against Kunji for the first three instalments. The bond was returned to him by the court and is not now forthcoming." [After deciding that the bond referred to was genuine, the District Judge proceeded as follows:—] "On the 4th and 5th of July, 1907, Musammat Sardaran executed in favour of the defendant, Nathu, sale-deeds of part of the property left by Gillay, and on the 18th of the same month she executed another sale-deed of another part to the defendant Mannu. Mannu was husband, of her daughter Musammat Bari

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Bai. On the 31st of May, 1914, Mannu sold to the defendant Satru part of the property sold to him by Musammat Sardaran. Nathu and Satru are sons of Kunji and joint with him. Musammat Sardaran died in October, 1914, and she was predeceased by Musammat Bari Bai. Musammat Tulsha being now the sole successor to the estate left by Gillay, sues to recover from Nathu, Satru and Mannu, the properties conveyed to them by the sale-deeds of 1907, her case being that they are collusive and obtained by undue influence and unsupported by consideration or legal necessity and are fictitious."

Both the courts below decreed the suit. One of the grounds on which the lower appellate court held that there was no consideration for the sale-deeds was stated in these words:—"Gillay's debt to Har Prasad was extinguished by the contract between Har Prasad and Kunji, and even if it had been possible to revert to the original position, Har Prasad's claim against the widow had long been barred by time."

Defendants appealed.

A. H. C. Hamilton, for the appellants.

A. P. Dube, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—We think the view taken by the court below was correct on the findings of fact arrived at by it. Assuming that there was a debt due by Gillay which it was the legal and pious duty of the widow to discharge, that debt was discharged by Kunji taking over the liability and agreeing to pay it off by instalments, it then ceased to be a debt either of Gillay or his widow. The mere fact that Kunji did not perform his obligations would not revive the debt so as to make it a good consideration for the alienation of the property. We dismiss the appeal with costs.

Appeal dismissed.

HAR KESH AND ANOTHER
versus
 EMPEROR *

Penal Code (Act XLV of 1860), sections 363, 368—Kidnapping—Lawful guardianship.

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March, 18.

KNOX, J.

A Jat girl under sixteen years of age was ordered by her father to take food to the bullocks. As she was coming home, one of the accused came to her and persuaded her to accompany him. Her hair was cut and she was dressed in boy's clothes. She lived for some time with both the accused. After this both the accused were taking away the girl when they were discovered by the *chowkidar*. She was crying and told the *chowkidar* that she was a girl and not a boy. The *chowkidar* then arrested the accused. *Held* that the accused were guilty of the offence of abduction having removed the girl from the lawful guardianship of her father without his consent. *Emperor v. Jetha*, 6 Bom. L. R., 785, followed.

CRIMINAL APPEAL from an order of E. R. NEAVE, Esq., Additional Sessions Judge of Meerut.

A. H. C. Hamilton, for the appellant.

Lalit Mohan Banerji, (Government Pleader) for the Crown.

The following judgment was delivered by

KNOX, J.—Harkesh and Bhullan have been convicted of offences under sections 366 and 368 of the Indian Penal Code. The charge sheet to which they were called upon to plead, as regards Harkesh is:—"That you about the month of April forcibly took Musammat Hardai, a minor girl of about 15 years from the lawful guardianship of her parents, with intent that she may be reduced to illicit intercourse and be sold in marriage to some one." As regards Bhullan the charge runs:—"That you about the month of June, July and a part of August kept Musammat Hardai hiding her identity that she was a girl with the intention of giving her in marriage and raising money from the transaction knowing that she was a minor girl kidnapped by Harkesh." The case was tried with two assessors. Both assessors gave it as their opinion that Harkesh and Bhullan were guilty of the offence specified in the charge. The learned Judge agreed with the assessors. Harkesh and Bhullan are described as Jats, the girl, respecting whom they have been charged, is also a Jat girl. Both the accused have been represented in this Court by learned counsel. Great stress has been laid on the improbability of the story given by the girl. The medical evidence shows that she is a girl under 16 years of age and in considering

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whether the offence charged has been committed by the accused or not the evidence to which we should first turn is not the evidence of the girl but the evidence of her father, Niadar. The offence is primarily an offence against him. I have carefully considered his evidence and I see no reason to doubt it. He tells us that at the time when the girl Hardai disappeared he was ill with fever. The girl was sent one evening to take food to the bullocks. The husband and wife returned shortly after and found the girl had not gone home and had not fed the bullocks. He made inquiries from his neighbours but no one had seen the girl. He was laid up with fever for several days but as soon as he could, he went and searched in the neighbouring villages but could find no trace of his daughter. He tells us that this was not the only occasion upon which he searched for his daughter. He admits that he made no report at the *thana*. Stress is laid upon this as being improbable conduct and not in harmony with the rest of his deposition. But he gives his explanation. He was afraid that if inquiry was made the girl might be spirited off further and he adds that he did fear that the chances of marrying would be spoilt if the news got about. Any one who is aware of a Jat's difficulties and prejudices can easily understand this and I see nothing at all improbable in it. The medical evidence places beyond doubt that the girl at the time the occurrence took place was under 16 years of age. Niadar is supported in his statement by the witness Bija. I have examined his evidence also with much care and it fully supports what Niadar has said. If their statements can be believed, I see no reason why they should not be believed and they have been believed by both the Judge and the assessors who heard the evidence, there is no room for supposing that Niadar was in any way privy to the removal of the girl or that he took no interest in her welfare.

When the girl was found first to the knowledge of Niadar, she had been discovered in a village not far distant from the village in which Niadar resides. There is not one word in the cross-examination which supports that either Niadar or Bija or any of the Jats of Kutta had any cause for quarrel or grudge against either of the accused.

It is admitted by both the accused that the girl Hardai was in their company at about the time when she disappeared and it undoubtedly rests with Harkesh and Bhullan to explain how the girl under these circumstances came into their company. The girl was a female under 16 years of age, her lawful guardian had not consented to her being removed out of his guardianship. As regards the matter of time the story is here taken up by the girl. I agree that what she says cannot be believed. Her account is that she met Harkesh, was assaulted by him, dressed in male clothes, taken and shut up and her hair cut. This is only one of the stories

told by her and it entirely disagrees in important points with the second story which she told. I discard her evidence and put it out of consideration. What I have to see is how the girl passed from the guardianship of Niader to the keeping of Harkesh. It is quite possible that Harkesh came upon her as she was on her way home to do her father's bidding and that she was persuaded by him to accompany him and afterwards to put on male clothes and to work for him. There is evidence put forward for the defence that the girl came wandering dressed in boy's clothes. That she asked for work and was engaged by Harkesh. I agree with the learned Judge and assessors in not believing this story. It is in the first place improbable and in the second place the evidence given is so vague, just when it ought to be definite.

Bearing all this in mind I am satisfied that an offence under section 366 of the Indian Penal Code has been fully proved against Harkesh and I dismiss his appeal.

With reference to Bhullan there is the evidence of his witness Shera which is of great importance. No reason has been shown why Shera's evidence should not be believed. He tells us that he had seen this girl living at Bhora first with Harkesh and then with Bhullan. She was dressed as a boy. People began to suspect she was not a boy but a girl. On his making enquiry as to her sex Hardai said she was a girl. Next morning both the accused and the girl had disappeared. Lohari who is Chaukidar says that as he was going to his field, about the time mentioned, with other people, he saw the girl dressed in boy's clothes and crying. Bhullan and Harkesh were quarrelling close by. Each was saying that he would take away the girl; he asked the girl, thinking it was a boy, but the reply was I am not a boy but a girl. She also said they were taking her about and she feared they would kill her. Upon this Bhullan began to make off but the witness ran after him and arrested him. There is nothing in the cross-examination to show that this witness has any malice against Bhullan. I hold this evidence is enough to show that at the time the girl was being by force compelled to go about with these two accused and their act amounted to abduction. On behalf of the accused I was referred to the case of *Emperor v. Ewaz Ali* (1). That, however, was a different case. The girl in that case was one who was found to have left the guardianship of her husband with intention to remain out of that keeping. It so far differs from the present case and I am not prepared to follow it. I was also referred to the case of *Empress of India v. Sri Lal* (2). That was an absolutely different case and in no way a guide in the present case. The case of *King-Emperor v. Ram Chander* (3), is also quite different, but I need only refer to the concluding words of that judgment to show

(1) [1915] I. L. R., 37 All., 624. (2) [1880] I. L. R., 2 All., 694.

(3) [1914] 12 A. L. J. R., 265.

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that the circumstances of that case and of this case do not agree. The learned Judges say "we need hardly point out that the case would be very different if the girl had been going on a visit or message or any such like occasion." The evidence in the present case satisfies me that the girl was going on a message when she disappeared. The case of *Emperor v. Jitha Nathoo* (1), is in my opinion a case exactly in point. As the learned Judges there point out what have to be considered are the broad features of the case. I hold that a case of abduction with intent that the girl might be compelled to marry against her will or forced or induced to illicit intercourse has been abundantly proved against Bhullan and I dismiss his appeal.

My attention has been called to the case of *Abdur Rahman v. Emperor* (2). With great respect to the learned Judge who decided that case I hold that in that case the evidence showed that Abdur Rahman, if he did any act at all, did an act subsequent to the alleged offence of kidnapping. The Indian Penal Code does not recognize abetment after the main act, and the arguments, therefore, really amount to an *obiter dictum*.

There remains the question of sentence. Looking at all the features of the case I think the sentences have been unnecessarily severe.

I allow the appeal, so far that I reduce the sentences passed to a sentence of three years' rigorous imprisonment, both in the case of Harkesh and Bhullan; the sentences served by them will be considered part of this sentence. So far and no further I allow their appeals.

Sentences reduced.

(1) [1904] 6 Bom. L. R., 785

(2) [1916] 14 A. L. J. R., 765.

DEOKI NANDAN (*Plaintiff*)*versus*GAPUA (*Defendant*)*

CIVIL

1918

March, 19.

TUDBALL, J.
ABDUL
RAOOF, J.

Limitation Act (IX of 1908), sch I, art. 120—Loan on security of moveable property—Suit to enforce payment of the money charged thereon—Personal decree not sought for.

Where a plaintiff who had lent money on the security of eight black buffaloes sought by his suit to enforce the payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, *held* that the suit was not barred by limitation, it being governed by article 120 of the first schedule to the Limitation Act.

SECOND APPEAL from a decree of D. R. LYLE, Esq., District Judge of Agra, confirming a decree of Babu Chater Behari Lal, Munsif.

The plaintiff sued on the basis of a bond, dated 6th September, 1911, for the recovery of the amount due thereon by enforcement of the hypothecation lien against eight buffaloes which had been pledged as security under the bond. The suit was instituted on 20th December, 1915. One of the pleas raised by the defendant was that of limitation. Both the courts below accepted this plea and dismissed the suit, holding that Article 80 of the Limitation Act applied. The plaintiff appealed to the High Court.

Narmadeshwar Upadhya, (with *Surendra Nath Sen*), for the appellant, submitted that the case was governed not by Article 80 but by Article 120 of the Limitation Act. The relief sought by the plaintiff was not a mere simple money decree, but the recovery of money charged on moveable property by enforcement of the hypothecation. Article 80 did not contemplate a suit like this. The only article applicable was Article 120. The following cases were relied on :

Madan Mohan v. Kanhai Lal, [1895] I. L. R., 17 All., 284 ;

Nim Chand v. Jagabundhu, [1894] I. L. R., 22 Cal., 21 ;

Mahalinga Nadar v. Ganapathi, [1902] I. L. R., 27 Mad., 528. F. B.

The lower appellate court had relied upon the case of

Villa Kamti v. Kalekara, [1887] I. L. R. 11 Mad., 153,

which was practically overruled by the Full Bench case in I. L. R., 27 Mad., 528.

* S. A. No. 1097 of 1916.

CIVIL

1918

DEOKI

NANDAN

v.

GAPUA.

Sital Prasad Ghosh, (for *Narayan Prasad Asthana*), for the respondent, submitted that the cases relied on by the appellant were cases in which jewelry or other such property had been pawned and were in the possession of the creditor, and so the creditor was able to enforce his lien against it; whereas in the present case, the pledged property consisting of eight head of cattle, without specific description, and not in the creditor's possession, a hypothecation decree, if passed, would not be executable. Practically there would only be a simple money decree.

Secondly, there was nothing in Article 80 itself to show that a suit like the present was beyond its purview. None of the cases cited by the appellant gave any reasons why Article 80 could not be applied to suits upon bonds in which moveable property was pledged without possession. That article covered all cases of bonds which were not expressly provided for by any other article. Unless it could be said that the present suit was not a suit on a bond at all, Article 80 was applicable, and therefore Article 120 could not be applied.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—The question raised in this appeal is one of limitation. The plaintiff sued on the basis of a deed of the 6th of September, 1911, to recover from the defendant the sum of Rs. 283 principal and Rs. 447 interest total Rs. 730 together with costs and interest *pendente lite* and for the future, by enforcement of the hypothecation lien against eight black buffaloes. The defendant raised several pleas in defence, among them was the plea that the suit was barred by limitation. The court of first instance found that the bond had been executed and that the money was due but it held that the suit was barred by limitation and on that ground it dismissed it. The plaintiff appealed. The lower appellate court held that the suit was one falling under article 80 of the second Schedule of the Limitation Act, which allowed a period of three years from the date on which the bond became payable, and as the suit had been brought in the year 1915, it dismissed it as being barred by time. The plea taken before us is that under the rulings of this Court, of the Calcutta High Court, and also of the Madras High Court the article applicable to the present suit is article 120 of the second Schedule and attention is called to the rulings in *Mahalinga Nadar v. Ganapathi* (1), *Madan Mohan Lal v. Kanhai Lal* (2), and *Nim Chand Babu v. Jogabundhu Ghose* (3). The ruling in XXII Calcutta was quoted before the lower appellate court, but it preferred to follow the ruling in *Vitla Kamti v. Kalekara* (4). Apparently its attention was not called to the fact that this had been overruled in the case of *Mahalinga Nadar v. Ganapathi Subbien* (1). Also the ruling of this Court appears not to have been

(1) [1902] I. L. R. 27 Mad., 528.

(2) [1895] I. L. R. 17 All., 284.

(3) [1894] I. L. R. 22 Cal., 21.

(4) [1887] I. L. R. 11 Mad., 153.

quoted before it. We think that these rulings are applicable to the facts of the present case, for it is clear that the plaintiff does not seek by his suit to get a personal decree against the defendant, but only to enforce the payment of the money charged upon the buffaloes which were pledged as security. A claim against the person of the defendant is clearly barred by limitation, but the decision of this point is not quite sufficient for the decision of the suit. It is impossible to give the plaintiff a decree for his money recoverable by the sale of any eight buffaloes. It is by no means clear that these eight buffaloes are still in existence. It is clear that the only property which can be put to sale is the property which was actually hypothecated on the 6th of September, 1911. Before giving the plaintiff a decree we must have a finding from the court below on the following issue:—

Are the eight buffaloes which were hypothecated on the 6th of September, 1911, still in possession of the defendant? If so, a clear and distinct description of the animals must be given so as to enable the court which executes the decree to execute it properly.

Issue remitted.

B. K. M.

CIVIL
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1918
—
DEOKI
NANDAN
v
GAPUA.
—
Tudball, J.

BALGOBIND RAI AND OTHERS (*Petitioners*)

versus

SHEORAJ RAI (*Opposite party.*)*

Decree—Amendment, application for—Suit for sale—Decree passed by Munsif—Appeal by defendant—Munsif's decree affirmed.

In a suit for sale on a mortgage the Munsiff granted a decree for the claim as “proved.” The defendant appealed and the decree of the Munsiff was affirmed. A decree absolute followed. The defendant then made an application to the appellate court for the amendment of the decree, and it was granted:—*Held* that the court was wrong in granting the application inasmuch as the defendant should have shown that the judgment of the appellate court was at variance with its decree and not that the judgment of the Munsiff was at variance with his decree.

CIVIL REVISION against an order of BABU BANKE BHARI LAL, District Judge of Azamgarh.

Peary Lal Banerji, for the appellant.

Kamla Kant Varma, for the respondent.

*Cr. Rev. No. 206 of 1917.]

CIVIL
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1918
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April, 25.
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RICHARDS,
O. J.
BANERJI, J.

CIVIL

1918

BALGOBIND

RAI

v.

SHEORAJ

RAI.

Richards,

C. J.

The judgment of the Court was delivered by

RICHARDS, C. J.—This application in revision arises under the following circumstances. In the year 1905 a suit was brought on foot of a mortgage. The plaintiff claimed the principal sum, interests up to date of suit and interest *pendente lite* and future interest. The Munsif decreed the plaintiff's claim "as proved" with costs and directed a decree to be prepared in the terms of Section 88 of the Transfer of Property Act. The decree was drawn up and it awarded the plaintiff interest at the contractual rate up to the institution of the suit and up to the date fixed for payment and future interest at 6 per cent per annum. The defendant appealed. He took no exception to any alleged variance between the judgment of the Munsif and the decree. The District Judge dismissed the appeal. The decree was made absolute in the year 1906. The decree was put into execution from time to time and partially executed. The present application was made in May 1917, to the District Judge to bring the decree into accordance with the judgment. The learned Judge granted the application and amended the decree by ordering the provision for future interest and interest *pendente lite* to be debited. It is against this order that the present application is made. On the general merits it seems to have been a very belated application. As a matter of fact the decree only awarded the plaintiff what he was legally entitled to. The judgment of the Munsif was certainly capable of being read as decreeing all that the plaintiff claimed and if this were the proper construction of the judgment there would have been no variance between it and the decree. But the application for amendment of the decree had to be made to the District Judge. Now the District Judge's judgment was to uphold the decree of the Munsif and to dismiss the appeal. It was necessary for the applicant to show, not a variance between the judgment of the Munsif and the decree of the Munsif but a variance between the judgment of the District Judge and the decree of the District Judge. It is quite clear that there was no variance of any kind between the judgment and the decree of the District Judge. We hold that the court below had no jurisdiction to amend the decree. We accordingly set aside its order and dismiss the application for amendment, dated the 17th of May, 1917, with costs in both courts. Costs in this Court will include fees on the higher scale.

Application dismissed.

SAHDEO RAI

versus

EMPEROR*

CRIMINAL

1918

April, 28.

KNOX, J.

Penal Code (Act XLV of 1860), section 173—Tender of a summons—Refusal to receive—Whether an offence.

Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under section 173 of the Indian Penal Code.

CRIMINAL REFERENCE made by G. C. BADHWAR ESQ., Sessions Judge of Ghazipur.

The parties were not represented.

The facts and circumstances are stated as follows in the order of reference by the Sessions Judge:—

“This is an application for revision of the order, dated 7th of February, 1918, of Maulvi Mohammad Wajib, Magistrate, 1st class of Ballia, who convicted Sahdeo Rai under section 173, Indian Penal Code and sentenced him to pay a fine of Rs. 10, on the ground that on the 10th of December, 1917, he had refused to take the notice which Mahadeo Ram constable wanted to serve on him. In the Deputy Magistrate's opinion this act of Sahdeo Rai amounted to intentional prevention of service on himself. It seems to me that this is not the object of section 173, Indian Penal Code. The refusal to receive a summons is not an offence under section 173, if the actual delivery was not legally necessary to complete its service. Under the Criminal Procedure Code the mere tender of a summons is sufficient and a refusal to receive does not expose one to the penalty of section 173 (1). I cannot agree with the Deputy Magistrate that the accused intentionally prevented the service of the notice on himself by refusing to receive it. The Deputy Magistrate seems to have misconceived the scope of section 173. I would, therefore, report this case under section 438, Criminal Procedure Code, to the Hon'ble High Court with the recommendation that the order of the Deputy Magistrate above referred to be set aside as illegal and that the applicant be acquitted of the offence under section 173. The fine, if already paid, may also be ordered to be refunded to the applicant. Before the record is submitted to the High Court the Magistrate will be asked to furnish an explanation.”

The following judgment was delivered by

KNOX, J.—The reference made has been properly made. No offence under section 173 of the Indian Penal Code has been committed. I set aside the conviction and direct that the fine or any part of it which has been paid be refunded. The sentence of imprisonment has been served.

Knox, J.

Reference accepted.

* Cr. Ref. No. 237 of 1918.

(1) [1882] I. L. R., 5 Mad., 199.

CIVIL

1918

April 26.

RICHARDS,
C. J.
BANERJI, J.

ALAMDAR HUSAIN (*Plaintiff*)*versus*MOTI RAM AND OTHERS (*Defendants*)**Sale—Non-payment of part or whole of consideration—Effect thereof.*

Where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to the property should pass the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. The non-passing of the consideration may often be very strong evidence that the deed was not intended to operate.

SECOND APPEAL from a decree of SYED MUHAMMAD ALI, Esq., District Judge of Moradabad, confirming a decree of Babu Raj Behari Lal, Munsif.

S. M. Sulaiman (for *Iqbal Akmad*), for the appellant.

Peary Lal Banerji, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit brought under the following circumstances. Defendants 2 and 3 had sold some property to Moti Ram, defendant No. 1. As the result of that transaction Moti Ram owed the defendants 2 and 3 the sum of Rs. 800. Defendants 2 and 3 sold their rights to the plaintiff by a deed, dated the 19th of May, 1914. The consideration as set out in the sale deed was as follows:—Rs. 188 8, already due by the ladies to the plaintiff, Rs. 150 paid before the Registrar and a covenant to pay the balance of the purchase money (Rs. 750) by monthly instalments of Rs. 20. The plaintiff instituted the present suit and he made parties thereto the original debtor, Moti Ram, and the two ladies. Moti Ram pleaded that he had already paid the debt. The ladies pleaded that they had not got the consideration which the plaintiff agreed to give them. It is true that they alleged in the written statement that the deed was “fictitious,” but it is equally clear from their evidence and from the details of their pleas that they never intended to allege that the deed was never intended to be acted upon or that they did not intend to transfer the right to sue Moti Ram to the plaintiff. On the contrary it is quite clear from the evidence of the ladies themselves that they did intend that the right to sue should pass to the plaintiff. Their real allegation was

that the plaintiff had not fulfilled his bargain with them. The courts below have found that Moti Ram never paid the ladies. There was also a finding by the courts that the consideration for the assignment had not been paid by the plaintiff to the ladies. This finding was arrived at in this way. The court found that the Rs. 188-8 was never due. If this finding be correct it would rather go to show that the price which the plaintiff is supposed to have given to the ladies was intentionally inflated by both sides. This would not be at all an unreasonable view to take and it is supported by some remarks which the learned District Judge makes in the course of his judgment. He seems to consider that Rs. 750 would have been a very large sum for the plaintiff to pay for the right to recover Rs. 800 from Moti Ram. Rs. 150 was really paid before the Registrar but the ladies say and their evidence was believed by the District Judge that immediately after the payment of the Rs. 150 the plaintiff said to the ladies that he wanted that money to commence the litigation against Moti Ram. This would really mean that the Rs. 150 part of the consideration was paid but was immediately borrowed again by the plaintiff. With regard to the rest of the consideration it was not intended by the terms of the deed that it should be paid at once. But there was a covenant that the balance should be paid by monthly instalments of Rs. 20. We may at once remark that where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to the property should pass, the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer "fictitious". The non-passing of consideration may often be very strong evidence that the deed was not intended to operate. But in the present case upon the pleas of the ladies themselves and on their evidence it is absolutely clear that the intention was that the right to sue Moti Ram for the Rs. 800 should pass to the plaintiff. The very evidence which was given with regard to the Rs. 150 shows this because the ladies themselves say that the plaintiff told them he wanted the Rs. 150 to bring a suit. Both the courts below have dismissed the suit against Moti Ram. Having regard to the finding that Moti Ram owed the money and that he had not repaid the money to the ladies this decision seems to have been a very unsatisfactory one to every one concerned except to Moti Ram. The ladies assuming that they were defrauded to some extent by the plaintiff, would get absolutely nothing. We think upon the facts as found by the court below, the plaintiff was clearly entitled to a decree for the full amount claimed against Moti Ram. Defendants 2 and 3 have not appealed but even in their absence we think, we can give some effect to the finding of the court below, namely, that they did not receive the consideration. We think that they should have a lien or charge on the amount which the plaintiff realises under the decree which we intend to pass for the sum of Rs. 600.

CIVIL
 1918
 ALAMDAR
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 Richards,
 C. J.

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 Richards,
 C. J.

We allow the appeal, set aside the decree of both the courts below, grant the plaintiff a decree against Moti Ram for the amount claimed including interest up to the date of the decree at the rate claimed, with further interest from the date of the decree to the date of realisation at 6 per cent per annum on Rs. 800, the principal amount claimed and costs. We allow costs in all courts including in this Court fees on the higher scale. We direct that the defendants 2 and 3 shall have a lien or charge against the plaintiff for the sum of Rs. 600 on the amount realised by the plaintiff from Moti Ram, that is, when the amount is realised it will be allocated in the following way, namely in the first place upon payment of the plaintiff's costs and in the next place in payment to the defendants 2 and 3 to the extent of Rs. 600 and the balance to the plaintiff.

Appeal allowed.

CIVIL
 1918
 April, 25.
 RICHARDS,
 C. J.
 BANERJI, J.

MOHNI (*Plaintiff*)
versus
 BAIJ NATH AND OTHERS (*Defendants*)*
Provincial Insolvency Act (III of 1907), section 22—Insolvency—Property taken by Receiver as insolvent's property—Objection of third person claiming title thereto—Court's decision that property belongs to insolvent—Suit by third person—Suit maintainable.

Where in a suit a plaintiff does not complain of any act of the Receiver in insolvency, but complains that the court executing the decree, held by a certain person against certain insolvents, disallowed her objection and decided that the property attached belonged to the insolvents and not to her, held that the suit is not barred by section 22 of the Provincial Insolvency Act.

SECOND APPEAL from a decree of PANDIT DURGA DATT JOSHI, 1st Additional District Judge of Aligarh, confirming a decree of Babu Sudershan Dayal, Second Additional Subordinate Judge.

Narain Prasad Asthana, for the appellant.

B. E. O'Connor (with him *Peary Lal Banerji* and *Panna Lal*), for the respondent.

The judgment of the Court was delivered by

Richards,
 C. J.

RICHARDS, C. J.—This appeal arises out of a suit for a declaration of right. The plaintiff claimed a certain house as being her property. The house had been attached by one Baij Nath in execution of a decree against Salig Ram and Sagar Mal. Salig Ram and

Sagar Mal were declared insolvents and any property they had vested in the Receiver. The Musammat as already stated claimed the property as being hers and said that it did not belong to Salig Ram or to Sagar Mal. Her objection having been disallowed she was clearly entitled to bring a suit for a declaration of her title and a necessary party to that suit would be the Receiver in insolvency who represented the claims (if any) of Salig Ram and Sagar Mal and their creditors. Both the courts below have dismissed the suit as being barred by the provisions of section 22 of the Provincial Insolvency Act. That section is as follows — "If the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the Receiver, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just." The plaintiff in the present case was not complaining of any act or decision of the Receiver in the insolvency. She was complaining that the court which was executing the decree of Baij Nath had disallowed her objection and decided that the property was the property of the insolvents. It seems to us that section 22 does not apply under the circumstances of the present case [See *Jhunkoo Lal v. Peary Lal*(¹)] The lower appellate court has relied upon the case of *Mul Chand v. Murari Lal* (²). The facts there were quite different. The property had not been attached in execution of a decree but had been taken possession of by the Receiver as being property belonging to the bankrupt.

We allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal and deal with it according to law. Costs here and heretofore will be costs in the cause. Costs in this Court will include fees on the higher scale.

Cause remanded.

(1) [1916] 15 A. L. J. R., 49, 56.

(2) [1913] 1. L. R., 36 All., 8.

CIVIL
1918
MOHNI
v.
BALJ NATH.
Richards,
C. J.

CRIMINAL

1918

April, 13.

BANERJI, J.

JAI NARAIN LAL AND OTHERS

versus

EMPEROR *

Criminal Procedure Code (Act V of 1898), section 435—Revision—High Court, powers of.

Eight persons were charged with offences under various sections of the Indian Penal Code. Three of the accused had not been arrested when the proceedings were initiated but they surrendered at a late stage. The other five accused were acquitted by the trying Magistrate. The case of the three accused who had surrendered themselves later rested on the same evidence, and on the trying Magistrate asking for orders from the District Magistrate as to whether the prosecution against them should be continued or not, the latter ordered the continuance of the proceedings and transferred the case to another Magistrate, although it was held that the prosecution could not succeed upon the evidence on the record:—*Held* that the High Court was competent in revision to set aside the order of the District Magistrate and quash the proceedings. *T. N. Chadha v. Emperor*, [1916] 14 A. L. J. R., 851, followed.

CRIMINAL REVISION from an order of J. C. NELSON, Esq., Magistrate, first class of Etawah.

C. Dillon and J. M. Banerji, for the applicants.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—This is an application for revision of an order of the District Magistrate directing the prosecution of the three applicants. It appears that a complaint was made against the three applicants and five other persons charging them with offences under sections 147, 325 and 452, Indian Penal Code. The case was tried by a Magistrate of the first class against five of the accused. The three applicants Jai Narain, Kunj Behari and Sanwalia had not been arrested when the proceedings were commenced. At a late stage of the proceedings they surrendered but the Magistrate did not place them on their trial. The Magistrate, however, considered the evidence for the prosecution, considered all the circumstances of the case, inspected the locality and came to the conclusion that the prosecution had hopelessly failed to establish the charge made by the complainant against the accused. The case of *Jai Narain* and *Kunj Behari* was exactly the same as that against some of the other accused. The same charge was brought against Sanwalia also, but he was not named in the first report. After acquitting the other accused the Magistrate who had tried the case made a report to the District Magistrate in which he said that it was useless to proceed against the applicants after what he had said in his judgment, but he asked for orders as to whether the prosecution should be continued against these persons. The Magistrate of the

* Cr. Rev. No. 125 of 1918,

district in his order says that the evidence against the applicants could only be the same as that produced against the other accused and that as that evidence was not credible, the prosecution of the applicants on the same evidence would in all probability be futile. He also remarked that it was doubtful whether any conviction would be likely to succeed. Still he ordered the continuance of the proceedings against these accused and he directed the case to be transferred to another Magistrate for trial. Against this order the present application has been filed. Having regard to the judgment of the trial Magistrate in the case against the other accused and to the observations of the learned District Magistrate to which I have referred it is clear that no useful purpose will be served by the continuance of proceedings against the applicants. Under these circumstances I do not think the prosecution of the applicants should be proceeded with. That this Court can interfere in a matter like this under section 435 of the Code of Criminal Procedure appears from the judgment of this Court in *T. N. Chadha v. Emperor* (1), and the case referred to therein. I accordingly allow the application and set aside the order of the District Magistrate, dated the 2nd of February, 1918, directing the prosecution of the applicants.

CRIMINAL

1918

JAI NARAIN

LAL

v

EMPEROR.

*Banerji, J.**Application allowed.*

(1) [1916] 14 A. L. J. R., 851.

BHUP SINGH AND OTHERS (*Plaintiffs*)*versus*JAI RAM AND OTHERS (*Defendants*)*

CIVIL

1918

Agra Tenancy Act (II of 1901), section 22—Occupancy holding—Succession.

April, 25.

Several persons were entitled to an occupancy holding. The holding as between the zemindar and the persons entitled thereto was one holding of which the rent was jointly paid. One Bhim Sen was in possession of a three-eighths share. The plaintiffs who were the nearest reversioners of Bhim Sen brought a suit against one Roshan Singh to recover possession thereof. Bhim Sen died before the Tenancy Act came into operation and was succeeded by his widow, who died after the Act had come into force. The plaintiffs cultivated the "holding" jointly with Bhim Sen, but they did not cultivate the particular plots constituting Bhim Sen's share. The suit was dismissed on the ground that the plaintiffs did not share in the cultivation with Bhim Sen, of his plots:—*Held* that section 22 of the Tenancy Act did not apply, and the plaintiffs were entitled to succeed.

RICHARDS,

O. J.

BANERJI, J.

SECOND APPEAL from a decree of W. F. KIRTON, Esq., Second Additional Judge of Aligarh, confirming a decree of Babu Pyare Lal, Munsif of Koil.

B. E. O'Connor (with him *Pannalal*), for the appellants.

Baldev Ram Dave, for the respondents.

* S. A. No. 904 of 1916.

CIVIL

1918

BHUP SINGH

v.

JAI RAM.

Richards,

C. J.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal comes out of a suit in which the plaintiffs sought to recover certain shares in what they alleged to be an occupancy holding. A pedigree will be found in paragraph 6 of the plaint. The common ancestor was a man called Girdhari. He had a number of sons and amongst them one Durjan Singh. Durjan Singh had a son named Bhim Sen who left a widow Musammat Jiwalia but no children. She died some 9 months ago before the present suit was instituted and it is to recover a $\frac{3}{4}$ ths share of what Bhim Sen held in a certain holding (*viz.*, one-fourth) that the present suit has been brought. One of the defendants Roshan Singh alleged that he had been adopted by Musammat Jiwalia with authority from Bhim Sen. It has been found by both the courts below that this is not true and if the property was ordinary immoveable property the plaintiffs would undoubtedly have been entitled to succeed as the nearest reversioners. In the plaint the plaintiffs alleged that there was one large holding in two villages, that the descendants of Girdhari had remained in possession thereof but that it was still a joint holding, the rent of which was jointly paid to the zamindars. Roshan Singh admitted that the holding in the two villages was entered in a joint *Khata* as alleged in paragraph 2 but denied the rest of the paragraph. The 14th paragraph of the written statement is as follows:—Although the whole *Khata* is recorded as joint in papers yet all the persons are in separate possession of their shares in the cultivatory holding. The zamindar has admitted the contesting defendant to be in possession of the cultivatory holding and to be adopted son." No issue was framed in either of the courts below as to whether or not there was only one occupancy holding. But as we have shown it was specifically alleged in the plaint that there was but one occupancy holding, that is to say, that all the lands in the two villages constituted one holding as between the landlord and the several persons who were entitled to the occupancy holding, and that the rent was a joint one. These allegations were certainly not specifically denied in the written statement of Roshan. It is admitted that the land is recorded as one holding and the papers on the record show that it is recorded as a holding at one joint rent. The old and the present Patwari was also examined and their evidence goes to show that the holding is a joint holding although the different persons in possession cultivated at different times separate portions. We hold that there was only one holding. We assume for the purposes of our decision that Bhim Sen was in separate possession during his life-time of certain specific portions of the holding and that after his death Musammat Jiwalia continued to be in separate possession of that portion of the holding which Bhim Sen had been in possession of during his life-time. We also accept as we are bound to do the finding of the court below that the plaintiffs are the nearest reversioners and that Roshan Singh was not the adopted son of Bhim

Sen. The question which we have to decide is whether the plaintiffs were entitled to a decree under these circumstances. The first court decided against the plaintiff because it thought that Musammat Jiwalia having come into possession before the passing of the Tenancy Act had thereby acquired an absolute title to the portion of the occupancy holding in possession of which Bhim Sen was before his death. This is not clearly correct. If Bhim Sen had been a sole tenant of an occupancy holding and died before the passing of the Act his widow would have succeeded him under the provisions of that Act but on her death the succession would be regulated by the provisions of the present Tenancy Act. The lower appellate court decided against the plaintiffs upon the ground that the plaintiffs being collateral heirs were not entitled because they did not share in the cultivation of the specific plots held by Bhim Sen and after his death by Musammat Jiwalia. When a Hindu dies the succession to his property is regulated by the ordinary rules of Hindu Law, save so far as those rules have been modified by the provisions of some Act. The only provision which could prevent the plaintiffs being entitled to succeed upon the death of Musammat Jiwalia is section 22 of the present Tenancy Act. Section 22 allows a collateral heir to succeed failing lineal descendants in the male line and other heirs as mentioned in the section. But it contains a proviso that no collateral relative shall be entitled to inherit who did not share in the cultivation of the holding at the time of the tenant's death. If this section applies at all to the circumstances of the present case, then it is clear that while the plaintiffs did not share in the cultivation of the specific plots held by Bhim Sen they did share in the cultivation of the "holding" in which Bhim Sen had an interest. "Holding" in the proviso clearly means *holding* as that expression is defined in the Tenancy Act. If we were asked to hold and did hold that section 22 only applies while the question arises as to the succession of an entire occupancy holding then the section not applying to the circumstances of the present case, the ordinary rules of Hindu Law would prevail and the plaintiffs would be entitled to succeed.

We allow the appeal, set aside the decrees of both the courts below and give the plaintiffs a decree for possession of the share claimed. We send back the case to the court of first instance directing it to make an enquiry as to mesne profits up to the time of the institution of the suit and also up to the date of delivery of possession as mentioned in Order XX, rule 12. The court below will then make a final decree as to the amount of the profits. The respondents must pay the costs in all courts including in this Court, fees on the higher scale.

Appeal allowed.

CIVIL

1918

BHUP, SINGH

v.

JAI RAM

Richardson,
C. J.

CIVIL

1918

April, 30.

BANERJI, J.
ABDUL
RAOOF, J.HINGO SINGH AND OTHERS (*Defendants*)*versus*JHURI SINGH AND OTHERS (*Plaintiffs*)*

Code of Civil Procedure (Act V of 1908), Order IX, rules 3, 6—One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred.

On the date fixed for the hearing of a suit the defendants and their pleader did not appear. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present. He was also the general attorney of the other plaintiffs. The court dismissed the suit for "want of prosecution." The plaintiffs thereupon applied to have the dismissal set aside, but the application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit:—*Held* that inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non-appearing plaintiffs the suit must be regarded as having been dismissed on the merits, and not under Order 9, rule 3 of the Code of Civil Procedure and a second suit on the same cause of action was therefore barred.

FIRST APPEAL from an order of BABU SEKHAR NATH BANERJI, Subordinate Judge of Jaunpur.

S. M. Sulaiman, for the appellants.

M. L. Agarwala, for the respondents.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This is a somewhat unfortunate case. The facts which have given rise to it are as follows. The plaintiffs, who are six in number, brought a suit for the same relief which they have claimed in the present suit. That case was taken up for hearing and one of the plaintiffs was examined. The parties then informed the court that they would abide by the deposition of a particular person. A date was fixed and on that date the person named appeared but refused to make any statement. Thereupon the case was postponed and the 15th of September, 1914 was fixed for hearing and the parties were ordered to produce their evidence on that date. On the 15th of September, 1914, when the case was called on for hearing the defendants or their pleader did not appear. The plaintiffs' pleader also did not appear. One of the plaintiffs

* F. A. F. O. No. 113 of 1917.

Jhuri Singh was present but he did not "prosecute the suit" by which we understand the trial court to mean, that he adduced no evidence. Thereupon the court made an order dismissing the suit "for want of prosecution" (*Ba-adam-pairawi*). The plaintiffs applied to have this dismissal set aside but their application was refused on the ground that their remedy was a separate suit. They thereupon instituted the present suit for the same reliefs. The court of first instance dismissed it on the ground that the suit was not maintainable in view of the dismissal of the former suit. It held that the dismissal must be deemed to be a dismissal on the merits under Order 17, rule 3 of the Code of Civil Procedure and therefore a subsequent suit could not be maintained. This decision of the court of first instance was reversed by the lower appellate court which was of opinion that Order 17, rule 2 of the Code of Civil Procedure was applicable to the case and that the suit was maintainable. That court accordingly remanded the case to the court of first instance. From this order of remand the present appeal has been filed. The question we have to consider is whether under the circumstances mentioned above, a second suit is maintainable. It is clear that on the date which was fixed for hearing of the former suit namely on the 15th of September, 1914, what the court had to do when it took up the case, was to ascertain whether the parties were present and which of them. After this the court had to take action under the provisions of Order 9. If neither party was present it had to dismiss the suit under rule 3 of that Order. In that case the remedy of the plaintiffs would be either to apply to have the suit restored or to bring a fresh suit on the same cause of action, if not barred by limitation. If the plaintiffs were present and the defendants were absent, the court had to proceed under rule 6 and hear the case *ex-parte*. If the plaintiffs were absent and the defendants were present, it had to proceed under rule 8 and decide the case accordingly. In the present case one of the plaintiffs Jhuri Singh was, as stated above, present and this is also stated in the judgment of the court which heard the first suit. It has been found in this suit and the finding was never impugned, that he was the general attorney of all the other plaintiffs. Therefore we must take it that all the plaintiffs were present before the court, through Jhuri Singh, who appeared for himself and represented the other plaintiffs as their general attorney. As the plaintiffs were present the court could not take action under rule 3 and the only rule under which it could proceed was rule 6. In proceeding under rule 6 it had to consider whether the plaintiff's case was proved and it could either decree the claim or dismiss it. In the present case the court dismissed the claim. We must hold that the case was dismissed under Order 9, rule 6, because the plaintiffs did not satisfy the court by the evidence on the record or any evidence which they might have produced that their case was a true one. The court, it is true, did not say that it dismissed the

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suit because no evidence was adduced which satisfied the court that the claim was a true one, but the court said that there was an absence of prosecution. These words can only be understood as meaning that the plaintiffs did nothing to support their claim, that is to say, that there was no evidence which established the claim. The court's action could only be under Order 17, rule 3, that is to say, the court decided the case upon the materials before it. We are unable to hold that under these circumstances the suit must be deemed to have been dismissed under Order 17, rule 2, read with Order 9, rule 3. It was not a case in which the plaintiffs were absent nor was it a case in which the plaintiffs' pleader was present but had no instructions. If rule 3 of Order 9 had applied the plaintiffs certainly would have been entitled to bring a first suit. As that rule, under the circumstances of the present case, could not apply, the dismissal can only be regarded as one on the merits and thus bars the institution of a fresh suit. It is true that when an application was made to the court to restore the suit to its original number, the court seemed to think that the dismissal was one under Order 9, rule 3, but as has already been pointed out that dismissal as a matter of fact was not and could not be one under Order 9, rule 3, and therefore no application could be made under rule 4 of that Order. We think that the view taken by the court of first instance was right. We accordingly allow the appeal, set aside the order of the court below and restore the decree of the court of first instance with costs.

Appeal allowed.

GUMANAN AND OTHERS (*Defendants*)

versus

JAHANGIRA (*Plaintiff*).^{*}

Hindu widow—Gift—Suit by remote reversioner—Declaration that gift invalid—Minority of presumptive reversioner—Suit not maintainable.

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March, 22.

PIGGOTT, J.
WALSH, J.

The right to maintain a suit, that a gift made by a Hindu widow in possession of her husband's estate as heir is not binding upon the heirs of her husband, does not belong to any one having a possibility of succeeding to the estate of inheritance held by the widow for her life; as a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir if those nearer in the line of succession, are in collusion with the widow or have precluded themselves from interfering. The minority of the presumptive reversioner does not enable a remoter heir to bring such a suit.

FIRST APPEAL from a decree of BABU MAN MOHAN SANYAL, Additional Subordinate Judge of Meerut.

The facts of the case are fully set forth in the judgment; briefly stated they were as follows:—On the death of one Tota, his widow succeeded to a life estate. She executed a deed of gift of part of her husband's estate in favour of her children by a second marriage. Thereupon, a male reversioner brought a suit for a declaration that the gift would not be binding after the death of the widow. One of the pleas in defence was that Tota had left a daughter who had an infant son, and that during the life time of the daughter and the daughter's son the plaintiff would not be the nearest reversioner to the estate of Tota and consequently would not be entitled to bring the suit. The plaintiff had made no mention of the daughter or her son in the plaint, and denied that she was Tota's daughter, but the court found against him on this point. It was also found that but for the daughter and her son the plaintiff and one Tulshi, who was the second husband of the widow, would be the nearest reversioners. The lower court held that when a female or a minor intervened between the widow and a remote reversioner the latter was entitled to bring the suit, and relying on the cases in I. L. R., 34 All., 207 and 4 I. C., 957 decreed the suit. The defendants appealed.

Nehal Chand, for the appellants, contended that the plaintiff was too remote a reversioner, and a suit by him was not maintainable, except on proof that the nearer reversioners had colluded

^{*} F. A. No. 220 of 1916.

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with the widow or concurred in the alienation, or had refused to institute the suit or precluded themselves from doing so.

Rani Anand Kumoor v. The Court of Wards [1880] I. L. R., 6 Cal., 764, P. C.

The circumstances and the manner in which the present suit was brought were similar to those of the case of

Meghu Ezi v. Ram Khe'awaz, [1913] 11 A. L. J. R., 382, and the decision in that case applied fully to the present.

The lower court had misapplied the case of

Raja Dasi v. Umed Singh, [1912] I. L. R., 34 All., 207,

there the gift was made to the daughter's son himself, who was the nearest male reversioner, and so the case came within the exceptions mentioned in the Privy Council case. In the recent case of

Saudagar Singh v. Pardeep Narayan, [1917] 13 A. L. J. R., 61, P. C., the daughter, who was childless and widowed, had joined in making the alienation, and the suit was by some of the nearest class of reversioners.

Sheo Dihal Sinha, for the respondent, submitted that, as has been held in the case of

Raja Dasi v. Umed Singh, [1912] I. L. R., 34 All., 207,

as well as in some other cases, referred therein, of the Allahabad High Court, a remoter reversioner could bring such a suit where the next reversioner was a female having only a life interest. The existence of the daughter was, therefore, no hindrance to the plaintiff's bringing the present suit. The grounds of collusion *etc.*, mentioned in the Privy Council case in I. L. R., 6 Cal., 764 were not exhaustive.

The daughter's son was a minor, under the natural guardianship of his mother. The donees were half brothers of this daughter, and presumably there was collusion or acquiescence on her part. Under these circumstances the next set of reversioners should be allowed to bring the suit.

On the merits the suit was unanswerable, as the transfer was a mere gift. The question was whether it should be defeated by reason of its having been brought by a reversioner who was next in step to the daughter's son.

Neelal Chand, was not heard in reply.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This is an appeal by the defendants in a suit for a declaration which arose on the following state of facts. One Tota died, leaving him surviving a widow Musammat Gumanan and a

daughter named Musammat Khajani. This daughter has been married, presumably since her father's death, and is now the mother of an infant son named Surju. Before the birth of the daughter's son, the nearest reversioners under the Hindu Law, after the life estate of the widow and of the daughter, were two persons named Tulshi and Jahangira. They are distant male agnates, according to the pedigree set up in the plaint, and are equal in degree, their grandfathers having been own brothers. Musammat Gumanan has contracted a second marriage (the parties belong to the Jat caste) with Tulshi, one of the aforesaid reversioners, and has borne him children. She has now executed a deed of gift of one-half of her late husband's estate in favour of her sons by Tulshi. Jahangira brought the suit out of which this appeal arises for a declaration that this alienation will not bind him after the death of the widow. In the plaint as filed the existence of Musammat Khajani and her son, Surju, was simply ignored. The defendants made it a part of their defence that even after the life-estates of the widow and the daughter came to an end, the next heir to the estate would be Surju, son of Khajani, and neither the plaintiff Jahangira nor his alleged joint reversioner Tulshi. The parties were at issue upon various questions of fact in the court below. On the one hand the defendants put the plaintiff to proof of the pedigree set up by him. On the other hand the defendants alleged that Musammat Khajani was not the daughter of Tota at all. It seems to have been suggested that she was a daughter of Tulshi by a former wife, whom he had married before he contracted his union with Musammat Gumanan. These questions of fact have been determined by the learned Subordinate Judge in the sense already stated, and the parties before this Court are not prepared to contest these findings of fact. The appeal is based therefore upon a single question of law, the contention being that Jahangira should not be permitted to maintain the suit, seeing that he is not the presumptive reversioner to the estate of Tota in the presence of the daughter's son, Surju. Since the decision of their Lordships of the Privy Council in *Rani Anand Kunwar v. The Court of Wards* (1), this question of law may be regarded as having been definitely settled. The right to maintain a suit of this sort does not belong to any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life. As a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow or have precluded themselves from interfering. These principles were applied by a Bench of this Court in a case very similar to the present, that of *Meghu Rai v. Ram Khelawan* (2), and this decision seems to be clearly in favour of the defendants appellants and against the view taken by the court below. The learned Subordinate Judge founded his decision on the case of *Raja Dei*

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(1) [1880] I. L. R., 6 Cal., 764.

(2) [1913] 11 A. L. J. R., 382.

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v. Umed Singh (1). That case would be on all fours with the present if the gift by Musammat Gumanan had been in favour of the minor Surju, son of Musammat Khajani. It could then have been said that the donee was precluded from suing to contest the validity of the gift and that a more distant reversionary heir was entitled to come forward and assert his rights. On the facts now before us the only arguable plea which can be taken on behalf of the plaintiff respondent is based upon the fact of Surju's minority. This however in no way precludes the bringing of a suit by a next friend on his behalf. In the plaint itself there is no suggestion of collusion on the part of the minor, or of the minor's mother as his natural guardian. Their interest is simply ignored. On this state of facts the plaintiff cannot claim the benefit of the exceptions recognised by their Lordships of the Privy Council to the general principle that the suit for a declaration of this sort must be brought by the presumptive reversionary heir. This appeal therefore must succeed. We allow it accordingly and, setting aside the decree of the court below dismiss the plaintiff's suit with costs throughout.

B. K. M.

Appeal allowed.

(1) [1912] 2 L. R. 34 All., 207.

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March, 23.

TUDBALL, J.

ABDUL

RAOOF, J.

PUTTU LAL (*Defendant*)*versus*RAM SARUP (*Plaintiff*)*

Malicious prosecution—Suit for damages—Complaint false to the knowledge of complainant—Process issued to accused—Acquittal of accused after evidence taken—Malice.

Where a person was dragged into the Criminal Court by reason of a complaint which to the knowledge of the complainant was false from beginning to end, but after evidence taken the accused was acquitted of all the charges made against him, *held* that the cause of action for a malicious prosecution was complete and the facts afforded sufficient evidence of malice.

FIRST APPEAL from an order of BABU RAMA DASS, Subordinate Judge of Farrukhabad.

The facts of the case were shortly as follows:—The parties were owners of adjoining groves. In August, 1915, the defendant preferred a complaint to a Magistrate alleging that the plaintiff, accompanied by several persons and armed with a gun and *lathis*,

* F. A. F. O. No 146 of 1917.

had gone on the plaintiff's groves, had caused the old boundary mark to be destroyed, and had encroached upon 2 *gathas* of the defendant's. There was a further charge of assault against the plaintiff. But the Magistrate, after examining the complainant, issued process against the plaintiff in respect of charges for criminal mischief and criminal trespass. The case was tried, the complainant adduced evidence, and ultimately the plaintiff was acquitted, on the ground that "the matter can best be settled by the Civil Court; it is not for this Criminal Court to decide boundary disputes. Accused are, therefore, acquitted under section 245, Criminal Procedure Code and parties are referred to the Civil Court." The defendant then instituted a suit under section 9 of the Specific Relief Act for possession of the land encroached upon. But the suit was dismissed, the court finding that no encroachment had been proved, and even if there had been any encroachment, there was nothing to prove its extent. The plaintiff then instituted the present suit for damages for malicious prosecution, alleging that the whole story put forward by the defendant in his complaint to the Criminal Court as to the rioting, assault, criminal mischief and trespass was wholly false to the knowledge of the defendant. The court of first instance dismissed the suit, holding that there was reasonable and probable cause for the complaint. The lower appellate court found that the allegations as to encroachment were wholly incorrect, and as to assault and rioting wholly false, and as the case was either true or false to the knowledge of the defendant no question of reasonable and probable cause could arise, and allowing the appeal the court remanded the case for trial of the other issue as to the amount of damages.

The defendant appealed.

Kailas Nath Katju (with him *Tej Bahadur Sapru*), submitted that there had been no prosecution of the plaintiff at all on the charges of assault and rioting. The Magistrate having refused to issue process on those charges the plaintiff was never under jeopardy in respect thereof. The measure of damages in a suit for damages for malicious prosecution was the risk run by the plaintiff, and not the moral blameworthiness of the defendant. It was true that the defendant had endeavoured to start a prosecution on those charges, but having failed to induce the Magistrate to issue process in regard thereto, there was an end of the matter. The plaintiff had as a matter of fact never had any occasion to meet or answer to that charge, and had suffered no damage whatever on that score. Reference was made to

Gopal Jan v. Bholanath Khettry, [1911] I. L. R., 38 Cal., 880 ;

Sheikh Meeran Sahib v. Ratnarelu Mudali, [1912] I. L. R., 37 Mad., 181,

again, the plaintiff was in the present suit bound to show not only that he was innocent, but that his innocence had been declared by the Criminal Court before which he had been tried. In the present

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case there was no such finding of innocence by the Criminal Court. The Criminal Court had found that there had been some encroachment upon the defendant's land but had acquitted the accused on the ground that the dispute was of a civil nature.

Nalliappa Goundai v. Kallappa Goundai, [1900] I. L. R., 24 Mad., 59.

There was further no finding of malice against the defendant by any court. Reference was also made to

Corea v. Peiris, [1909] A. C., 549.

Surendra Nath Sen (with him *Gulzari Lal*), referred to

Amedbhai v. Framji, [1903] 5 Bom. L. R., 940 ;

Bhim Sen v. Sita Ram, [1902] I. L. R., 24 All., 363.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—In this case the plaintiff respondent has sued the defendant appellant for damages for malicious prosecution. The facts are simple. The parties were old enemies. On the 15th of August, 1915, the plaintiff repaired a boundary mark between his grove and the defendant's grove, or rather he had it repaired by his servants. On the 16th of August, the defendant Puttu Lal made a complaint before a Magistrate to the effect that Ram Sarup had gone to the grove armed with a gun assisted by four or more men armed with *lathis*, axes and spades; that they had, in spite of his protest, dug up the boundary mark and re-built it so as to include a portion of his grove in Ram Sarup's grove, and as he protested, they pushed him and assaulted him, and had moreover cut down two trees belonging to him. The Magistrate took his statement on oath and issued a summons to Ram Sarup to appear in court, informing him that he had been charged with offences under sections 426 and 447, Indian Penal Code. Puttu Lal had made a complaint of offences under these two sections and also under sections 147 and 352, Indian Penal Code. The case was tried. Puttu Lal entered the witness-box. He testified to the facts which he had alleged, including assault, riot, wilful mischief and criminal trespass. He called witnesses who corroborated his statement. Evidence was taken as to whether or not there had been any encroachment. The Magistrate came to the conclusion that the dispute was only a dispute over a boundary, that no offence had been committed and he acquitted the accused. Puttu Lal, thereupon, brought a suit in the Civil Court under section 5 of the Specific Relief Act for possession of land from which he claimed that Ram Sarup had dispossessed him. The Munsif held that no dispossession had been proved and dismissed the suit. Ram Sarup then brought the present suit for damages for malicious prosecution. It was dismissed by the court of first instance. The lower appellate court has come to the conclusion that the prosecution story in the criminal case by Puttu Lal was false to the knowledge of Puttu Lal himself and

that therefore there was no question of any reasonable or probable cause in the case, in that to Puttu Lal's own knowledge the complaint was false. On this finding but without mentioning the word "malice," the lower court, remanded the case to the court of first instance for decision of the other points which had not been touched by that court. It is urged that there was no prosecution by Puttu Lal of Ram Sarup in respect to the offences under sections 352 and 147, Indian Penal Code and that therefore Puttu Lal is not liable for damages in that there was no prosecution for offences under these two sections. We do not think that the case can be narrowed down in this way. Puttu Lal, according to the finding of the court below, went into a Criminal Court with a story that was false from beginning to end, and false to his own knowledge. He made that false complaint. Ram Sarup was dragged into court not of his own free will but against it. Evidence was given by Puttu Lal which, if it had been accepted, would have resulted in the conviction of Ram Sarup for all four of the offences mentioned in the written complaint, even though only sections 426 and 447 had been mentioned in the summons issued. In our opinion the facts as found by the court below, prove clearly and distinctly that Puttu Lal did prosecute Ram Sarup on a false charge and that he did his best to secure a conviction of offences under all four sections. The cases quoted to us viz.; *Golap Jan v. Bholanath Khettary* (1), *Nalliappa Goundai v. Kailappa Goundai* (2), do not help us in the present case at all. They are all cases in which no process was issued according to law to the accused person. The view taken by the Calcutta and Madras High Courts do not agree with the view taken by the High Court of Bombay, *vide* the case of *Ahmed Bhai Habib Bhai v. Framji Edulji Baubont* (3). However, it is unnecessary for us to decide which of these two views is correct according to our opinion, for in the present case the accused was dragged into court and Puttu Lal did all that lay in his power to prosecute him. It is next pleaded that there is no finding by the court below on the question of malice. It is correct to say that there is no direct finding as to malice, but the facts found by the court below are such that a court is bound to infer malice from these facts, or the complaint made by Puttu Lal was held to be false and without foundation. There is moreover the additional finding of fact that the parties were old enemies and had been at litigation. Malice is clearly and distinctly established in the case and in our opinion there is no force in this appeal. It is, therefore, dismissed with costs.

K. N. K.

Appeal dismissed.

(1) [1911] I. L. R., 38 Cal., 880.

(2) [1900] I. L. R., 24 Mad., 59.

(1) [1903] 5 Bom. L. R., 940.

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April. 16.

RICHARDS,
C. J.
BANERJI, J.

INAYAT-ULLAH KHAN (*Decree-holder*)*versus*HASHMAT-ULLAH KHAN (*Judgment-debtor.*) *

Compromise, decree on—Plaintiff to execute decree on payment or deposit of sums of money—Money remitted by money order—No deposit as required by decree—Mortgage made by defendant as preliminary to sale of property provided in compromise—Whether decree executable.

In a suit for dower a decree was made in terms of the compromise entered into in the suit. The terms were (1) that the defendant would sell to the plaintiff property worth Rs. 12,000; (2) that the plaintiff was to pay a deposit in court the price of the stamp, the registration-fee and another sum of Rs. 15 and if he did not do so his claim would stand dismissed with costs except for the sum of Rs. 700 due to a creditor; and (3) that an agreement was to be executed within three months from its date containing the terms of the compromise. The agreement was in fact executed and it contained hypothecation of the very property which was to be sold to the plaintiff by the defendant. The plaintiff, however, remitted the price of the stamp, the registration-fee and the sum of Rs. 15 by money-order to the defendant which was refused by the latter. The plaintiff then applied for the execution of the decree and he asked for the sale of the property. The defendant objected that the price of the stamp, the registration-fee not having been paid or deposited the plaintiff lost his right and that the plaintiff could not apply for sale but must bring a suit for sale on the mortgage: *held* (1) that the mortgage was a collateral security and the plaintiff could sell the property to realise his claim as a money decree; (2) that the remittance by money-order was not a "payment" under the compromise.

EXECUTION First Appeal from a decree of Maulvi Shams-ud-din Khan, 1st Additional Sub-Judge of Aligarh.

B. E. O'Connor (with him *Tej Bahadur Saxena*), for the appellant.
Iqbal Ahmed, for the respondent.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of an application for execution of a compromise decree. The compromise decree was a very peculiar one. It was made in a suit for dower brought by the plaintiff as one of the heirs to his daughter for a proportionate share of her dower. The compromise decree provided that after

* E. F. A. No. 379 of 1917.

the expiration of ten years the defendant would sell to the plaintiff certain property for the sum of Rs. 12,000 made up as in the compromise is set forth. The compromise decree contained a curious provision that the plaintiff was "to pay or deposit" in court the price of the stamp, registration-fee and another sum of Rs. 15 by the 1st of May and that if he did not do so his claim should stand dismissed with costs except for the sum of Rs. 700 due to one Badam Singh. The plaintiff did not tender or pay in cash to the defendant the price of stamp, the registration-fee or the sum of Rs. 15 but he remitted by money-order a sum which we may take to be sufficient to cover those items. The money was paid in to the Post Office on the 10th of April and should no doubt under ordinary circumstances have reached the defendant before the 1st of May. The plaintiff got back the money-order on the 6th of June with a notification that the defendant had refused to accept it on the 21st of May. The compromise decree also contained a provision that an agreement was to be executed within three months from its date containing the terms of the compromise. Such an agreement was in fact executed by the defendant and it contained a hypothecation of the very property which was to be sold to the plaintiff in order to secure the due fulfilment of the conditions of the compromise decree by the defendant. In the application for execution the plaintiff alleged that under the terms of the compromise decree if there was default on the part of the defendant he should be entitled to execute the decree for the sum of Rs. 5,150 with interest at the rate of eight annas per cent. per mensem and for Rs. 700 paid to Badam Singh and his application was for such execution and asked for the sale of the property. (It is quite possible that the plaintiff considered under the terms of the compromise decree that he was entitled to put up the property for sale as if it had been mortgaged.) Two objections were taken in the court below by the defendant. In the first place it was contended that the stamp, registration-fee and the Rs. 15 were neither "paid or deposited" before the 1st of May, 1917, and that consequently the plaintiff on the terms of the decree itself lost all rights thereunder. It is next contended that having taken a mortgage of the property, the property could not be brought to sale except by proceedings in a suit under the mortgage. The court below decided both of these objections in favour of the defendant and dismissed the application for execution altogether. The decree-holder comes here in second appeal. We doubt much whether the court was right in holding that the property could not be sold because of the mortgage which was executed by the judgment-debtor. This mortgage was merely collateral security for the due fulfilment of the conditions of the compromise by the defendant. We think that if there had been no other objection the plaintiff would have been entitled to have had the property sold to realise his claim as a simple money decree. The law as

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to bringing to sale property upon which a party has a mortgage is now regulated by Order 34, rule 14 of the Code of Civil Procedure and mortgaged property can be brought to sale so long as the claim does not arise "under the mortgage." The present claim would be a claim *under* the decree and not a claim *under* the mortgage. The next objection seems more serious. The court has to execute the decree as it stands. The decree undoubtedly contains a provision that if the plaintiff failed to pay or deposit in court the price of stamp, registration-fee and the sum of Rs. 15, his claim should be dismissed except as to the sum of Rs. 700, due to Badam Singh. We find it impossible to hold that the mere remitting of a money order, which so far as the evidence goes was not only not accepted but did not even reach the defendant until after the prescribed period, is a payment within the meaning of the clause in the decree. We think that the view taken by the court below that this was a fatal objection to the execution of the decree for the Rs. 5,150 and interest was correct. The court seems to have overlooked the fact that the plaintiff was entitled, notwithstanding the non-payment of the registration-fee &c, to execute his decree for Rs. 700. We allow the appeal to this extent that we modify the order of the court below by declaring that the plaintiff is entitled to execute his decree for the sum of Rs. 700 paid to Badam Singh, with this declaration we remand the case with directions to proceed with execution having regard to what we have stated above. We direct the parties to pay their own costs in both courts.

Appeal allowed—Cause remanded.

CRIMINAL

1918

April, 15.

BANERJI, J.

RAM DAS AND OTHERS

versus

EMPEROR *

Excise Act (Local, No. IV of 1910), section 64 (c)—Wilfully doing or omitting to do anything—Not keeping correct accounts.

In order to secure a conviction of a license-holder under section 64 of the Excise Act the Legislature clearly means that it must be proved that a license-holder (accused of an offence thereunder) should have allowed the breach to be committed by his servant or that he should be cognizant of what the servant was doing.

CRIMINAL REFERENCE made by E. H. ASHWORTH, Esq., Sessions Judge of Calcutta.

The parties were not represented.

* Cr. Ref. No. 226 of 1918

The following judgment was delivered by

BANERJI, J.—The three accused in this case have been convicted under section 64 (c) of the United Provinces Excise Act No. IV of 1910. The first two accused are the holders of a license for the sale of liquor. The third accused Kallu is their salesman. One of the conditions of the license was that an account of sales made shall be kept in a prescribed form. The charge against the accused was that they had not kept correct accounts and that they had thus committed a breach of condition 9 of the license. Section 64 provides that whoever being the holder of a license or being in the employment of such holder and acting on his behalf, *wilfully does* or omits to do anything in breach of any of the conditions of the license, shall be punished for each such offence with fine. As regards the first two accused, they would be guilty under the section if they wilfully did or omitted to do anything in breach of any of the conditions of their license. The use of the word “wilfully” clearly shows that it must be shown that they themselves allowed the breach to be committed by their servant or were cognizant of what their servant was doing. The learned Sessions Judge therefore was, in my opinion, right in the view that these men could not be legally convicted under the section. The Magistrate who convicted them referred to the case of *Emperor v. Babu Lal* (1) That was a case under the Opium Act, the provisions of which were different from those of the Act in question in the present case. Reference was made in that judgment to the unreported case of *Queen-Empress v. Ram Kishen* (2), decided on the 26th of February, 1890. That was a case under section 42 of Act No. XXII of 1881, the provisions of which were different from those of the present Act. The use of the word “wilfully” seems to me, clearly to show that in the case of the accused it must be proved that they had intention or knowledge. As for Kallu who is said to have altered a page of the register, it seems that the original page, according to the finding of the court below, did not contain an incorrect entry. I have considerable hesitation in agreeing with the learned Sessions Judge that the word “accounts” does not mean correct and proper accounts, but even on that construction it can hardly be held, in view of the lower court’s finding, that the accounts were not correctly kept.

Under these circumstances the conviction of the three accused was not justified. I accordingly set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Conviction set aside.

(1) [1912] I. L. R., 34 All., 319. (2) [1890] Cr. Ref. No. 69 of 1890.

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RAM DASH

v.
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Banerji, J.

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April, 6.

BANERJI, J.

ABDUL RASHID

versus

EMPEROR *

Penal Code (Act XLV of 1900), sections 480, 482—Using false trade-mark—Intent to defraud.

According to an agreement between the different Oil Companies it was settled that one company could use the tins of another company, provided the company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the company whose tins were being used. In pursuance of this agreement the Burma Oil Company could use the tins of the Standard Oil Company (U. S.) by putting on the cap the word "Victoria." The accused sold eight tins of Kerosine Oil, but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps. At the time of selling he had told the purchaser that the tins contained oil of the Burma Oil Company and the price agreed upon was the price of the Burma Oil Company as prevailing in the market:—*Held* that although the accused was guilty of using a false trade-mark so far as the six tins with plain caps were concerned, yet (in the absence of a conspiracy between the purchaser and the accused) the accused could not be convicted, under section 482 of the Indian Penal Code of using a false trade-mark, as he had acted without intent to defraud.

CRIMINAL REVISION, from an order of V. E. G. HUSSEY Esq., Additional Sessions Judge of Moradabad.

C. Dillon, S. M. Sulaiman and Satya Chandra Mukerji, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The accused in this case has been convicted under section 482 of the Indian Penal Code of having used a false trade-mark. The accused is the agent of the Burma Oil Company. The trade-mark which he is said to have used is the trade-mark of the Standard Oil Company of the United States. Since the war it had been agreed between different Oil Companies that tins belonging to one company might be used by another company provided that the other company put upon the cap of the tin a distinctive mark indicating that it was the oil of the company which was using the tin. In the case of the Burma Oil Company they had to put on the cap the word "Victoria" showing that the oil, though contained in the tin of the Standard Oil Company, was oil of the Burma Oil Company. It has been proved that the accused

sold eight tins of Kerosine Oil to one Shekhar Chand. The caps of two of the tins bore the word "Victoria", the remaining six had only plain caps. It is in respect of these tins that the accused has been convicted. Two questions arise in this case. The first is whether the accused used a false trade-mark and the second is whether he has proved that he did not use the trade-mark with intent to defraud? As to the first point it has been fully established that in using tins which had plain caps on them he used a false trade-mark. Section 480 of the Indian Penal Code defines what is meant by a false trade-mark. According to that section whoever used any receptacle with any mark thereon in a manner reasonably calculated to cause it to be believed that the goods contained in such receptacle were the manufacture or merchandise of a person whose manufacture or merchandise they were not, was said to use a false trade-mark. In the present case if there was no mark on the cap the accused used a receptacle which was reasonably calculated to cause it to be believed that the goods contained in the tins were the manufacture of the Standard Oil Company and not of the Burma Oil Company. Therefore in using the tins of the Standard Oil Company without putting on the cap the mark of the Burma Oil Company he used a false trade-mark. We have next to see whether the accused has been able to prove that he acted without intent to defraud because if he proved that he had acted without such intention he would not be punishable under section 482 of the Indian Penal Code. The accused sold the tins in question to one Shekhar Chand. Shekhar Chand was examined as a witness and he clearly swore that at the time that he bought the tins from the accused the latter told him that they contained not the oil of the Standard Oil Company but the oil of the Burma Oil Company and that the price agreed upon was the price prevailing in the market of the Burma Oil Company's product. If that statement was true there was no fraud in the case and it was apparent that there was no intention to defraud. There was nothing to show that there was any conspiracy or collusion between Shekhar Chand and the accused. Shekhar Chand is not a dealer who sells Kerosine Oil in the neighbourhood of the place where the accused carried on his business. The courts below have not disbelieved him. If Shekhar Chand sells this oil which he knew to be the oil of the Burmah Oil Company and which he had purchased as such as oil manufactured by the Standard Oil Company he would be punishable under section 486 of the Indian Penal Code but that would not justify the conviction of the accused under section 482. This being so it seems to me that the conviction under section 482 of the Indian Penal Code cannot be sustained.

I allow the application set aside the conviction and sentence and direct that the fine imposed on the accused, if paid, be refunded.

Conviction set aside.

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CRIMINAL

1918

April, 15.

PIGGOTT, J.
WALSH, J.

SURENDRA NATH MUKERJI

versus

EMPEROR*

*Evidence Act, (I of 1872), sections 25, 27—Statement of accused to police—
Discovery by reason of the statement—Admissibility in evidence of record.*

S accused of having caused the death of his wife by strangulation, presented himself at a Kotwali police station and made a report, a record of which was entered in the police register. In consequence of the report a police-officer proceeded to the house of S, and discovered in a room a corpse of a woman. Upon a question as to the admissibility of the report so made, held that the provisions of sections 25 and 27 of the Indian Evidence Act apply to the circumstances of the case. Under section 27 of the Evidence Act the Kotwal was entitled to depose that the accused came to him at the time and place stated and said "I have killed my wife; her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated, but thereafter the defence were entitled to require the production of the whole record and to insist upon the proof of it.

CRIMINAL APPEAL from an order of F. D. Simpson, Esq, Sessions Judge of Allahabad.

C. R. Alston, for the appellant.

A. E. Ryves (Government Advocate), for the Crown.

The following judgments were delivered.

Piggott, J. PIGGOTT, J.—On the 3rd of December last, somewhere about 2 o'clock in the day, a young Bengali, Surendra Nath Mukerji, whose age is given in the record as 22 years but who according to his father's evidence was not yet quite 20 years of age, presented himself at the Kotwali police station at Allahabad and made a certain report, a record of which was entered in the police register provided for the purpose. In consequence of this report the City Inspector, Muhammad Said, proceeded at once to the house in the city in which the said Surendra Nath Mukerji was living. He found the door leading into the inner apartments locked and it was opened with a key produced from his person by the above-mentioned accused. The latter then led the way to a certain room on the north-east side of the courtyard which was fastened on the outside by a chain. He unchained this door and led the police officer and certain witnesses, one of whom, Bande Husain Khan, has been called at the trial, into the room. On the floor was lying the corpse of a young girl named Sunilabala Debi, wife of Surendra Nath

*Cr. App. No. 215 of 1918.

Mukerji aforesaid. As to the age of this girl there is some little conflict of evidence but we shall not be far wrong if we take it to have been about 15 years. She was quite dead and was wearing only a bodice and a loin cloth. Some part of this loin cloth was in some way drawn together or heaped up under the back of the neck. There was a slight cut or incision on the great toe of each of the feet, and with reference to these the accused made a statement and produced from a recess in the same room an implement with which he said those incisions had been made. The corpse was subsequently examined by Mr. Kashi Nath, Assistant to the Civil Surgeon of Allahabad. With regard to the incisions above spoken of, Mr. Kashi Nath was quite satisfied that they had been inflicted after death, and this is in accordance with the statement to which the accused himself has adhered throughout. The only other external mark of injury was a slight redness of the skin on the left side of the neck. This was evidently a mere patch, described in the Assistant Surgeon's evidence as $1\frac{1}{2}$ " long $\frac{3}{4}$ " broad. A further examination of the corpse disclosed that death was almost certainly due to asphyxiation, but beyond this the Assistant Surgeon was not prepared to go. He was asked a number of questions as to the possibility of death by strangulation or death by suffocation and as to the presence or absence of indications tending to prove that this suffocation, or strangulation, or whatever it was, had been in its nature either homicidal or suicidal. The general effect of his evidence seems to me to be to leave these questions absolutely open. In one portion of his evidence the Assistant Surgeon seemed to incline towards the belief that death had been caused by suffocation rather than by strangulation, though he admitted himself to be puzzled by the absence of any marks of external injury about the mouth or nose. At the very end of his examination, after he had protested that he was unable to give any decisive answer on the question of strangulation or suffocation, he told the court that on the whole strangulation by means of a soft cloth seemed to him more in conformity with the *post mortem* appearances than any other theory. This is in itself an opinion expressed with much doubt and reserve; it is not altogether consistent with other portions of the evidence given by the same witness. It is difficult to understand how, on the theory of strangulation effected in this manner, the only mark left upon the neck should have been the small red patch already referred to. On the evidence moreover it would seem that what is ordinarily the most characteristic symptom of death by strangulation, namely the protruded tongue, was entirely absent. Surendra Nath Mukerji was eventually put on his trial on the charge that he had murdered his wife. Of the assessors who heard the evidence one finds him guilty and the other not guilty. The learned Sessions Judge finds him guilty and has passed sentence of death. The record is before us for confirmation of that sentence and we have had the advantage of hearing the petition of appeal presented on

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behalf of the convict argued by Mr. Ross Alston. The evidence on the record is admittedly most scanty. At the very outset of the trial a question arose as to the admissibility in evidence of the statement recorded at the Kotwali police station at 2-30 P.M. on December, the 3rd. The learned Sessions Judge was at first disposed to reject that statement as inadmissible by reason of the provisions of section 25 of the Indian Evidence Act. Later on, upon further consideration of the provisions of section 27 of the same Act, he has allowed it to be put in evidence. I have no doubt that the provisions of both these sections apply to the circumstances stated and require to be considered. A mere statement in evidence by the City Kotwal that the accused came to the police station and made a report, in consequence of which the corpse of his wife was discovered in an inner room of his residential house, would be calculated to work unfairly both from the point of view of the prosecution and from that of the defence; section 27 of the Indian Evidence Act was no doubt introduced on purpose to obviate the possibility of such unfairness. Under that section the City Kotwal was unquestionably entitled to depose that Surendra Nath Mukerji came to him at the time and place stated and said "I have killed my wife; her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated by the accused. Now when once this much had been deposed to on behalf of the prosecution, the defence were clearly entitled to require the production of the record made at the time at the Kotwali police station and to insist upon the proof of the whole of that record if they thought it advisable to do so. I think that the statement should have been put in evidence in this manner at the request of the defence; but as the case stands I see no reason to object to its appearance on the record and I find it necessary to consider it in some detail. According to this statement the accused reported that his wife had been seriously misconducting herself for some time past and that she had been carrying on an illicit correspondence with another man. For this reason, the statement says, the accused made up his mind to kill her. He arranged that he should be alone with her in the house at about noon on the day in question. He had spent the night in remonstrating with her, and continued to do so; but her only reply was, "leave me alone; I want to go away." Thereupon the accused tied her loin cloth round her neck and killed her, after which he inflicted the two incisions on the great toes already spoken of. With regard to these the explanation given in the statement is that the accused had heard that persons strangled by means of a piece of cloth would come to life again.

On the following day, the 4th of December, 1917, the accused, having spent the night in police custody, was placed before a Magistrate of the first class to whom he made a confession. We have before us the record of that confession and also the evidence of Mr. S. E. Anthony, the Magistrate who took it. According to

Mr. Anthony, as soon as he began to question the accused and before he had even completed the preliminary questions which a Magistrate always puts in these cases, the accused interrupted him by saying, "I have killed my wife." The confession itself adds very little to this bald statement. It repeats the allegation of unchastity against the girl in general terms, and adds that the accused had obtained possession of letters written by her to some other man. For this reason, he says, he murdered her by strangling her with the *dhoti* she was wearing. After the enquiry preliminary to commitment the accused was again examined by the same Magistrate on the 21st of December, 1917. He then declined to answer most of the questions put to him and claimed his right to reserve his defence for the sessions trial. To the Sessions Judge the accused said that he had gone out on the morning of December, the 3rd, and returned about 11 o'clock, to find the house door shut and no answer returned to his knocks. He then climbed over one of the walls and, in the closed room already spoken of, found his wife lying dead with her own loin cloth tied round the neck. He unfastened the cloth and, in the attempt to discover whether life was quite extinct inflicted the cuts on the toes which have already been referred to. He came out of the house, locking the door behind him and told one Tarak Nath Mukerji, a telegraph signaller, what had happened. On the advice of the latter he first sent a telegram summoning his own father, who was in Calcutta at the time, and then went to the police station intending to report that his wife had committed suicide. He alleged that, somewhere inside the police station, before he went upstairs to the room where the City Inspector Mohammad Said was sitting, he entered into conversation with some subordinate police clerk who strongly advised him not to report that his wife had committed suicide but to say that he had killed her out of jealousy on account of her misconduct. He says this Munshi gave him further reasons for adopting this course and that, after he had gone upstairs, the City Kotwal also urged him not to be afraid, but to say that he killed the woman and that he would get off all right. He ascribed his subsequent confession to the Magistrate to police influence. He now denied having killed the girl, asserting that he was very much in love with her. He said, further, that she had attempted to commit suicide on other occasions. The defence evidence was mostly directed to this point; but the telegraph signaller, Tarak Nath Mukerji, confirmed the accused's statement so far as it concerned him. Two physicians, Dr. Nogendra Nath Datt and Nanak Prasad Varma, a homeopathic practitioner, gave evidence that they had attended the girl on two different occasions after what appeared to be attempts on her part to commit suicide by poisoning. Evidence was also given of an occasion on which it was said the accused's wife had left her house declaring her intention of drowning herself in the Jumna river. The evidence of the accused's father, Benod Behari Mukerji and of a neighbour, Nimai Charan Mukerji, suggests

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further that the girl was of a wilful and hysterical temperament, that she would resort to hunger-striking and to beating her head on the ground if her will was crossed in any way.

I have set out the evidence for the defence in the first instance because there is really no further evidence for the prosecution beyond that already indicated. A younger brother of the accused's was called, but he gave no evidence particularly relevant to the case, except that in cross-examination he supported the allegation for the defence as to previous attempts to commit suicide. The record before us suggests that the prosecution intended in the first instance to produce certain further evidence, and more particularly that witnesses who were present at the discovery of the corpse were to be examined as to statements made by the accused at that time and as to a certain pantomime gone through by him, in illustration of the manner in which he had compassed his wife's death. It is not clear whether this part of the prosecution case was dropped because those responsible for the conduct of the case were satisfied that there was no substance in it, or because it was supposed that evidence of this nature could not be given without contravening the provisions of section 26 of the Indian Evidence Act. The evidence is certainly not before us and I only allude to it because of this latter possibility. I think that the witnesses were entitled to depose to any actions performed by the accused in their presence and, after they had done so, the defence would have been entitled under other provisions of the Indian Evidence Act to put questions (if they deemed it advisable) as to any words used by the accused which accompanied or explained those actions. If any evidence of this sort was available I can only say that, in so difficult a case, I feel some regret that it is not before me.

The learned Sessions Judge in finding the accused guilty has proceeded upon a line of reasoning which sounds convincing enough, if all the premises assumed by the learned Sessions Judge are granted. He takes it that the case must necessarily have been either one of suicide or one of wilful murder. He comes to the conclusion that the evidence as a whole, and more particularly the statement of the Assistant to the Civil Surgeon, considered along with appropriate passages in certain medical treatises to which the court was entitled to refer under the proviso to section 60 of the Indian Evidence Act, practically excluded the possibility of suicide. Holding therefore that the fact of murder is established beyond question, the learned Sessions Judge finds that, even apart from the accused's retracted confession, the circumstances as a whole point to the accused as the only possible murderer. The confession itself as made before the Magistrate on December the 4th, the learned Sessions Judge evidently regards as clinching the matter.

In considering the soundness of the conclusion thus arrived at I wish to take up first two questions of detail. The whole of the

evidence for the defence has been swept aside by the learned Sessions Judge on what appear to me quite inadequate grounds. It is true that most of the persons concerned are relatives, caste-fellows or friends of the accused, although it is not clear that these remarks apply to the physician Nanak Prasad Varma. The matters to which these witnesses were required to depose were matters which could only have been within the knowledge of relatives or close friends of the family. It is not logical to put aside evidence of this sort, merely on the ground that the persons giving it have a motive for desiring to befriend the accused person. No doubt, as the learned Sessions Judge remarks, the fact that this unhappy girl had attempted to commit suicide on previous occasions would have but little bearing on this case, if it be indeed proved beyond possibility of doubt that the present case was not one of suicide. Nevertheless the defence evidence as a whole does suggest to my mind certain conclusions which I regard as established with reasonable certainty. I accept it as proving that this child-wife was of a self-willed disposition and hysterical temperament. I think it highly probable that she had on previous occasions, either actually made, or professed to make, some attempt to take her own life. Further than this I do not desire to press the defence evidence, nor do I think it necessary to do so. Now as regards the medical evidence, I feel bound, although with some reluctance, to comment on the absence of certain details which I should have desired to find there. In a case of this sort, where a human life is at stake, no motives of delicacy, however natural or in themselves commendable, can be allowed to interfere for a moment with any attempt to sift out the truth. Speaking on the basis of an experience which goes back for a considerable number of years, and which calls to my mind more than one case analogous to the present in some of its most important features, I take it upon myself to say that in all cases in which the supposed victim of a murder is a young girl, the medical officer conducting the *post mortem* examination should invariably make a thorough and careful examination of the organs of sex. In the present case we have it that the parties had been married for about a year and, according to the evidence, they had been separated for almost six months of that time. It appears not very probable that the medical examination, if directed expressly to this point, would have proved that this unhappy girl was at the time of her death a *virgo intacta*; but if this had happened to be the case it would have thrown a most important light upon the consideration of the entire evidence. Even apart from this possibility, it might have disclosed some evidence bearing upon one conceivable view of the case which has been entirely kept out of sight at the trial, but which I think it impossible altogether to overlook.

Subject to these preliminary remarks, I now come to close quarters with the main grounds upon which the judgment of the court below has proceeded. Is it fairly established on the evidence

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that the present case is either one of suicide or of wilful murder, and moreover is the hypothesis of suicide absolutely excluded by the evidence? It is not a matter about which it is possible to enter into any course of detailed reasoning. The question is as to the inferences to be drawn from the evidence of the Assistant to the Civil Surgeon considered in the light of any standard authorities on medical jurisprudence. Speaking for myself I can only say that, on the evidence as it stands, I think that the theory of suicide, although shown to be somewhat improbable, cannot be said to be definitely excluded. I would go further and say that, in the case of a young girl of this age and of such antecedents and temperament as I believe to be proved by the defence evidence, the possibility of death by accident, or by some undiscovered natural cause, is not altogether excluded. There remains yet another possibility at which I have taken it upon myself to hint in an earlier portion of this judgment. To put the matter bluntly, assuming that this girl met with her death at a moment when she was alone in a certain room with her husband, I should not even then be satisfied that the accused had caused her death by inflicting any injury upon her with such guilty intention or such guilty knowledge as would be necessary to support a charge of culpable homicide. The possibility would remain that he had been resisted in an attempt to exercise his marital rights, resisted perhaps with cries and screams, and in an attempt to stifle those cries he had used more force than he realised and driven a nervous and hysterical child into death by suffocation, without any intention of producing such a result or knowledge that he was likely to do so. The most curious and exceptional feature of this particular case is to be found in the two cuts inflicted upon the feet after death. I am quite unable to believe that a man who had deliberately murdered his wife would inflict these curious *post mortem* injuries for any such motive as that suggested in the statement taken down at the Allahabad Kotwali. If he merely wished to make sure that his victim was dead, he could have used a cutting implement to better purpose in a great variety of other ways. I feel confident that the explanation subsequently offered by the accused of these injuries is the true one, namely that he was trying desperately to see whether there was not some life left in the apparently inanimate body. It is at least possible that he suspected the girl was shamming death and intended to put that to the test.

This brings me therefore to the final question. We are asked to convict this young man of murder, substantially upon a retracted confession, and to do this in a case in which, putting that confession on one side, there is not, in my opinion, definite proof that murder has been committed at all. I should feel in any case most reluctant to act upon a retracted confession under such circumstances. In this particular case I feel no hesitation in going a good deal further. Parts of the confession in question I definitely

disbelieve. I do not believe the reason given in the statement recorded at the Kotwali for the cuts inflicted after death on the feet. I do not believe the imputations on the chastity of the unfortunate girl thrown out, either in this statement, or in the confession subsequently recorded before the Magistrate. Practically I come back to this, disbelieving so much of the confession, am I prepared to feel satisfied beyond the possibility of doubt that the accused was speaking the truth when, at the outset of his statement before the Magistrate on December the 4th, he began by saying "I have killed my wife"? To this my answer is, firstly, that I am not satisfied beyond all doubt that the accused was speaking the truth when he said this. If he had been induced by injudicious advice, no matter from what quarter that advice may have proceeded, to tamper with the truth, in other portions of his statement, he may not have been speaking the truth when he uttered those words. Secondly, as I have already pointed out, I might be prepared to believe that the accused truly said that he had killed his wife, and yet hold that in doing so he had not committed the offence of murder, or even that of culpable homicide. I am satisfied as the case stands that the conviction and the sentence recorded in the court below cannot be affirmed and that, on the materials on this record, the appellant cannot be convicted of any lesser offence.

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WALSH, J.—I agree that this appeal must be allowed. I have formed no theories about the case, but if I had to direct a jury I should feel myself compelled to tell them, not as a matter of law, but as a matter of common sense, that upon the mysterious condition of the evidence in this case it was their duty to give the defendant the benefit of the doubt.

Walsh, J

[His Lordships then discussed the evidence in the case].

By THE COURT.—We accept this appeal, set aside the conviction and sentence in this case, acquit the appellant Surendra Nath Mukerji of the offence charged and direct that he be forthwith released.

Conviction set aside.

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May, 6.

KNOX, J.

HAIT RAM

versus

GANGA SAHAI AND OTHERS *

Penal Code (Act XLV of 1860), section 494—Offence triable by Court of Session—Magistrate discharging accused—Order directing complainant to pay compensation—Order illegal—Code of Criminal Procedure (Act V of 1898), Ch. XVIII, sections 209, 250 and 253—Powers and duties of Magistrate.

Several persons were charged before a Magistrate of the first class with an offence under section 494 of the Indian Penal Code. He discharged the accused and ordered the complainant to pay compensation :—*Held* that inasmuch as the Magistrate had no jurisdiction to try the case (it being neither a warrant nor a summons case) the order directing payment of compensation was illegal ; all that the Magistrate could do was to follow the procedure laid down in Chapter XVIII of the Code of Criminal Procedure in which chapter neither section 250 nor section 253 found a place.

Held also that in a case triable by a Court of Session the Magistrate under section 209 of the Code of Criminal Procedure is not authorised to write a judgment ; all that he is empowered to do is to record reasons for a discharge, if he make such an order and to pass the order. *Fattu v. Fattu*, [1904] I. L. R., 26 All., 564, referred to.

CRIMINAL REFERENCE made by E. E. P. ROSE, Esq., Second Additional Sessions Judge of Aligarh.

C. J. A. Hoskins, for the applicant.

Nehal Chand, for the opposite party.

The following judgment was delivered by

Knox, J.

KNOX, J.—This is a reference made by the Second Additional Sessions Judge of Aligarh. He sends us an order passed by a first class Magistrate of Etah ordering the discharge of several persons accused before him and directing the complainant to pay compensation to the accused persons. The order directing payment of compensation is undoubtedly to my mind illegal and must be set aside. The offence with which the accused were charged was really an offence under section 494 of the Indian Penal Code ; sections 363 and 420 of the Indian Penal Code which were added as sections under which the accused were alleged to be guilty were mere appendages to the original section. The Magistrate had

* Cr. Ref. No. 185 of 1918.

no jurisdiction to try the offence under section 494 of the Indian Penal Code. Sections 250 and 253 of the Code of Criminal Procedure are to be found one in a chapter which deals with the trial of summons cases by a Magistrate, and the other in a chapter dealing with the trial of warrant cases by Magistrates. This was neither a summons nor a warrant case. All that the first class Magistrate had jurisdiction to do in a case of a charge of an offence under section 494 of the Indian Penal Code was to follow the procedure laid down by Chapter XVIII of the Code of Criminal Procedure. In that chapter neither section 250 nor section 253 finds any place. The order directing payment of compensation is set aside and the compensation or such part of it as may have been paid will be at once refunded.

In going into the case, however, a more important question arises and that is whether the Magistrate, Babu Brij Nath Ugra, was justified in discharging the accused. I hold that he was not. He has evidently misconceived the purpose and the intention of section 209 of the Code of Criminal Procedure. He has written a judgment in the case. Now if the learned Magistrate will look at section 209 he will find that he is not authorised to write a judgment in a case triable by a Court of Session; all that he is empowered to do is to record reasons for a discharge if he make such an order and to pass the order of discharge. This Court has gone into the matter at considerable length in the case of *Fattu v. Fattu* (1). The learned Magistrate has done exactly what this Court in the case cited above condemned. He has criticised the evidence given with painful minuteness. He has found it entirely unreliable and worthless, and he has written a paragraph saying that he is dealing with the complainant for making a malicious complaint without any foundation to harass the accused. The case has to be thoroughly enquired into. A thorough and complete enquiry has not been made. I set aside the order of discharge and I return the case to the District Magistrate of Etah who will direct Babu Brij Nath Ugra, if he is still there, or some other Magistrate competent to hold inquiry to take any further evidence that may be offered, to examine the accused, and to commit them to the Court of Session for trial.

Order set aside.

(1) [1904] I. L. R., 26 All., 564.

CRIMINAL

1918

HATT RAM

v.

GANGA

SANAI.

Knox, J.

CRIMINAL

1918

April, 15.

BANERJI, J.

SUKRU

versus

EMPEROR *

Excise Act (Local No. IV of 1910), sections 60 (a), 71—Presumption.

The only presumption which arises under section 71 of the Excise Act is that an accused is in possession of an exciseable article and not that he has himself manufactured the liquor.

CRIMINAL REFERENCE made by F. D. SIMPSON Esq., Sessions Judge of Allahabad.

The parties were not represented.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The accused in this case was convicted on his own plea of being in possession of illicit liquor and was sentenced under section 60 (a) of the Excise Act to one and a half month's rigorous imprisonment. The statement of the accused which the Magistrate apparently accepted was that his son was ill and that he had brought a small quantity of liquor from his brother-in-law. The Magistrate was of opinion, as he states in his explanation, that under section 71 of the Act the presumption was that the accused had himself manufactured the liquor. No such presumption arises in the case. The only presumption is that the accused was in possession of an exciseable article. This, however, the accused himself admitted. Under the circumstances the sentence of imprisonment was unduly severe and was not called for. I, accordingly, reduce the sentence to one of a fine of Rs. 10 or in default to one week's rigorous imprisonment. If the fine is paid the bail bond given by the accused will be discharged.

Sentence reduced.

*Cr. Ref. No. 210 of 1918.

KHUBI AND OTHERS

versus

BAKHTAYAL*

CRIMINAL

1918

April, 25.

KNOX, J.

Revision—Application for delivery of possession over land made subsequently to conviction of the accused—Application rejected by trying Magistrate—District Magistrate on appeal ordering the same to be delivered.

Where certain persons were convicted and subsequently to the conviction the complainant applied, through the police under section 522 of the Criminal Procedure Code, for an order for possession over certain land which application was refused by the trying Magistrate but on appeal the District Magistrate directed that such possession should be given, *held* that the order was a proper one and should have been made long ago.

CRIMINAL REVISION from an order of A. W. MACNAIR Esq., District Magistrate of Meerut.

Satya Chandra Mukerji, for the applicants.

A. H. C. Hamilton, for the opposite party.

The following facts appear from the judgment of the Magistrate, third class.

"The case was decided on the 20th December, 1917. The accused were convicted. After the judgment was delivered the complainant in that case filed a petition for an order of possession through the police under section 522, Criminal Procedure Code. This application was rejected by me on the ground that an order to this effect must have been passed simultaneously with the order of conviction. I am shown certain rulings that such an order is an independent order and can be passed subsequently to the judgment. I admit this but I find that having once rejected the application I am not competent to grant the same on the same facts. Moreover, I am under the impression that the order passed by me on the application already is appealable. I, therefore, do not think it regular procedure to alter my own order myself and the same will hold as far as this court is concerned."

The complainant appealed to Mr. A. W. MacNair, District Magistrate, who passed the following order:—

Appellant in this case contends that the order of the lower court in refusing to give possession under section 522 of the Code of Criminal Procedure on the ground that he was asked to do so

* Cr. Rev. No 194 of 1918.

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1918

KHURI

v.

BAKHTAYAL.

some days after he had passed orders in the original case is a mistaken one and that the latest ruling on the subject is in favour of the appellant.

Jotindro Nath v. Emperor, (19 I. C.)

I think this is so. The whole tenor of that judgment in criminal revision is to the effect that if such order proceeds out of the original judgment without fresh material being produced, it is not an illegal one. In this case the appellant asked for that form of redress in his original complaint and the lower court might not have taken cognizance of it. He passed his order in the original case on 20th December, 1917. On 22nd, application was made for action under section 522, Criminal Procedure Code, which was refused on 3rd January, 1918. I think the lower court in view of the ruling quoted could have and should have issued order under section 522, Criminal Procedure Code. I allow the appeal and direct that the police be ordered accordingly to give possession over the disputed land to the appellant.

The following judgment was delivered by

Knox, J.

KNOX, J.—This is an application for revision of an order passed by the District Magistrate of Meerut under section 522 of the Criminal Procedure Code whereby he directed the police to give possession over some disputed land to one of the parties. Whether the District Magistrate has or has not the authority to pass the order in question it seems to me unnecessary to decide. The order which the learned Magistrate has now passed is an order which could and should have been passed long ago. I decline to interfere and dismiss the application. Let the record be returned.

Application dismissed.

CRIMINAL

1918

May, 1.

KNOX, J.

MEWA RAM (*Applicant*)

versus

NARAIN DAS AND OTHERS (*Opposite party*).^{*}

Code of Criminal Procedure (V of 1898), section 526 (e)—Transfer of case—Allegation that justice more likely to be done if case heard by another officer who did not know the parties—No ground.

Section 526 (e) of the Code of Criminal Procedure is no authority for the transfer of a case from one court to another when the ground alleged is that the transfer would be in the interests of justice if the trial were held by a court which knew nothing about either party.

Ishaq Khan, for the applicant.

N. Upadhyaya, for the opposite party.

^{*} Mis. Case No. 82 of 1918.

The following judgment was delivered by

KNOX, J.—This is an application for the transfer of a case of which the number is given and is said to be between Mewa Ram and Narain Das and others, residents of Etawah. The case is said to be pending in the court of Bench Magistrates, Etawah. The application is that it be transferred from that court to some other Magistrate of Etawah competent to try the case. It is supported by an affidavit of the vaguest description. No date whatever is given in the affidavit from beginning to end. There is nothing to show that the person who swore to the affidavit was in court on any particular date or was in court on every date when the case came up for trial. The deponent says that Lala Ram Nath, one of the Bench Magistrates is a personal friend of the accused Narain Das and his two sons. He also says that the accused are in debt to Lala Ram Nath, the said Bench Magistrate. He gives no foundation for the first of the two allegations. The second is said to rest upon a copy of a mortgage-deed twelve years old obtained from the Registration office a few days ago. Such an affidavit is not worth the paper on which it is written. I am told that the application is made under s. 526 (e), Criminal Procedure Code, and that the transfer sought is expedient for the ends of justice. The learned counsel who appears in support of the application explains that it would be better for both parties that the case should be heard by some one who knows nothing about them and that it is more likely that justice will be obtained from such an officer. This ground is not set out in section 526, Criminal Procedure Code, and I have not been referred to any precedent showing that this is the interpretation to be placed upon section 526 (e), Criminal Procedure Code. I shall not venture even to suppose that the learned gentlemen who sit on the Bench with Lala Ram Nath are so indifferent to their reputation and so subservient as to allow Lala Ram Nath to lead them to pass an order contrary to what seems to them to be just. I see absolutely no ground for interfering and direct that the case proceed to trial with all speed, the stay order is discharged.

Order discharged.

CRIMINAL

1918

MEWA RAM
v.
NARAIN DAS.

Knox, J.

CIVIL

1918

May, 1.

RICHARDS,
C. J.
TUDBALL, J.CHITHRU SINGH AND ANOTHER (*Defendants*)*versus*BHAGWANT SINGH (*Plaintiff*) *

Sale of property under the management of the Court of Wards by auction—Price insufficient—Plaintiff present—No bid by him—Sale cancelled—Second sale—Suit for pre-emption—Plaintiff's knowledge of sale—Invitation to purchase—Refusal—Suit not maintainable.

Certain property was under the management of the Court of Wards. It was sold and the sale was duly advertised. The highest bid was Rs. 1,000. The plaintiff was present but did not bid. The price was considered inadequate and the property was withdrawn from the sale. It was advertised for sale a second time and at the second sale it fetched Rs. 950. It was not clear whether plaintiff was present at the second sale. In a suit for pre-emption, *held* that the plaintiff having known that the property was being sold and having every opportunity to purchase, his absence of protest at the sale being made again and the delay in bringing the suit was tantamount to his refusal to purchase and the suit was not maintainable.

SECOND APPEAL from a decree of PANDIT SURAJ NARAIN MUJJU, District Judge of Azamgarh, reversing a decree of Babu Preo Nath Ghosh, Munsif.

M. L. Agarwala and N. P. Singh, for the appellants.

Braj Nath Vyas (for whom *Baleshwari Prasad*), for the respondent.

The judgment of the Court was delivered by

Richards,

C. J.]

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The property is under the management of the Court of Wards. The sale was duly proclaimed and advertised and it has been found that the plaintiff was actually present at the first attempt to sell. He made no bid, Rs. 1,000 was the highest bid which was considered at the time insufficient and the property was withdrawn. The property was again advertised for sale and put up a second time when the vendee purchased at Rs. 950. It is not known whether or not the plaintiff was present at the second sale. After the sale was completed the plaintiff made not the smallest attempt to protest at the sale being made but on the contrary waited for 12 months when he instituted the present suit. We are perfectly satisfied (and there is nothing inconsistent with the facts the lower appellate court has found and what we have said) viz., that the plaintiff knew perfectly well that the property was being sold and that he had every opportunity to purchase the property, if he pleased. In fact he got the most complete invitation to do so and even made an offer. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs of this Court and of the lower appellate court.

Appeal allowed.

JAINT SINGH AND OTHERS, (*Petitioners*)*versus*GOSAIN (*Opposite-party*)*

CIVIL

1918

May, 6.

Hindu Law—Widow in possession of husband's estate—Gift in favour of daughter's son—Daughter alive—Suit by remote reversioner for declaration of invalidity of alienation by widow—Suit maintainable.

RICHARDS,
C. J.
BANERJI, J.

Held that a decree declaring that a gift in favour of a daughter's son made by the widow of the last male owner was of no effect after her death might be given to a remote reversioner, even though the daughter herself was alive at the date of the suit. *Rajadei v. Umed Singh* [1912] I. L. R., 34 All., 207, followed.

CIVIL MISCELLANEOUS REFERENCE, made by Government, United Provinces.

M. L. Agarwala, for the petitioner.

Kailas Nath Katju, for the opposite party.

The judgment of the Court was delivered by

RICHARDS, C. J.—This is a reference under the Kumaun Rules. The plaintiff brought a suit for a declaration relating to a certain deed of gift. It appears that Puran Singh died leaving him surviving a widow and a daughter and a daughter's son. The widow made a deed of gift in favour of her daughter and her daughter's son. The suit was for a declaration that this deed of gift was not binding upon the plaintiff (who alleged himself to be the nearest reversioner) and that he was the heir after the death of the widow. The defence was that the plaintiff was not entitled to maintain the suit, that after the death of the widow her daughter (who was a defendant to the suit) would be entitled to the property for her life and after the death of the daughter her son would be entitled. The plaintiff replied to this that there was a custom prevailing in Kumaun under which the daughter and daughter's son were excluded from inheritance. The court of first instance decided that the custom set up by the plaintiff existed and granted the plaintiff a decree. The Deputy Commissioner held that there was not sufficient evidence to prove the existence of a custom, and that being so the ordinary rules of Hindu Law must prevail, in which case the daughter and daughter's son would succeed and dismissed the plaintiff's suit. The learned Commissioner simply made a decree in favour of the plaintiff declaring that the gift to the grandson would not bind the plaintiff beyond the life-time of the donor, the widow.

Richards,
C. J.

* Civ. Mis. Ref. No. 112 of 1918.

CIVIL

1918

JAINT SINGH

v.

GOSAIN.

Richards,

C. J.

We have been asked by Government to advise as to the correctness of the decision of the learned Commissioner and say whether he should not have decided the issue of the existence of the custom, and further to give Government an expression of our opinion on the case in general.

Had the question arisen outside of Kumaun we think that the Commissioner was bound to have accepted the finding of the Deputy Commissioner that the custom did not exist. So far as this question was a question of fact the Deputy Commissioner was the court to decide it. The Commissioner as the court of second appeal could only interfere upon a question of law and the only possible question of law which could have arisen was the question upon whom the *onus* lay, that is to say, whether in Kumaun it can be said that a general rule of law prevails excluding daughters and a daughter's son in such a way as would throw the *onus* on the defendant of showing that there was an exception in their case. We have no hesitation in saying that if the question had arisen outside Kumaun the *onus* of proving a custom different from the ordinary Hindu Law would undoubtedly have lain on the plaintiff who came into court on the basis of a custom of that description. The learned Commissioner has given a very guarded decree. He has only declared that the gift to Jaint Singh, that is the daughter's son, as a gift will not bind the plaintiff after the death of the donor. Even on the assumption that the ordinary rules of Hindu Law prevailed and governed the parties, such a decree might be granted as against the daughter's son as was done in the case of *Raja Dei v Umed Singh* (1). On the same assumption no decree can be given against the daughter, because she would be entitled under the ordinary Hindu Law to succeed on the death of her mother. We think therefore that we cannot say that the decree of the Commissioner was wrong. As to whether he ought or ought not to have decided the question of the existence of the custom is more difficult and raises a very important question in Kumaun. There seems to be little doubt that the custom of the exclusion from inheritance of daughters and daughter's sons does, at least to some extent, prevail in Kumaun, and having regard to the decree which the Commissioner made it was not strictly necessary for him to decide this issue involving as it did a question of very great difficulty. We think under all the circumstances the decree of the Commissioner may be affirmed and we think that the parties ought to bear their own costs in all courts.

Decree affirmed.

(1) [1912] I. L. R. 34 All., 207.

JHUNKU LAL (*Defendant*)*versus*BISHESHAR DAS AND ANOTHER (*Plaintiffs*)*

CIVIL

1918

May, 6.

Civil Procedure Code (Act V of 1908), Order 23, rule 1—Trial of suit—Evidence concluded—Application by plaintiff to withdraw suit with leave to bring a fresh one—Application made during or after arguments—Leave granted to bring fresh suit—Exercise of jurisdiction—Revision.

RICHARDS,
C. J.
BANERJI, J.

A suit was instituted in the court of the Munsif. After the evidence had concluded and either during or after arguments the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. He based his application upon the fact that he had failed to give formal proof of a plaint which was essential to the plaintiffs' success. The court granted leave to bring a fresh suit. Upon an application in revision against the order, *held* that the court had jurisdiction to grant the leave, and the fact that in so acting the court came to a wrong decision was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure.

CIVIL REVISION from an order of BABU KALI DAS BANERJI, Munsif of Hathras.

Panna Lal, for the applicant.

Durga Charan Banerji, for the opposite parties.

The following judgments were delivered.

RICHARDS, C. J.—This is an application in revision and arises under the following circumstances. The plaintiff instituted a suit in the court of the Munsif. After the evidence had concluded and either during or after the arguments the plaintiff applied for leave to withdraw with liberty to bring a fresh suit. He based his application upon the fact that he had failed to give formal proof of a certain plaint which was apparently considered by the parties to be essential to the plaintiffs' success. The court granted leave to bring a fresh suit. The present application is made under section 115 of the Code of Civil Procedure. That section provides that "the High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears

Richards,
C. J.

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or

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v

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DAS.Richards,
G. J

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit." It is argued on behalf of the applicant that the Munsif acted illegally or with material irregularity in granting permission to bring a fresh suit. Order 23, rule 1 deals with the withdrawal and adjustments of suits. Rule 1 is as follows :—" At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim, where the court is satisfied

(a) that a suit must fail by reason of some formal defect or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may grant the plaintiff permission to withdraw with liberty to institute a fresh suit.

In support of the application the case of *Bai Kashibai v. Shidapa Annappa* (1), the case of *Khub Chand v. Ajodhya Prasad* (2), and the decision of their Lordships of the Privy Council in the case of *Robert Watson & Co. v. The Collector of Zillah Rajshahye, Dost Muhammad Khan Chowdhry* (3), have been cited. I may say, speaking for myself, that I consider that a court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits and probably an appellate court ought seldom or never to do so except where an application has been made to the first court and the appellate court thinks the first court should have granted the application. I do not think that it ever was intended that a plaintiff should have the power of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time. But the real question before us is whether or not we can interfere in revision upon the ground that the Munsif either had no jurisdiction, or that he exercised his jurisdiction with material irregularity. It will be noted that the rule is divided into two parts, first where a suit fails for a "formal defect," and secondly where there are "other sufficient grounds." It was for the Munsif to say whether or not there were "other sufficient grounds" in the present case. It is somewhat difficult to definitely decide that the absence of a witness could under no possible circumstance be "other sufficient grounds" within the meaning of the rule. However this may be it seems to me that even if the Munsif be taken to have made a mistake in law, we nevertheless are not entitled to interfere in revision. In the very recent case of *Balakrishna Udayar v. Vasudeva Ayyar* (4), their Lordships dealing with section 115 of the present Code of

(1) [1913] I. L. R., 37 Bom., 682. (2) [1912] 11 A. L. J. R., 783.

(3) [1869] 13 M. I. A., 160. (4) I. L. R., 40 Mad., 793 at p. 799.

Civil Procedure say as follows:—"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." In the Privy Council case referred to on behalf of applicant the original court had dismissed the plaintiff's suit at the same time recording in its "proceeding" that the order was not intended to bar the plaintiffs from proceeding as if the action had not been brought. The question which their Lordships had to decide was whether the appearance of these words in the "proceedings" enabled the plaintiff to bring a fresh suit, notwithstanding the dismissal of the first one, the defendant having pleaded *res judicata*. Their Lordships incidentally, it is true, dealt with the meaning of the expression "sufficient cause" appearing in section 97 of Act VIII of 1859 and no doubt took the view that that section was not intended to allow or enable a plaintiff to bring a fresh suit after it had been heard on the merits. I would reject the application.

BANERJI, J.—I also am of opinion that the application should be rejected, but I would confine myself to this ground in rejecting it that it is not maintainable under section 115 of the Code of Civil Procedure. It cannot be said that the court below exercised a jurisdiction which was not vested in it by law. In the exercise of the jurisdiction which it undoubtedly had it may have committed an error and apparently it did commit an error in the present case; but that alone would not justify this Court in interfering under section 115 as interpreted by their Lordships of the Privy Council in previous cases, and also in the recent case to which the learned Chief Justice has referred. This being so, the application for revision cannot in my opinion be entertained and must be rejected.

BY THE COURT —The order of the Court is that the application is rejected with costs.

Application rejected.

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JHUNKU LAL
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—
Richards,
C. J.

CRIMINAL

1918

May, 4.

PIGGOTT, J.

RAJA RAM SINGH

versus

EMPEROR •

Penal Code (Act XLV of 1860), section 500—Words of an obscene and insulting nature—Words addressed when quarrel had ended to persons other than the person in respect of whom they were used—Defamation.

There was an altercation between *R* and *M*. The latter was a respectable Mukhtar. After the altercation *R* used language in respect of *M* which was of an obscene and insulting nature. The words were not addressed to *M* but to third persons:—*Held* that the words complained of not having been used in the course of a quarrel, and not being addressed to *M* they were calculated to harm *M*'s reputation and *R* was rightly convicted under section 500 of the Indian Penal Code.

CRIMINAL REVISION from an order of BABU BANKE BEHARI LAL, Sessions Judge of Azamgarh.

Peary Lal Banerji, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—This is an application in revision by one Raja Ram Singh, who has been convicted on a charge under section 500 of the Indian Penal Code, and sentenced to a fine of Rs. 50, the case against him being that he used language of an obscene and insulting nature in speaking of a respectable Mukhtar of the name of Muhammad Ali Khan. I do not propose to go into the unedifying details of the quarrel between these two gentlemen. The trying Magistrate has gone into the evidence very thoroughly and has written a carefully considered judgment. I accept his finding as to the words used by Raja Ram Singh and the circumstances under which they were spoken. The point taken on behalf of the applicant is that the words used were obviously not intended to be understood literally and amounted to no more than an open expression of the fact that the accused was very angry with the complainant. There is some authority for the proposition that words *prima facie* defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied. I am content to refer to

the case of *Emperor v. Behari* (1). I think the present case distinguishable; the words in respect of which Raja Ram Singh has been convicted were not used in the course of a quarrel: they were not addressed to Muhammad Ali Khan at all, but were spoken of him after the altercation between the parties was over. Assuming in the applicant's favour that he did not intend that his hearers should take literally the disgusting imputation conveyed by his words, I do not see that he is in any better position than he would have been if he had said—"I wish to convey to you in the most emphatic language at my command that I consider Muhammad Ali Khan a worthless and despicable black-guard." Surely the Sub-Inspector would not wish me to hold that his own credit and reputation amongst his acquaintances stands so low that he has himself no "reason to believe" that such an expression of opinion on his part would harm the reputation of the person of whom it was made.

I hold that Raja Ram Singh was rightly convicted on the facts found and I dismiss his application.

Application dismissed.

(1) [1883] 3 A. W. N., 36.

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RAJA RAM
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v.

EMPEROR.

Piggott, J.

MUHAMMAD ALI KHAN

versus

RAJA RAM SINGH*

CRIMINAL

1918

May, 4.

Piggott, J.

*Criminal Procedure Code (Act V of 1898), section 250—Compensation—
Compensation to accused in criminal case—Complete discharge or acquittal.*

The accused was charged under sections 506 and 500 of the Indian Penal Code but convicted under section 500 being acquitted under section 506. The Magistrate ordered the complainant to pay compensation for bringing a frivolous and vexatious charge under section 506 of the Penal Code:—*Held* that the order directing payment of the fine was illegal inasmuch as section 250 of the Criminal Procedure Code could only operate where the trial or enquiry ended in the unqualified discharge or acquittal of the accused. *Mukti Bewa v. Jhotu Santra*, [1896] I. L. R., 24 Cal., 53, followed.

CRIMINAL REVISION from an order of Dr. S. S. NEHRU, Magistrate, First Class of Azamgarh.

Iqbal Ahmad, for the applicant.

Peary Lal Banerji, for the opposite party.

*Cr. Rev. No. 138 of 1918.

CRIMINAL

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MUHAMMAD
ALI KHAN
v.RAJA RAM
SINGH.*Piggott, J.*

The following judgment was delivered by

PIGGOTT, J.—Raja Ram Singh was tried at one trial by a Magistrate of the first class on two charges framed under section 506 and section 500 of the Indian Penal Code. He was acquitted on the former and convicted on the latter charge. The complainant Muhammad Ali Khan has been ordered to pay a compensation of Rs. 25 to Raja Ram Singh on the ground that the charge of criminal intimidation was frivolous or vexatious. The question I have to determine is whether this order is legal in view of the fact that Raja Ram Singh was convicted on one of the two charges against him. I must take it that the complainant's case was that the two offences in question were committed in the course of one series of acts so connected together as to form the same transaction, otherwise they would have been separately charged and tried separately. The provisions of section 250 of the Code of Criminal Procedure will not apply to such a state of facts unless the Magistrate who tried the case discharges or acquits the accused altogether. The section speaks of "the case" as a whole, and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial court, to be prosecuted for any offence against the Indian Penal Code which he may have committed; but the policy of the Legislature seems to be to limit the summary jurisdiction of the court under section 250 of the Criminal Procedure Code to simple cases, in which the complainant is found to have been wholly in the wrong. There is authority for this view in the case of *Mukti v. Jhotu* (1). I think that case was rightly decided and that it covers the facts now before me.

I set aside the order directing Muhammad Ali Khan to pay Rs. 25 as compensation. The money, if paid, will be refunded.

Order set aside

(1) [1896] I L R., 24 Cal., 53

BHAGWAN DIN AND OTHERS
versus
 EMPEROR *

CRIMINAL

1918

May, 4.

BANERJI, J.

Penal Code (Act XLV of 1860), section 447—Criminal trespass—Intention to commit offence or to intimidate or annoy.

A Zamindar brought a suit in the Revenue Court for the ejectment of certain persons from a certain holding on the ground that they were non-occupancy tenants. The suit was decreed and formal possession of the holding was given to the zamindar. The tenants who contended that they were occupancy tenants preferred an appeal and during the pendency of the appeal entered on the land and tried to plough it. They were prosecuted and convicted under section 447 of the Indian Penal Code. The appellate court subsequently set aside the order for ejectment, holding that one of the accused was an occupancy tenant:—*Held* that the conviction was illegal inasmuch as there was no *mala fides* on the part of the accused and they entered on the land in the belief that it formed part of their occupancy tenancy and consequently they did not intend to commit an offence or to intimidate, insult or annoy the Zamindar.

Semble.—Whether the possession mentioned in section 441 of the Indian Penal Code means actual possession or formal possession delivered by a court.

CRIMINAL REVISION from an order of MUNSIF MUHAMMAD AZIM KHAN, Magistrate First Class of Fatehpur.

Kailas Nath Katju, for the applicants.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

BANERJI, J.—This is an application for revision of an order by which the applicants have been convicted under section 447 of the Indian Penal Code and sentenced to fine. The facts are these:—The zamindar brought a suit for ejectment in a Revenue Court against Bhagwan Din accused and others on the allegation that they were tenants without rights of occupancy. They pleaded that they were occupancy tenants. The court of first instance decided against them and made a decree for ejectment on the 26th of June, 1917. On the 23rd of August, 1917, possession was delivered to the decree-holder. Of course the possession which was so delivered was only formal possession, the lands not having any crops on

Banerji, J.

CRIMINAL

1918

BHAGWAN

DIN

v.

EMPEROR.

Banerji, J.

them at the time and the decree-holder after delivery of possession not having ploughed the lands or sown any crops. The defendants to that suit preferred an appeal from the decree of the court of first instance and during the pendency of the appeal they, on the 11th of October, 1917, entered on the land and tried to plough it. It is in consequence of this act that they were prosecuted and have been convicted. Two contentions have been raised in this case. The first is that the decree-holder zamindar had never got actual possession and therefore could not be deemed to have been in possession within the meaning of section 441 of the Indian Penal Code, and the second is that there was no intention to commit an offence or to intimidate, insult or annoy any one in possession. In support of the first contention the case of *In the matter of the petition of Gobind Prasad and another* (1), was referred to. The view taken in that case was followed in *Kunji Lal and others v. King-Emperor* (2). I do not deem it necessary for the purposes of this case to decide whether the possession delivered to the zamindar was actual possession or not within the meaning of the decisions to which I have referred and whether the possession mentioned in section 441 of the Indian Penal Code means actual possession or formal possession delivered by a court. The real question is whether there was any intention to commit an offence, or to intimidate, insult, or annoy the zamindar. As the result shows Bhagwan Din, the person whose ejectment had been ordered, was not liable to ejectment as it was held by the appellate court subsequently that he was a tenant with rights of occupancy and the order of ejectment was set aside by that court. Under these circumstances it cannot be said that the persons who were the tenants of the land and who as the event proved were not liable to ejectment intended to commit an offence, or to intimidate, insult or annoy the zamindar, decree-holder, when they entered on the land which formed their occupancy holding for the purpose of ploughing and cultivating it. There was clearly no *mala fides* and they were apparently acting in the belief that they were entitled to continue in possession. In this view their conviction by the court below was illegal and improper. I accordingly allow the application, set aside the order of the court below, acquit the applicants of the offence of which they were convicted, and direct that the fines imposed on them, if paid, be refunded.

Conviction set aside.

(1) [1879] I. L. R., 2 All., 465.

(2) [1913] 12 A. L. J. R., 151.

NANHE
versus
EMPEROR.*

CRIMINAL

1918

May, 3.

KNOX, J.

Criminal Procedure Code (Act V of 1898), sections 118, 514—Accused asked to furnish personal security and provide respectable surety—Surety offering house as security reported respectable and the house worth Rs. 500—Security not accepted—Revision.

A person was ordered, under section 118 of the Criminal Procedure Code to furnish a bond of Rs. 200 and a respectable surety. A surety came forward and offered security in the shape of house-property. The surety was reported to be respectable and the house worth Rs. 500. The Magistrate rejected the security purporting to act under section 514 of the Criminal Procedure Code :—*Held* that the surety being respectable and the house worth Rs. 500 should have been accepted though it was true that only moveable property could be attached and sold during surety's life-time for recovery of penalty.

CRIMINAL REFERENCE made by W. T. M. WRIGHT, Esq., Sessions Judge of Budaun.

The parties were not represented.

The following judgment was delivered by

KNOX, J.—The Sessions Judge of Budaun has referred the following matter. One Nanhe was ordered under section 118 of the Criminal Procedure Code to furnish a bond for Rs. 200 and to provide one respectable and reliable surety in Rs. 100. A surety came forward and offered security. The security was house property about which the Tehsildar reported that the house owned by the surety was worth Rs. 500 and that he was a respectable person. Still the Magistrate refused to accept it on the ground that under section 514 of the Criminal Procedure Code only moveable property can be attached and sold for the recovery of any penalty ordered under that section. No proceedings could be taken against a house and the District Magistrate considered the security insufficient. While it is true that so long as a surety is alive only moveable property can, for default under section 514 of the Criminal Procedure Code, be attached and sold for recovery of penalty, yet I agree with the learned Sessions Judge that if the house offered as security is worth Rs. 500 and the surety is reported by the Tehsildar to be a respectable person, the security should be accepted. I set aside the order of the learned District Magistrate and direct that the surety and security offered be accepted. Let the record be returned.

Knox, J.

Order set aside.

* Cr. Ref. No. 239 of 1918.

CIVIL

1918

May, 9.

RICHARDS,
C. J.
BANERJI, J.

JAIMAL SINGH (*Plaintiff*)*versus*SHIB SARAN SINGH AND ANOTHER (*Defendants*).*

Agra Tenancy Act (II of 1901), section 201—Suit for profits—Plaintiff not recorded co-sharer—No bar to suit—Procedure to be followed in the case.

Under section 201 of the Tenancy Act the mere fact that a plaintiff is not recorded as a co-sharer is not enough to bar him from maintaining a suit for profits. The procedure to be followed in a case in which a plaintiff is recorded and in a case in which he is not recorded is indicated in the section. In the latter case if an issue as to the plaintiff's title arises the Revenue Court should either try it or refer the plaintiff to a Civil Court.

SECOND APPEAL from a decree of E. M. NANAVUTTY Esq., District Judge of Bareilly, confirming a decree of C. H. Marsh, Esq., Assistant Collector, First Class.

Sham Nath Mushran, for the appellant.

Nehal Chand, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—We think that the ground upon which the lower appellate court decided this case was not correct. The plaintiff is not a recorded co-sharer of the property in respect of which the profits claimed are alleged to have accrued due. The lower appellate court seems to think that the mere fact that the plaintiff was not recorded was sufficient to prevent him maintaining the suit. We do not think this view is correct. Section 201 of the Tenancy Act provides for what is to be done in the case of a plaintiff who is recorded and in the case of a plaintiff who is *not recorded*. If the issue arises as to the latter's title the Revenue Court is either to try the case itself or to refer the plaintiff to a Civil Court. We think, however, that it is perfectly useless to send the case back for trial, because on the allegations of the plaintiff himself in his plaint he cannot possibly maintain the present suit. According to his own allegations the defendant Musammat Dayali Kunwar is not and was not a co-sharer. The other defendant is a minor and it is not alleged that he made collections. Furthermore the suit is a suit for profits. Otherwise it could not have been instituted in the Revenue Court. It is not alleged and could not have been alleged that either the minor or Musammat Dayali Kunwar was the lambardar. In reality the plaintiff's suit is a suit for damages because a certain compromise was not carried into effect. (The compromise fell through because it was found by the court that the compromise was not for the benefit of the minor.) The person with whom the compromise was really made was dead before the institution of the suit. We dismiss the appeal with costs.

Appeal dismissed.

TOTA RAM AND ANOTHER (*Defendants*)*versus*GOPAL SINGH (*Plaintiff*)*

CIVIL

1918

May, 2.

RICHARDS,
C. J.
TUDBALL, J.*Pre-emption—Sale to a stranger—Re-sale to vendor subsequently to institution of suit—Vendor no co-sharer at date of re-sale.*

Where after the institution of a suit for pre-emption the vendee (a stranger) re-sold the property sought to be pre-empted to the vendor who by selling all the rights he was possessed of had ceased to be a co-sharer at the date of re-sale, *held* that the pre-emptor was entitled to a decree for pre-emption.

SECOND APPEAL from a decree of A. G. P. PULLAN Esq., District Judge of Mainpuri, reversing a decree of Pandit Vishnu Ram Mehta, Munsif of Shikohabad.

Kailas Nath Katju, for the appellants.

Tej Bahadur Sapru, for the respondent.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The court of first instance dismissed the suit. The lower appellate court gave a decree. One Angnu was the vendor. The vendee was a stranger. In the first instance only the vendee put in a written statement. He alleged that after the commencement of the suit he had re-sold the property to the original vendor. He put in further the pleas, that the consideration mentioned in the sale deed was the correct consideration. Later on the vendor also appeared and put in a written statement alleging amongst other things that the plaintiff had refused to purchase. The court of first instance found that the plaintiff had refused to purchase and it was on this ground that the suit was dismissed. The lower appellate court disbelieved the evidence as to refusal and granted the decree. Two points have been urged before us in the appeal. The first relates to the finding of the court below upon the issue as to the refusal by the plaintiff to purchase. Having fully heard the learned vakil, for the appellant, we consider that we are bound to accept the finding of the lower appellate court that the plaintiff did not refuse to purchase. The court has given its reasons for coming to this conclusion. The next point urged was that the

Richards,
C. J.

* S. A. No. 1325 of 1916.

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Richards,
C. J.

re-sale to the vendor was a complete defence to the suit notwithstanding that the re-sale did not take place until after the present suit was instituted. This is contrary to the rulings in *Narain Singh v. Parbat Singh* (1) and *Liakat Husain v. Rashid-ud-din* (2). In those cases the re-sale had been made to a co-sharer. In the present case it does not appear that the original vendor was a co-sharer at the time of the re-sale. A perusal of the sale deed rather suggests the contrary. It seems as if the vendor, Angnu, sold all that he was possessed of. In any event if the defendant relied upon the re-sale to a co-sharer, the burden lay upon him of proving the fact. We dismiss the appeal with costs.

Appeal dismissed.

(1) [1901] I. L. R., 23 All., 247.

(2) [1906] 3 A. L. J. R., 794.

CHITAN SINGH (*Plaintiff*)

versus

BALDEO SINGH AND OTHERS (*Defendants.*)*

CIVIL
1918
May, 8.
RICHARDS,
C. J.
TUDBALL, J.

Pre-emption, suit for—Pre-emptor to be ready to pay when entitled to get possession—Extension of time.

In a pre-emption suit a plaintiff is presumed to be ready and willing to pay the purchase-money whenever he can get possession of the property. If for any special reason a plaintiff in pre-emption suit wants to have a more extended time, he should instruct his pleader to ask the court to make a special term in the decree and to give the court good reasons for giving an extended time.

SECOND APPEAL from a decree of F. D. SIMPSON, Esq., District Judge of Budaun, confirming a decree of Babu Khired Gopal Banerji, Subordinate Judge.

Peary Lal Banerji, for the appellant.

Lakshmi Narain, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—In this case the plaintiff brought a suit for pre-emption. The property was sold on the 5th of March, 1914. The consideration stated was a sum of Rs. 4,500, which both the courts below have found to be the true consideration. The present suit was not instituted until the 28th of January, 1915, when the

^a S. A. No. 275 of 1916.

plaintiff alleged, amongst other things, that the sale price was only Rs. 2,731. The court of first instance granted a decree upon payment of the price within one month. Just as that time was about to expire an application was made to the court to extend the time. The court intimated that it had no power to change the terms of the decree. Thereupon the plaintiff filed an appeal abandoning his allegation about the excess of the purchase money save to the extent of Rs. 333. After the plaintiff appealed the vendee also appealed. Both appeals came up and were dismissed. The court below refused to alter the decree of the court of first instance with regard to the time within which the money should be brought in. In order to justify the court in altering the decree of the court of first instance, the lower appellate court would have to find that one month was an unreasonable time for the court to fix in its decree for the payment of the money. Considering that the plaintiff had over eleven months to prepare himself for payment of the purchase money, we can hardly say that a month was an unreasonable time. In a pre-emption suit the plaintiff is presumed to be ready and willing to pay the purchase money whenever he can get possession of the property. If for any special reason a plaintiff in pre-emption wants to have a more extended time, he should instruct his pleader to ask the court to make a special term in the decree and to give the court good reasons for giving an extended time. Nothing of this appears to have been done in the present case. We think there is no force in the appeal and we accordingly dismiss it with costs.

Appeal dismissed.

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SINGH.
Richards,
C. J.

SAIYED MUHAMMAD RAZI-UD-DIN (*Plaintiff*)

versus

RAGHUBIR PRASAD AND OTHERS (*Defendants*).*

Pre-emption—Mohammedan Law—Shias—Property owned by more than two co-sharers—Wajib-ul-arz—Vague entry as to custom.

Upon a sale of property by a *Shia* Mohammedan no right of pre-emption arises when there are more than two co-sharers in such property. *Abbas Ali v. Maya Ram*, [1888] I. L. R., 12 All., 229, followed.

Held by RICHARDS, C. J., that a plaintiff is not entitled to claim the right of pre-emption when he produces in proof of his right a vague entry in the *Wajib-ul-arz* to the effect that in matters of pre-emption the rights were according to faith.

* S. A. No. 1227 of 1916.

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1918
May, 2.
RICHARDS,
C. J.
TUDBALL, J.

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MUHAMMAD
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v.
RAGHUBIR
PRASAD.

SECOND APPEAL from a decree of B. J. DALAL, Esq., District Judge of Benares at Jaunpur, confirming a decree of Pandit Rup Kishan Agha, City Munsif of Jaunpur.

Pre-emption suit.

S. A. Haidar, for the appellant

S. M. Sulaiman, Iqbal Ahmad and Mukhtar Ahmad, for the respondents.

The following judgments were delivered.

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The vendor was a Mohammedan of the *Shia* sect. The plaintiff alleged in the plaint that there was a custom under which he, as a co-sharer with the vendor, was entitled to a right of pre-emption. The evidence in support of a custom was an extract from the *Wajib-ul-arz* which simply stated that in matters of pre-emption the rights were according to faith. This is certainly a very vague entry. As a matter of fact the vendor and the pre-emptor are *Shias* and the best view of the law of pre-emption amongst *Shias* is that there is no right where there are more than two co-sharers. No doubt there is considerable authority the other way but the best view appears to be that amongst *Shias* there is no right of pre-emption where there are more than two co-sharers. In the present case there are more than two co-sharers and it was upon this ground that the court below dismissed the suit. In my opinion the plaintiff by the production of this vague entry from the *Wajib-ul-arz* did not prove the existence of a custom which entitled him as a co-sharer to purchase zamindari which was sold by another *Shia* merely upon the ground that he was a co-sharer where it is admitted there were several other co-sharers. I think that the decision of the court below should be affirmed, and I would dismiss the appeal.

Tudball, J.

TUDBALL, J.—I fully agree. The ruling in *Abbas Ali v. Maya Ram* (1), has been consistently followed in this Court for a long series of years.

BY THE COURT.—The order of the Court is that we dismiss the appeal with costs.

(1) [1888] I. L. R., 12 All., 229.

LALTA PRASAD CHAUDHRY (*Plaintiff*)*versus*GOKUL PRASAD AND OTHERS (*Defendants*)*

CIVIL

1918

May, 7.

Pre-emption—Custom admitted—Pre-emptor at the date of sale a co-sharer in the patti in which property sold was situate—Pre-emptor acquiring right by imperfect partition—Right not lost.

RICHARDS,
O. J.
TUDBALL, J.

By means of an imperfect partition of a village made in recent years a *patti* was formed and the plaintiff became a co-sharer therein. He claimed a right of pre-emption in respect of the sale of certain property situate in that *patti*. The custom of pre-emption was admitted. The *wajib-ul-arz* gave the right to a *hissadar-i-karibi*. The courts below interpreted the expression to mean a co-sharer in the same sub-division as the vendor. The lower appellate court dismissed the suit on the ground that the pre-emptor had become a co-sharer in the *patti* by reason of imperfect partition:—*Held* that the custom being proved, if the plaintiff could prove that he came within the custom at the time of the sale, he was entitled to the benefit of the custom and the mere fact that he was not within the custom prior to partition would not bar him from subsequently acquiring the right. *Madho Prasad v. Jaipal*, 8 I. C., 867, not followed.

SECOND APPEAL from a decree of BABU GOPAL DAS MUKERJI, Additional Subordinate Judge of Gorakhpur, reversing a decree of Babu Girish Prasad, Munsif of Bansi.

J. Simeon, for the appellant.

Gulzari Lal, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The plaintiff is a co-sharer in the same *patti* with the vendor but the *patti* was created by imperfect partition and in more recent years. There seems to be no dispute that a custom of pre-emption prevails in the village. The entry in the *wajib-ul-arz* of 1860 gives the first right to *hissadar karibi* and both courts were of opinion that this meant that the co-sharer in the same sub-division as the vendor would have a preference over a co-sharer in another sub-division. The court of first instance decreed the plaintiff's claim. The lower appellate court reversed the decision of the

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C. J.

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C. J.

court of first instance solely on the ground that the plaintiff's being in the same *patti* as the vendor was due to imperfect partition. It referred to a case *Madho Prasad Sahu v. Jaipal Rawat* (1). We do not agree with the decision in this case. It seems to us that where a custom is proved if the plaintiff can show that he comes within the custom at the time of the sale he is entitled to the benefit of the custom. The mere fact that he was not within the custom prior to partition does not prevent him from subsequently acquiring the right. For example it can hardly be said that if a co-sharer acquired a share in a *patti* by sale that he would not have the right of a co-sharer in that *patti* upon a sale subsequently made by one of the co-sharers. The rights which the plaintiff acquired by imperfect partition was just as binding upon the co-sharers as if he had acquired the right by sale. We must allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

(1) 8 I. C., 867.

CRIMINAL

1918

May, 15.

KNOX,

A. C. J.

GIRDHARI PASI

versus

EMPEROR*

Criminal Tribes Act (Local, Act III of 1911), section 10 (b)—Rules framed by Local Government for purposes of the Act—Rule 8 (a)—Change of residence to be notified—Temporary change for a day or two, whether to be notified.

Under Rule 8 (a) made by the Local Government for the purposes of the Criminal Tribes Act a registered member of a criminal tribe is not bound to notify a change of residence which is of a temporary character, as one for a day or two.

CRIMINAL REVISION from an order of C. MOORE, Esq., District Magistrate of Jaunpur.

A. H. C. Hamilton, for the applicant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Knox,

A. C. J.

KNOX, A. C. J.—Girdhari Pasi, a member of criminal tribe to which the provisions of section 10 (b) of Act III of 1911 have been made applicable by notification of the Local Government, was convicted before a Magistrate at Jaunpur of having committed an offence

* Cr. Rev. No. 169 of 1918.

under section 22, clause (2) (a) of the Criminal Tribes Act No. III of 1911. There is no doubt whatever as to Girdhari having been registered as a member of a criminal tribe. The rule which he is said to have violated is Rule 8 (a) made by the Lieutenant Governor for the purposes of the Criminal Tribes Act. According to that rule every registered member is to notify in person to the officer-in-charge of the police station within the limits of which he is for the time being residing his place of residence, any change or intended change of residence, and any absence or intended absence from his residence. The registration sheet was apparently drawn up in jail at the time when Girdhari was still in jail. It sets out that Girdhari resided at Barauli within the limits of the police station Maryahu. The document apparently bears no date unless the figures 11th June, 1917, placed over the thumb impression of the accused are to be considered the date. If so, Girdhari was under sentence to remain in jail until the 2nd of November, 1917. It is quite clear that he could not possibly notify, in person to the officer-in-charge of Maryahu, his place of residence. After his release he appears to have gone to a village which was not within the jurisdiction of Maryahu police station but within the jurisdiction of Badlapur police station. I do not think his stay at the village Rori which appears to have been merely for a day or two can be considered as a change of residence coming under Rule 8 (a). If he committed any offence at all which can be brought under Rule 8 (a) it was his neglect to notify in person to the officer-in-charge of Maryahu his residence at Maryahu and his absence from that residence. This will be simply a technical offence under the circumstances and I consider that the time passed by Girdhari in imprisonment is sufficient. The bail which he has entered will be discharged.

Sentence reduced.

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Knox,
A. C. J.

MAN MOHAN LAL (Plaintiff)

versus

GOPI NATH AND OTHERS (Defendants)*

Civil Procedure Code (Act V of 1908), Order XXI, rules 92, 93—Execution of decree—Purchaser at auction—Transfer of property by auction-purchaser—Vendee deprived of possession—Auction-purchaser refunding money to his vendee—Suit for refund of purchase-money—Sale not set aside—Suit not maintainable.

Certain persons obtained a decree against A. In execution of the decree certain property was attached, and one B came forward with a claim that the property was his and not liable to sale. His claim was

° S. A. No. 935 of 1916.

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ABDUL
RAOOF, J.

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Gopi Nath.

disallowed and the property was sold at auction and purchased by S1. S1 sold the property to S2 who obtained possession. In the meantime B succeeded in his appeal against the dismissal of his suit and in due course ousted S2. S1 had to refund to S2 the money received by him. S1 then transferred his rights to the plaintiffs. The auction-sale had not been set aside. In a suit for refund of the purchase-money, held that the suit was not maintainable.

SECOND APPEAL from a decree of PANDIT GURU PRASAD DUBE, District Judge of Bareilly, reversing a decree of Babu Baij Nath Das, Subordinate Judge.

Gulzari Lal, for the appellant

S. M. Sulaiman, for the respondents.

The judgment of the Court was delivered by

Tudball, J. TUDBALL, J.—This and the connected appeal No. 936 of 1916 arise out of the same suit. The facts are simple. Ganesh Prasad and others obtained a decree against Asharfi Lal and others. They had prior to the suit obtained attachment of certain property. One Badri Prasad came forward and claimed the property as his own and his objection was disallowed. He thereupon brought a suit for a declaration that the property was his and was not attachable and saleable in execution of the decree. His suit was dismissed by the first court on the 1st of March, 1909. The property was then put to sale and was purchased by Sita Ram on the 1st of October, 1909. Badri Prasad however appealed and on appeal he succeeded and the court held that the property was his and that the judgment-debtors had no interest therein. This decree was passed on the 3rd of June, 1910. In the meantime Sita Ram had transferred the property to Shiam Sundar Lal and the latter was in possession. Badri Prasad sued him for possession and obtained a decree on the 31st of July, 1912, and in due course he ousted him. Sita Ram then refunded to Shiam Sundar Lal what the latter had paid to him for the property. He has now assigned his rights, whatever they may be, to the present plaintiff-appellant who appears to be a speculator and he has sued to recover the sale price paid by Sita Ram which we may mention, had been distributed among a large body of creditors in addition to the decree-holders in the original suit against Asharfi Lal. The court below has dismissed the suit on the ground that it was not maintainable. The case is on all fours with the case of *Nannu Lal v. Bhagwan Das* (1). We think that the case being governed by that ruling this appeal must fail and it is therefore dismissed with costs.

Appeal dismissed.

(1) [1916] I. L. R., 39 All., 114; S. C., 14 A. L. J. R., 1216.

PRIVY COUNCIL.

RAHMAT-UN-NISSA BEGUM AND OTHERS (*Plaintiffs*)*versus*PRICE AND OTHERS (*Defendants*)

*Contract Act, 1872 (Act I of 1872), sections 252, 253, 254—Partnership—
Right to a dissolution—How far affected by terms of partnership contract*
• —*Power of court to decree dissolution.*

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It is not therefore a contravention of section 252 of the Indian Contract Act for a partner to seek dissolution, or for the court to decree it, though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. It is to meet the precise predicament that a partnership is not terminable at will that the court's power to decree dissolution is conferred in the events enumerated in section 254.

APPEAL from a decree of the Bombay High Court, varying a decree of MACLEOD, J.

The facts of the case are sufficiently stated in their Lordships' judgment. Briefly, the appellant's predecessor, Nawab Kamal Yar Jung had entered into a partnership with respondents for the quarrying and supply of stone to be used by respondents in constructing certain docks at Bombay. The partnership agreement provided that the partnership should continue until the supply of stone for the docks was completed. The partnership, however, resulted only in losses, and on that ground the Nawab sued for a dissolution. MACLEOD, J. decreed his suit but this decision was reversed on appeal by SCOTT, C. J., and DAVAR, J. They held that

Cowaji Nanabhoy v. Lallbhoy Vallubhoy, [1876] I. L. R., 1 Bom., 468, established the proposition that parties when entering into a partnership agreement may so stipulate as to relinquish their right of dissolution in the ordinary way and postpone those rights till the expiration of a period or the completion of an adventure; that that case was before the Contract Act, but that section 252 of the

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LORD

BUCKMAS-

TER,

SIR

JOHN EDGE,

SIR WALTER

PHILLIMORE

BART, SIR

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Contract Act laid down the same rule: that the parties here had expressly stipulated that the partnership should continue till the supply of stone for the docks had been completed. They added that even if they had a discretion to declare the partnership dissolved they would not have exercised it in plaintiff's favour. The docks being by this time completed, they did not dismiss the suit, but held that plaintiff was not entitled to a declaration that the partnership came to a termination before the termination of the adventure, and directed that partnership accounts be taken up to the end of the construction work of the docks.

Hence this appeal.

Upjohn, K. C., (with him *Sir W. Garth*), for the appellants.—Under section 254 (6) of the Indian Contract Act a partner may sue for dissolution of partnership when the business of the partnership cannot be carried on except at a loss. There are no circumstances here to justify the finding that the parties agreed to renounce the right of dissolving in case of loss. On a proper construction of the articles of agreement the appellants did not relinquish their statutory right to apply to dissolve the partnership in that case.

Cowasji Nanabhoy v. Lalbhoy, [1876] I. L. R., 1 Bom., 468; S. C., 3 I. A., 200,

does not lay down that partners can contract themselves out of that right. To the contrary effect *vide* Lindley on Partnership, p. 680.

On the question of discretion, there is nothing in the facts which disentitles appellants to the benefit of the statute. MAULEOD J., exercised his discretion rightly in plaintiff's favour and the appellate court had no sufficient reason for interference with it.

P. O. Lawrence, K. C., (with him *De Gruyther, K. C.*, and *E. B. Raikes*), for the respondents.—The appellate court were right in saying this was not a contract which one party could determine merely because the business was being carried on at a loss. The articles show that there was an agreement that the partners would not take advantage of their statutory right to apply for dissolution. Whatever power the court had to dissolve, the discretion not to dissolve has been exercised rightly and properly by the court of appeal.

Upjohn, K. C., replied.

Their Lordships' judgment was delivered by

*Sir
 Lawrence
 Jenkins.*

SIR LAWRENCE JENKINS.—This is an appeal from a decree of the High Court at Bombay in its appellate jurisdiction, dated the 8th September, 1914, varying a decree of that court in its original jurisdiction passed on the 28th March, 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab

Kamal Khan, but he has died in the course of the suit and the present appellants are his representatives. The defendants, his partners, are the respondents in this appeal. The partnership was constituted on the 11th March, 1908, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay, and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them the Nawab was either directly or indirectly interested.

For reasons which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

In the end an arrangement was made for cancellation of the two contracts and the release of all claims for their breach by the Nawab and those interested with him, and for the formation of a new partnership between the Nawab and the defendants for the quarrying and supply of the requisite granite and other stone. The defendants insisted that the Nawab should be a sleeping partner without any voice in the control and conduct of the business, so his advisers naturally demanded the insertion in the partnership instrument of a provision which would secure him against the risk of extravagant working.

To this the defendants assented, and a clause was inserted which ultimately became the 25th in the instrument as executed. It is this clause that has given rise to much of the present dispute.

In the instrument, which is expressed to be made between the Nawab, of the one part, and the defendants (thereinafter called the contractors), of the other part, after a narrative of the events leading up to the partnership, it is recited that "for the purpose of carrying out the said terms and conditions and of working the said quarries and producing stone and granite therefrom, and rendering the said quarries remunerative and profitable to the parties thereto, and in consideration of the advances to be made by the contractors," it had been arranged that the agreement should be entered into.

The instrument then provided that the Nawab and the defendants should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half (clause 1); that the granite and stone produced from the quarries should be furnished to the defendants for their works at

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the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (clause 3); that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4); that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent. on the cost of the work, including all charges (clause 17); that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22); and "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent." The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss which amounted to upwards of three lakhs of rupees on the 30th June, 1910. In these circumstances the present suit was instituted in October, 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

In the plaint extravagant charges of fraud were made, but they have been abandoned. While groundless charges of this type are to be deprecated, and may well attract the consequence of an adverse order as to costs, their Lordships cannot accede to the suggestion, somewhat faintly made, that the Nawab had by these charges forfeited his right to the protection of the court if he otherwise had a good cause of action.

The matters now in contest are:—(1) whether the suit is premature; (2) what is the "average rate of expense" mentioned in clause 25 of the partnership instrument; and (3) have there been "extraordinary circumstances" within the meaning of that clause?

The court of first instance decided in the Nawab's favour on the first and second of these points, and adversely to him on the third. The appellate Bench's decision was wholly adverse to the Nawab, but as the work on the docks had been completed before the hearing of the appeal, the court directed that partnership accounts should be taken from the 11th March, 1908, up to the end of the construction work of the docks.

The court of appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution was based on the continuance of the partnership involved in the terms of the partnership agreement and on section 252 of the Contract Act. And the court proceeded to express the opinion that, even if it had jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The

first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

It is beyond controversy that at the institution of this suit the business of the partnership could only be carried on at a loss. This is conclusively shown by the firm's balance sheets, the profit and loss account for the period from the 1st March, 1908, to the 30th June, 1912, and the admission in the defendants' written statement. The condition described in section 254 (6) of the Indian Contract Act, 1872, is thus established, and it is provided that in this event the court may, at the suit of a partner, dissolve the partnership. What, then, is there in the circumstances of this case to deprive the court of its jurisdiction or the plaintiff of his right to seek the court's assistance?

Their Lordships are unable to agree with the High Court's view that there is anything in section 252 that constitutes a bar; it appears to them to be directed to something wholly different.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution or for the court to decree it though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the courts, and yet, if the view of the appellate Bench is to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will; it is to meet that precise predicament that the court's power to decree dissolution is conferred in the events enumerated in section 254. For a partnership terminable at will no such provision would be required.

Their Lordships therefore are unable to affirm the decision of the appellate Bench as to the competence of the suit. But this leaves open the question whether the court's discretion should be exercised for or against the Nawab's claim. The appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an appellate court to substitute its discretion for that of the court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the appellate Bench as it is before this Board. And yet the appellate Bench did not hesitate to express its readiness to substitute its

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discretion for that of the original court, although in the view it took of the court's jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners.

Their Lordships therefore hold that there is no sufficient ground for disturbing the original decree so far as it pronounced for a dissolution.

The next inquiry involved in this appeal is as to the amount of the average rate of expense prescribed as a limit by clause 25 of the partnership instrument. This clause was inserted as a protection for the Nawab; it in effect imposed a limit on expenditure by the controlling partners, and the measure of that limit was the rate of expenditure in the past.

It had originally been arranged that the rate should be embodied in the document. Its ascertainment had been entrusted to Mr. Chukerbutty on behalf of the Nawab, and Mr. Stuart on behalf of the defendants, but they were unable to agree to a figure in time for its inclusion in the engrossment.

On the 10th March, 1908, however, the two representatives agreed to a figure, and the contest is as to what the figure covered. On the same day Stuart wrote on behalf of the defendants, and sent to the Nawab a letter in the following terms:—

"We beg to confirm the rate agreed upon with Mr. Chukerbutty this day as referring to clause No. 25 in the proposed agreement between you and ourselves, *viz.*, Bombay Government, rupee 1, annas 7, per cubic foot for all labour on granite for quarrying, dressing, and hauling to station."

On the 11th the partnership instrument was executed by the Nawab at Hyderabad, and from an endorsement it appears that it was read over and interpreted to him by Chukerbutty. It probably had been previously signed by or on behalf of the defendants at Bombay, though no distinct proof as to this has been brought to their Lordships' notice.

On the 14th March the Nawab wrote to the defendants as follows:—

"In reply to your letter dated the 10th regarding the working expense of granite stone at Lingampalli, I beg to point out the rate of 1/7 rupees was arrived at on calculation on wrong basis. This has got to be revised on actual working before it can be acceded to."

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Here it becomes necessary to refer to an admission made in the course of the suit and contained in a letter of the 30th July, 1913, written by the plaintiffs' attorneys to the defendants' solicitors. It is expressed to be in confirmation of what had passed between counsel for the parties at a meeting on the previous day and after stating that "with a view to shortening proceedings" certain charges were abandoned, it runs as follows:—

"We also give notice that for the above reasons and for the purposes of this suit only our client admits that at or about the time of signing the partnership agreement . . . it was agreed between the parties that the cost of working the quarries should not exceed the rate of 1/7 rupees (British currency) per cubic foot of stone. We think it right to add that this admission must not be taken as an admission that the said rate included only the items apparently contended for by the defendants as shown in the accounts submitted by them to our client."

This admission is of vital importance: it controls this branch of the case, and narrows the region of enquiry. Not only does it decisively affirm and place beyond controversy the fact that there was an agreement and that according to that agreement the rate was not to exceed 1/7 rupees, but it excludes the possibility of any objection to its admissibility under section 91 or 92 of the Evidence Act. The one qualification is that the rate did not only include the three items of quarrying, dressing, and hauling. All therefore that has to be considered and determined is whether under the agreement between Chakerbutty and Stuart three items only or more than three items were covered by the accepted rate of 1/7 rupees. It is beside the point to speculate as to whether this figure was assessed in error; for if error there was, the proceedings are not aptly framed for its correction.

On the question whether, in the agreement between Chukerbutty and Stuart these three items and these alone were included, the evidence stands thus. The letter of the 10th March is explicit on the point; it states that the 1/7 rupees were for these three items and for nothing else. It was written and sent on the very day the agreement was made and just after Chukerbutty had left, so there would be no room for forgetfulness in the matter. Nor is it reasonable to suppose that Stuart would have at once sat down and deliberately given a false version of the agreement. And then there is the significant circumstance that the agreement was subsequently signed by the Nawab without any protest or repudiation of the terms contained in the letter, and this was done in the presence of Chukerbutty, who, it is sworn, was always first consulted by the

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Nawab before signing anything, and who on this occasion acted as interpreter. It is true that on the 14th the Nawab wrote objecting to the letter of the 10th, but his objection was not that no agreement had been made in the terms stated by Stuart, but that the calculation had been on a wrong basis. And then there is the evidence of Stuart. He declares that the rate agreed upon between Chukerbutty and himself was 1/7 rupees per cubic foot, and that the letter of the 10th March correctly states the agreement. His veracity has not been impugned, but it has been strenuously contended on behalf of the Nawab that in view of the figures in Exhibit 27, the estimate of cost of stone prepared by Mr. Gay, and of Stuart's evidence as to the use made of those figures in arriving at the rate on which he and Chukerbutty ultimately agreed, it is impossible that the rate of 1/7 rupees could have been for the three items of quarrying, dressing, and hauling only, and that it must also have included loading, depreciation, royalty, quarry expenses, and incidentals.

Their Lordships recognise the force of this criticism, and realise that the coincidence of the figures in Exhibit 27 with this contention is worthy of consideration. But at the same time they feel that it would be easy to attribute too much weight to it, and more particularly as Stuart's evidence was given in answer to interrogatories and cross-interrogatories administered on commission, so that there was no opportunity of giving the examination a direction which would have elucidated the full significance of answers which now remain obscure. In the circumstances it is at least as probable that the estimate of 1/7 rupees was limited to the three items as the result of a compact between Chukerbutty and Stuart reached by accommodation or possibly even in error, as that the agreed rate of 1/7 rupees was not limited to the three items. As it is involved in the Nawab's admission of the 30th July, 1913, that there was an agreement for a rate of 1/7 rupees, and the only evidence on the record is that this rate covered the three items and no more, in the absence of contradiction by Chukerbutty or anyone else able to speak to the point, their Lordships hold that this must be accepted, and the decision of the appellate Bench on this point upheld.

It only remains to consider the defendant's contention that they had established such "extraordinary circumstances" as would justify the increase of the rate as provided by clause 25. The burden of making this good was on the defendants, and the question is whether they have succeeded in this. What then are the "extraordinary circumstances"? The only direct evidence is that of Gay, and all that can be spelt out of his evidence is that the circumstances occasioning greater expenditure were (1) the preparation of culvert stones, and (2) the importation of labour. The first of these cannot be regarded as an extraordinary circumstance,

for the schedule to the partnership instrument shows that it must have been within the contemplation of the parties when the contract was made.

So there only remains the importation of labour. This may have occasioned an increase of expenditure, but it certainly is not shown that it was an extraordinary circumstance that should raise the limit on the rate of expense prescribed in clause 25. This importation was due to an extension of the quarrying operations and was a normal development of the business made by the defendants to suit their own convenience and meet their requirements, not as partners of the Nawab, but as contractors engaged on the construction of the dock in Bombay.

Their Lordships, therefore, hold that no "extraordinary circumstances" within the meaning of clause 25 have been proved.

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the appeal court should be set aside and that of the original court restored, (1) with the variation that so much thereof as orders that in taking the account thereby directed "the Commissioner do allow for the costs of quarrying provided for in clause 25 of the partnership agreement for the Lingampalli quarries rupee one and annas five per cubic foot exclusive of management and supervision, and add thereto annas two for royalty" be omitted, and that in lieu thereof it be ordered and decreed that "the rate for the purpose of clause 25 of the partnership agreement was and shall be rupee one and annas seven per cubic foot for the cost of the quarrying of the Lingampalli quarries mentioned in the plaint in the suit, and that this rate covers only the expenses of labour on quarrying and dressing the stones and hauling the same to the railway station, and that neither royalty nor any depreciation of plant or machinery is included in the rate so fixed;" and (2) with the further variation that the declaration "that the defendants are justified in adding ten per cent. for extraordinary circumstances under the said clause 25 of the said agreement" be also omitted. Their Lordships recommend an order in the above form, as they do not wish to interfere with the discretion exercised by the original court in its direction as to costs; and as to the costs of this appeal and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

Appeal allowed.

T. L. Wilson, & Co.:—Solicitors for the appellants.

Grundy Kershaw Samson & Co.:—Solicitors for the respondents

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December, 7.
February 7.LORD
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ALI, SIR
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PHILLIMORE.DEBENDRA NATH DAS (*Defendant*)*versus*BIBUDHENDRA MANSINGH BHARAMBAR ROY
(*Plaintiff*).*Bengal Tenancy Act, (Act VIII of 1885), section 5, sub-sections 1, 4, 5—Land Tenure in Bengal—Tenure-holder or raiyat—Area exceeding 100 standard bighas—Presumption that tenant is tenure-holder—Purpose for which lease is granted—Cultivation by sub-lessee.*

Defendant was assignee of a lease of over 100 standard bighas of land granted by plaintiff's predecessor for cultivation, without any restriction as to the agency to be employed in such cultivation.

Held, that under the circumstances of the case the presumption arising under sub-section (5) of section 5 of the Bengal Tenancy Act, 1885, that the tenant was a tenure-holder and not a *raiya*t, since the area exceeded 100 standard bighas was not rebutted by referring under sub-section (4) of the same section to the purpose for which the right of tenancy was originally acquired.

APPEAL from a decree of the Calcutta High Court (SIR LAWRENCE JENKINS, C. J., and SIR ASHUTOSH MUKERJEE, J.), dated July 11th, 1913, reversing a decree of RICHARDSON, J.

The sole question involved was whether the defendant-appellant was a "tenure-holder" or a "*raiya*t" within the terms of the Bengal Tenancy Act (VIII of 1885). RICHARDSON, J., held he was a *raiya*t: the appellate bench of the High Court held that he was a tenure-holder. Hence this appeal.

The facts are sufficiently stated in their Lordships' judgment.

De Gruyther, K. C., for the appellant.—Act VIII of 1885 has a classification into tenure-holders, under tenure-holders, and *raiya*ts. The purpose for which the land was originally granted is the most important of all tests in determining whether a person is a *raiya*t:—

Durga Prasanna Ghose v. Kali Das Dutt, [1881] I. L. R., 9 Cal., 449.

That case was before Act VIII of 1885, but it was followed in

Laidley v. Gour Gobind Sarkar, [1885] I. L. R., 11 Cal., 501.

The primary purpose here was cultivation by hired labour. It is unlikely the tenant meant to become a tenure-holder, because if he were that any person he put in would be a *raiya*t and would have the rights of a *raiya*t.

The presumption under section 5, sub-section 5 that a tenant of over 100 standard bighas is a tenure-holder prevailed in

Gokul Mandar v. Padmanand Singh, [1902] 29 I. A., 196, S. C., I. L. R., 29 Cal., 707,

only because there was no evidence in that case that the purpose was to acquire *raiayat* tenure.

This suit purports to be brought under section 106 of the Act. The record of rights was prepared under sections 101, 102 and 105 and it was decided after due notice to respondent that appellant was a settled *raiayat* at a fixed rent. In the draft record he was shown as a tenure-holder, but he lodged an objection, which was decided in his favour. This suit has been brought only after final publication of the record: it was then no longer maintainable; section 106 only provides for disputes arising before final publication.

[**LORD BUCKMASTER.**—That point was not taken in the court below. It is undesirable the Board should entertain it.]

It does not follow that because a point has not been taken below it cannot be raised here.

[Their Lordships intimated that the present contention not being raised by appellant's case was not open.]

Counsel for the respondents were not called on.

Their Lordships' judgment was delivered by

MR. AMEER ALI.—The sole question involved in this appeal is whether the defendant-appellant is a "tenure-holder" or *raiayat* as defined in the Bengal Tenancy Act (VIII of 1885).

Mr. Ameer Ali.

The defendant holds over 250 acres of land in the village of Goyalbank, forming part of the plaintiff's zemindari in the district of Cuttack, under a lease granted by the predecessor of the plaintiff in 1901 to one Gokulananda Chowdhury. In 1907 Gokulananda assigned the lease to the defendant.

The land covered by the lease became about the same time the subject of "record-of-rights" proceedings instituted by Government under Chapter X of the Act,

These proceedings are taken by the revenue authorities before special officers for the ascertainment and record of all rights connected with the land within the ambit of the enquiry. At the initial stage of the proceedings the defendant was entered as a "tenure-holder," but subsequently on his objection the Assistant Settlement Officer recorded him as "a settled *raiayat* at a fixed rent."

The present suit has been brought under the provisions of section 106 on behalf of the zemindar for rectification of the entry

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by recording the defendant as a "tenure-holder." The suit was first heard by the Settlement Officer, who upheld the plaintiff's contention as to the status of the defendant, and his decision was confirmed on appeal by the Special Judge of Cuttack. The defendant then preferred a second appeal to the High Court of Calcutta, which came for hearing before RICHARDSON, J. The defendant renewed before that learned Judge his contention that under the terms of his lease he was entitled to be classed as a *raiyat*. RICHARDSON, J., accepted his contention and reversed the order of the Special Judge, the effect of which was that the entry in the record-of-rights remained as made by the Assistant Settlement Officer.

An appeal was thereupon preferred by the respondent under section 15 of the Letters Patent, which came on for hearing before two Judges of the High Court, JENKINS, C. J., and MOOKERJEE, J., who, differing from RICHARDSON, J., held, in concurrence with the Settlement Officer and the Special Judge, that the defendant was a tenure-holder. They accordingly reversed the order of that learned Judge, and restored the decree of the lower courts for the rectification of the entry in the record-of-rights.

The present appeal to His Majesty in Council, which forms the sixth stage of this litigation, is an indication not merely of the persistency of the defendant, but also of the valuable rights that are attached to his claim, for, if he be a tenure-holder persons holding under him would have the status of *raiyats* and would be entitled to acquire, after a certain efflux of time, the right of occupancy under the Act. Whereas, if he be a *raiyat*, those persons would only be *under-raiyats*, without the privileges or security afforded by the Act to *raiyats*.

For the purposes of the Tenancy Act, tenants are classed under three heads, *viz*, tenure-holders, *raiyats*, and *under-raiyats*, that is to say, tenants holding, whether mediately or immediately, under *raiyats*. *Raiyats*, again, are divided into three sub-classes, *i. e.*, (a) *raiyats* holding at fixed rates, (b) occupancy *raiyats*, and (c) non-occupancy *raiyats*. The defendant has been entered as a settled *raiyat* at a fixed rent, evidently on the ground that under the lease the rent payable by him is permanently fixed. But it is to be observed that fixity of rent is no criterion for the determination of the point at issue, for a tenure may be held at a fixed rent equally with a *raiyati* holding. The question must, therefore, be decided on other considerations.

Sub-section (1) of section 5 defines a tenure-holder to mean :—

"Primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors in interest of persons who have acquired such a right."

And a *raiya*t is defined to mean :—

"Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right."

Sub-section (4) provides certain rules for determining whether a tenant is a "tenure-holder" or "*raiya*t." Clause (b) is important: it says, "The court shall have regard to the purpose for which the right of tenancy was originally acquired." Sub-section (5) is equally important. It provides that where the area held by a tenant exceeds 100 standard *bighas* (a little over 33 acres) "the tenant shall be presumed to be a tenure-holder until the contrary is proved." In determining the status, therefore, of a tenant, *viz.*, whether he is a tenure-holder or a *raiya*t, two elements have to be borne in mind, *firstly*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding. A close examination of the definition-clauses makes it quite obvious that both these elements are closely inter-related. The law assumes the *raiya*t to be the actual cultivator of the soil, either by his own labour or the labour of members of his family or by hired labourers, and it assumes also that ordinarily a larger area than 100 *bighas* would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-section (5) of section 5 is founded on that hypothesis.

In the present case, the land held by the defendant amounts to more than 250 acres; the statutory presumption certainly applies to him. He seeks to rebut it by referring to the purpose for which the lease was granted. The terms of the document have been carefully examined by the Settlement Officer, the Special Judge, and the High Court. Their Lordships will, therefore, confine their remarks to its general features. It is an ordinary reclamation lease; it leases the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts. In other words, he is to reclaim the land at his own expense and bring it under cultivation. The sixth clause makes this quite clear. It says :—

"You shall, by reserving water and raising *bandhs* [on the land leased] make it fit for cultivation according to your will, and shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangement or adopt such other convenient steps as you consider necessary for cultivating the same."

The employment of the agency for the cultivation is left entirely to the option of the lessee; the land was leased for cultivation, that is, for agricultural purposes, but the agency to be employed is to be determined by the lessee; he has the power to establish *raiya*ts

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or under-lease it to others or cultivate it himself, if he can. It cannot be said that the purpose is, primarily or otherwise, that the demised land should be cultivated by his personal agency. At the best, the lease may be said to be equivocal. In their Lordships' opinion, the High Court and the lower courts were perfectly right to look to the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. Apart from the facts appearing in the lease to which the learned Judges of the High Court have referred as indicating that the land was being taken for purposes other than that of personal and direct cultivation as a *raiyat*, there is the outstanding circumstance that the land was leased to a man of means who appears to be a resident of another place for the purpose of reclamation and rendering fit for cultivation, the agency to be employed for carrying on the cultivation being left to his discretion.

Their Lordships think that the presumption under section 103B, on which the defendant relies, that an entry in a record-of-rights finally published "shall be presumed to be correct until it is proved by evidence to be incorrect," is fully rebutted by the circumstances to which the courts in India have referred in arriving at the conclusion that the defendant was a tenure-holder and not a *raiyat*.

Their Lordships are of opinion that this appeal should be dismissed with costs and that they will humbly advise His Majesty accordingly.

A. P. P.

*Appeal dismissed.**E. Dalgado* :—Solicitor for the appellant.*The Solicitor, India Office* :—Solicitor for the respondent.

HIGH COURT.

AMIR HASAN KHAN

versus

EMPEROR *

CRIMINAL

1918

April, 18.

PIGGOTT, J.

United Provinces Municipalities Act (II of 1916), section 307—Disobedience to notice—Continuing breach—Daily fine, object of.

Where under section 307 of the United Provinces Municipalities Act a Magistrate of the first class not only imposed a nominal fine on a person for not complying with a notice directing him to execute a certain work in respect of a drain but by same order made him liable to pay a daily fine until the notice should be satisfactorily complied with, *held* that the latter part of the order was illegal.

The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability is to be enforced by the institution of second prosecution in which the questions will be (1) how many days have elapsed since the date of the first conviction during which the offender is proved to have persisted in the offence, and (2) the appropriate amount of daily fine, subject to the maximum prescribed.

CRIMINAL REFERENCE made by E. H. ASHWORTH Esq., Sessions Judge of Cawnpore.

Sital Prasad Ghosh, for the applicant.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

PIGGOTT, J.—The learned Sessions Judge of Cawnpore has referred to this Court in revision two orders passed by a Magistrate of the first class subordinate to him in connection with certain prolonged proceedings which have been going on between the Municipal Board of Fatehpur and a gentleman of the name of Munshi Amir Hasan Khan, who I understand is a member of the legal profession for something more than one and a half years past. On the 8th of January, 1917, it was proved against the said Amir Hasan Khan that he had failed to comply with a notice directing

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him to execute a certain work in respect of certain property, namely, a drain about which there was some contention between him and the Municipal Board. Under section 307, clause (b) of the United Provinces Municipalities Act, which came into force on the 1st of July, 1916, Munshi Amir Hasan Khan was liable to a fine which might extend to Rs. 500 and in case of a continuing breach he was liable to a further fine which might extend to Rs. 5 for every day after the date of the first conviction during which it might be proved against him that he had persisted in the offence. The trying Magistrate imposed the almost nominal fine of Rs. 5; but instead of contenting himself with warning the accused of the further liability which would attach to him from the date of this conviction, he purported by this very order of the 8th of January, 1917, to direct Munshi Amir Hasan Khan to pay a further fine of Re. 1 per diem from the 9th of January, 1917, until the notice issued by the Municipal Board in respect of the drain in question should be satisfactorily complied with. As the learned Sessions Judge has pointed out the latter portion of this order is illegal. The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability will require to be enforced, as often as the Municipal Board may consider necessary, by institution of a second prosecution, in which the questions for consideration will be, how many days have elapsed from the date of the first conviction under the same section during which the offender is proved to have persisted in the offence and, secondly, the appropriate amount of the daily fine to be imposed under the circumstances of the case, subject to the prescribed maximum of Rs. 5 per diem. To begin with therefore I must accept the reference of the learned Sessions Judge with regard to the order of the 8th of January, 1917. The following words will be deleted from the said order, namely, "and also from to-morrow to a further fine of Re. 1 per diem till the arch in question is removed."

The next question which I have to consider is an order passed by the same Magistrate on the 23rd of November, 1917. The matter was laid before this Magistrate in the form of a simple application asking him to enforce that portion of the order of the 8th of January, 1917, which I have felt it my duty to set aside. The Magistrate has as a matter of fact enquired into one of the two questions which I have suggested above as essential in the event of a further prosecution in respect of a continuing breach. He has considered carefully how many days had elapsed since the order of the 8th of January, 1917, during which Munshi Amir Hasan Khan was proved to have persisted in his disobedience to the order of the Municipal Board. He has not however made any

attempt to form an independent opinion as to the gravity of the offence committed, as to the excuses which might be offered (and which apparently were offered) for the conduct of the accused and as to the amount of the daily fine the imposition of which would satisfy the ends of justice. I am gratified to find, and it is one of the few circumstances in connection with my examination of this record which is calculated to afford any satisfaction, that the Magistrate has come to the conclusion that compliance has now been made with the notice issued by the Municipal Board, he has held that such compliance was made, according to one part of his order, on the 7th of September, 1917, but according to another part of the same order, on the 17th of September, 1917. Further, I find that Munshi Amir Hasan Khan has admitted liability to a certain extent. He has made practical acknowledgment of his error by paying a sum of Rs. 139 in the way of a fine for his continuing breach of the notice issued to him. It is quite possible that, if the Magistrate who enquired into this matter had felt himself at liberty to exercise his discretion in the same, he might have fixed the amount of the daily fine at a sum which would have made this payment of Rs. 139 sufficient to clear the accused person from liability. While therefore I should have been reluctant to interfere upon a merely technical ground with the proceedings resulting in the order of November 23rd, 1917, had I thought that everything which an accused person in a proceeding taken in respect of a continuing breach under section 307, clause (b) of the Local Municipalities Act was entitled to have enquired into and considered had been as a matter of fact so enquired into and taken into consideration by the Magistrate, I think that this order of November 23rd, 1917, is open to objection in substance as well as in form. I set it aside accordingly. The sum of Rs. 102 required under the terms of this order to be paid by the accused Munshi Amir Hasan Khan, if paid, will be refunded.

It will be observed that, while accepting the rest of the reference made by the learned Sessions Judge I have passed no order directing any refund in respect of the sum of Rs. 139 paid by Munshi Amir Hasan Khan prior to the order of November the 23rd, 1917. No doubt that payment was actually made in compliance with that portion of the order of January the 8th, 1917, which I have set aside as inoperative; but a liability to a fine for a continuing breach attached to Munshi Amir Hasan Khan under the provisions of the statute itself, independently altogether of the above order. He has virtually assessed his own liability at Rs. 139 and I can see no reason why this should not be accepted. At any rate I pass no order of re-payment in respect of this sum of Rs. 139. Let the record be returned.

Record returned.

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1918

May, 13.

TUDBALL, J.
A. RAOOF, J.RAM CHANDRA NAIK KALIA (*Plaintiff*)*versus*

RAGHUNATH SARAN SINGH DEO

AND ANOTHER (*Defendants*)*

Civil Procedure Code (Act V of 1908), section 73—Rateable distribution—Execution of decree—Proportionate distribution of sale-proceeds—Suit for refund of assets distributed.

Held that a suit brought by a plaintiff (a decree-holder) for refund of assets before the actual distribution of them to the other decree-holders was premature and liable to be dismissed. Where plaintiff and defendants held money-decrees against certain judgment-debtors, and the judgment-debtors of the plaintiff represented only $\frac{1}{4}$ ths of the property sold, *held* that the plaintiff was entitled to rateable distribution out of the $\frac{1}{4}$ ths which was the share of his judgment-debtors.

FIRST APPEAL from a decree of E. BENNET, Esq., Subordinate Judge of Mirzapur.

Sital Prasad Ghosh and K. N. Laghate, for the appellant.

B. E. O'Connor, Tej Bahadur Sapru and Lalit Mohan Banerji, for the respondents.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—This is a plaintiff's appeal. He and the two defendants-respondents are three decree-holders. One Farzand Ali died leaving a certain number of heirs of whom Musammat Najm-un-nissa was one, she being his widow. She brought a suit as against her co-heirs to recover Rs. 97,500 due to her as dower. The other two defendants-respondents brought suits against all the heirs of Farzand Ali including Najm-un-nissa and obtained decrees as against them for monies due from Farzand Ali. In all three cases the sums found due were recoverable from the assets of Farzand Ali which had come to the judgment-debtors by inheritance. A certain property was attached and sold in execution of the decree obtained by the defendant No. 1, and the plaintiff applied for rateable distribution, so also did defendant No. 2. The plaintiff, we may state here, is the transferee of the decree of Musammat Najm-un-nissa. Rateable distribution was allowed only in respect to $\frac{3}{4}$ ths of the sum recovered inasmuch as the judgment-debtors in the plaintiff's decree represented only $\frac{1}{4}$ ths of the estate. Before the money was paid out to the other two decree-holders, plaintiff

* F. A. No. 301 of 1915.

brought the present suit actually to recover the sums which he considered had been improperly awarded to the other two defendants. The court below dismissed his suit holding in the first place that it was premature having been brought before the money had actually been paid and secondly on the merits holding that proper rateable distribution had been made. It based its decision on the Full Bench decision in *Ganesh Das Bagrea v. Shiva Lakshman Bhakat* (1). That is a decision which has been followed in this Court in the case of *Gatti Lal v. Bir Bahadur Sahai* (2). The plaintiff comes here on appeal and challenges the lower court's finding. It is quite clear as a matter of actual fact that the suit was premature inasmuch as it was brought before the money had been paid but it is unnecessary to decide the appeal on a technical point when on the merits it must equally fail.

The two decisions mentioned above apply to the case and it is quite clear that the court below has rightly applied the principle laid down therein. The plaintiffs judgment-debtors only represented $\frac{3}{4}$ ths of the estate and clearly only $\frac{1}{4}$ ths of the amount recovered was liable to be distributed rateably. The figures of the distribution have not been challenged. In our opinion there is no force in the appeal. We therefore dismiss it with costs.

Appeal dismissed.

(1) [1903] I. L. R., 30 Cal., 583.

(2) [1904] I. L. R., 27 All., 158.

RAM RICHCHA PRASAD TEWARI AND OTHERS (*Defendants*)

versus

RAGHUNATH PRASAD TEWARI AND OTHERS (*Plaintiffs*)*

Contract Act, (IX of 1872) section 69, application of—Property sold subject to mortgage—Money left with vendee to pay it off—Suit for pre-emption—Pre-emptor directed under decree to pay full price—Money withdrawn by vendee—Mortgage not discharged by him—Suit by mortgagee decreed against pre-emptor—Pre-emptor discharges decree to save property—Suit to recover from vendee money so paid—Vendee not liable.

Certain property was sold subject to a mortgage. The vendor left money in the hands of the vendee sufficient to discharge the mortgage. A suit was brought to pre-empt the sale but the decree made the pre-emptors liable to the vendees for the entire money and not for the amount actually paid by the latter. The pre-emptors paid the whole of the sale consideration as directed in the decree and got possession. The vendees did

* S. A. No. 1760 of 1916.

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RAM CHAN-

DRA NAIK

KALIA

v.

RAGUNATH

SARAN SINGH

DEO.

Tudball J.

CIVIL

1918

May, 9.

RICHARDS,

C. J.

BANERJI, J.

CIVIL

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RAM

RICHCHA

PRASAD

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v.

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PRASAD

TEWARI.

not pay off the mortgage but withdrew from court the money deposited by the pre-emptor. The mortgagee brought a suit for sale which was decreed and the pre-emptors in order to save the property from sale paid off the amount due to the mortgagee. They then brought a suit to recover from the vendees the money so paid by him.

Held that the plaintiffs were not entitled to recover inasmuch as there was no contractual liability between the plaintiffs and the defendants nor was there that liability which the law implies under circumstances where one man is compelled to pay money for which another is legally liable.

SECOND APPEAL from a decree of E. BENNET, Esq., District Judge of Gorakhpur, reversing a decree of Maulvi Ali Ausat, Munsif of Deoria.

S. M. Sulaiman, for the appellants.

Surendra Nath Sen, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises under the following circumstances. Certain property which was subject to a mortgage was sold. The vendor left in the hands of the vendee a portion of the consideration which was to go in discharge of a mortgage. A suit was brought by the plaintiffs for pre-emption of the property sold and a decree was obtained. Very unfortunately the decree directed that the plaintiffs should pay into court as a condition precedent to getting the property the whole of the purchase money. The plaintiff ought not to have been asked to pay the entire price. He ought to have been only directed to pay in the amount of cash which the vendee had paid to the vendor, retaining in his hands the balance of the purchase money for payment of the mortgagee just in the same way as the original vendee was to retain part of the purchase money. The plaintiffs paid into court the full purchase money and got possession of the property. The defendant's predecessors drew out of court the full amount deposited by the plaintiffs but never discharged the mortgage or any part of it. Later on a suit was brought by the mortgagee and the plaintiff in order to save the property had to pay the mortgage money. They then instituted the present suit to recover from the defendants the money left in the hands of the vendee for payment to the mortgagee together with interest. The court of first instance dismissed the suit. The lower appellate court has decreed the suit. Hence the present appeal by the defendants. We should have been very glad to have seen our way to uphold the decree of the court below, because there can be no doubt that the defendants have kept in their hands money which clearly they should have paid to the mortgagee. But the question is upon what basis can the plaintiffs succeed. The defendants or their predecessors-in-title never entered into any contract with the present plaintiffs to pay the money

to the mortgagee. Even the mortgagee himself could not have recovered this money from the defendants. The obligation of the defendants' predecessor-in-title was one based on his contract with the original vendor. The whole trouble arose from the plaintiffs not taking care that the pre-emption decree was drawn up in proper form directing that they should only pay the amount which the defendants' predecessor-in-title had paid to his vendor. We consider that under the circumstances of the present case there was no contractual liability between the present plaintiffs and the defendants. Nor was there that liability which the law implies under certain circumstances for instance where one man is compelled to pay money for which another is legally liable. Section 69 on which the court below relies clearly is not applicable to the circumstances of the present case. We must allow the appeal, set aside the decree of the court below and restore the decree of the court of first instance with this modification that we direct the parties to pay their own costs throughout.

Appeal decreed.

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RAM
RICHCHA
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RAGHUNATH
PRASAD
TEWARI.
—
Richards,
C. J.

MAKHAN SINGH (*Defendant*)

versus

JAHAN KUAR AND ANOTHER (*Plaintiffs*)*

Pre-emption—Consideration—Onus of proving—Whether vendee bound to prove every detail of the consideration.

Prima facie the consideration stated in a sale-deed is to be taken as the true consideration in a suit for pre-emption. Where, however, the plaintiff shows that the price is a very excessive price, he can shift the *onus* on to the vendee of showing that the consideration stated in the deed was actually given.

A court is not justified in treating a suit for pre-emption as if it were suit by a reversioner seeking to set aside a sale deed made by a Hindu widow, by casting on the vendee the *onus* of proving every detail of the consideration.

SECOND APPEAL from a decree of A. G. P. PULLAN, Esq., District Judge of Mainpuri, confirming a decree of Pandit Piare Lal Katara, Subordinate Judge.

Surendra Nath Sen, for the appellant.

Sham Krishna Dar, for the respondents.

* S. A. No. 275 of 1917.

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1918
May, 8.
—
RICHARDS,
O. J.
TUDBALL, J.

CIVIL

1918

MAKHAN

SINGH

v.

JAHAN

KUAR.

Richards,
C. J.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The first court granted a decree on payment of Rs. 88. The lower appellate court confirmed this decree. The vendees appealed. The first point taken is that the custom is not proved as giving a right to the plaintiffs. We consider that the courts below were justified in holding that the plaintiffs had a right of pre-emption. The next point is the question of consideration. The consideration stated in the sale deed is Rs. 2,000. The plaintiff's own witness admitted that the property was worth Rs. 2,400 and there can be no doubt that the property was worth at least Rs. 2,000. It is very difficult to understand how the courts below came to give the plaintiffs a decree conditional upon payment of Rs. 88 only. *Prima facie* the consideration in the sale deed is to be taken as the true consideration. No doubt where the plaintiff shows that the price is a very excessive price, he can shift the *onus* on to the vendee of showing that the consideration stated in the deed was actually given. To all intents and purposes if Rs. 88 was the actual sum paid in the present case, the transaction was a gift in which case there would be no right of pre-emption at all. What the courts below have really done is to throw the *onus* upon the vendee of proving all the details of the consideration and this notwithstanding that the property is worth fully the amount stated in the sale deed. The courts below appear to have treated the plaintiffs as if they were reversioners suing to set aside a sale deed made by another Hindu female. We do not think that the court was justified in treating a suit for pre-emption in this way. If the reversioners think fit to challenge the alienation by the vendor in the present case they can do so but in the present pre-emption suit we think the plaintiffs must pay the consideration stated in the sale deed. We accordingly vary the decree of the court below by substituting the sum of Rs. 2,000 for the sum of Rs. 88. This sum must be paid on or before the 8th of August next. If the sum is not paid within this time the suit will stand dismissed with costs in all courts. In any event the appellant will get his costs of this appeal.

Decree varied.

JWALA PRASAD AND ANOTHER (*Plaintiffs*)*versus*EAST INDIAN RAILWAY COMPANY (*Defendants*)*

CIVIL

1918

May, 16.

Civil Procedure Code (Act V of 1908), section 115—Plaint returned by Munsif for presentation to proper court—Decision affirmed—Revision—Erroneous decision of question of law.

BANERJI, J.
RYVES, J.

Where a Munsif returned a plaint for presentation to the proper court on the ground that the cause of action had not arisen within his jurisdiction and his decision was affirmed by the appellate court, *held* that the decision was not open to revision by the High Court it being only an erroneous decision of a question of law which the courts below had jurisdiction to determine.

CIVIL REVISION from an order of E. H. ASHWORTH ESQR., District Judge of Cawnpore.

B. M. Vyas, for the applicant.

Ladli Prasad Zutshi, for the opposite party.

The judgment of the Court was delivered by

BANERJI, J.—The plaintiffs brought a suit against the East Indian Railway Company in the court at Cawnpore for recovery of certain money deposited by them with the Railway Company in Calcutta. The Subordinate Judge held that the Cawnpore court had no jurisdiction to entertain the suit and ordered the plaint to be returned for presentation in the proper court. An appeal was preferred from this order to the District Judge and the learned District Judge affirmed the decision of the court of first instance. This is an application for revision of the appellate order of the District Judge. Admittedly no appeal lies from such an order. It is also admitted that the District Judge had jurisdiction to entertain the appeal before him. If in the exercise of his jurisdiction he committed an error (we do not hold that he did so) that does not give the applicants a right to apply in revision under section 115 of the Code of Civil Procedure. In our opinion this application cannot be entertained.

Banerji, J.

We accordingly dismiss it with costs.

Application rejected.

Civil Revision No. 18 of 1918.

CRIMINAL

1918

May, 3.

KNOX, J.

DOOBAR TEWARI AND OTHERS

versus

EMPEROR*

*District Magistrate, jurisdiction of—Accused to furnish bond with one surety—
Order illegal.*

Where a District Magistrate was not trying a case as a court of appeal he had no jurisdiction to direct that each of the accused convicted should furnish a bond for a certain amount with one surety of a like amount.

CRIMINAL REVISION from an order of R. H. WILLIAMSON ESQ.,
District Magistrate of Basti.

Satya Chandra Mukerji, for the applicants.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Knox, J.

KNOX, J —This application succeeds. The District Magistrate had no power to direct that each of the accused convicted furnish a bond for Rs. 200 with one surety for a like amount. At the time when he passed the order he was not trying the case as a court of appeal. I direct that the order be set aside and any security, that may have been furnished, be quashed. Let the record be returned.

Record returned.

* Cr. Rev. No 190 of 1918.

PRIVY COUNCIL.

CIVIL

1917

RADHA KANT LAL AND OTHERS

... Plaintiffs

versus

MUSAMMAT NAZMA BEGAM AND OTHERS ... Defendants.

Nov. 1, 2 &
5, Dec. 14.LORD
BUCK-
MASTER,
SIRJOHN EDGE,
MR. AMEER
ALI,
SIR WALTER
PHILLIMORE
BART.

Hindu Law—Gift—Mitakshara—Issue as to joint or separate estate—Blending of self-acquired and joint funds—Gift by managing member of joint family property.

A member of a Hindu joint family may convert his self-acquired property into ancestral family estate by throwing it into the common stock.

A Mitakshara family of five brothers separated in estate. *D* and *K* two of the brothers, continued to live together, *D* acting as guardian of *K*, who was a minor. Later on a son *R* was born to *D*. Later still *D.D* a third brother died, and property came to *D* and *K* from his estate. *D* kept only one account of the profits of this property, even after *K* came of age; and he kept only one account for all his receipts from this and other property and of all his expenditures. A *desork* partition (*i. e.*, partition by metes and bounds) was later made between *D* and *K* and mutual exchanges made whereby *D* gave up his share in certain ancestral property for *K*'s share in property acquired from *D.D*'s estate, and *vice versa*.

In a suit by *D*'s son *R* and grandsons (the appellants) after *D*'s death to set aside deeds of gift made by *D* in favour of the respondents on the ground that the property given was ancestral property and the gifts in consequence invalid.

Held, that, even assuming that the property coming from *D.D*'s estate was *D*'s self-acquired property, yet by blending the income of that property in the accounts with the income of the new joint family constituted on *R*'s birth by *D* and *R* and by the mutual exchanges with *K*, *D* had shown his intention to treat what came to him from *D.D* as joint property and had converted it into ancestral estate: that the properties included in the deeds of gift were therefore joint family properties of which *D* had not the right to dispose, and that the appellants were entitled to recover them.

Lal Bahadur v. Kanhaya Lal, [1907] 34 I. A., 65; S. O. I. L. R., 29 All., 244;

Pandit Suraj Narain Lal v. Pandit Ratan Lal, [1917] 44 I. A., 201; S. O. 15 A. L. J. R., 684, followed.

CIVIL

1917

RADHA KANT
LAL
v.
NAZMA
BEGUM.

CONSOLIDATED APPEALS from decrees of the Calcutta High Court, dated June 2, 1913, reversing decrees of the Subordinate Judge of Gaya.

The facts are sufficiently stated in their Lordships' judgment. The plaintiffs Radha Kant Lal and others sued to set aside two deeds of gift made by their ancestor Drigpal Lal, deceased, in favour of his mistress, Nazma Begum, and his daughter by her, Kulsam Bibi. The main question for determination was whether the properties comprised in the deeds of gift were the self-acquired property of Drigpal or whether they were or had become the ancestral property of the joint family of which Drigpal and plaintiffs were the co-parceners. The trial Judge substantially allowed the plaintiff's claim but on appeal the High Court (CARRY and TENNON, JJ.) reversed this decision and dismissed the suit. Hence this appeal.

De Gruyther, K. C., (with him *Sir W. Garth*) for the appellants, submitted that Drigpal and his brothers did not inherit Din Dayal's properties as collaterals, (in which case they would be self-acquired) but obtained them for valuable consideration paid out of joint family funds, and that the properties were therefore joint family property. Even assuming that the properties were self-acquired when they first came to Drigpal's hands yet he threw them into the common stock of the joint family and treated them as joint. That was clear from the way in which the accounts were kept and the subsequent partition proceedings between Drigpal and his brothers. They relied on

Suraj Narain v. Ratan Lal, [1917] 44 I. A., 201; S. C., 15 A. L. J. R., 684;

Lal Bahadur v. Kanhaya Lal, [1907] 34 I. A., 65; S. C., 1 I. L. R., 29 All., 244.

The respondents did not appear.

Their Lordships' judgment was delivered by

*Sir Walter
Phillimore.*

SIR WALTER PHILLIMORE, BART.—The suits to which these consolidated appeals relate concern the validity and effect of two deeds of gift made by one Drigpal Lal, deceased, the father of the first plaintiff and appellant, and grandfather of the other plaintiffs and appellants, in favour of two concubines and the daughter of one of them.

The son asserts that he and his father were joint members of a Hindu family, and that the properties to which the gifts relate were part of the joint family estate. This is the question to be determined in the suit.

Some of the properties in question came to Drigpal from the estate of his brother, Din Dayal, and others were acquired by the use of the revenues of Din Dayal's estate; and the first matter to

be enquired into is whether the property which came to Drigpal from Din Dayal's estate was self-acquired property or came to him as part of the joint family estate.

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The circumstances in which it was acquired are as follows :—

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BEGUM.

Drigpal and Din Dayal were two of five brothers who were at one time all members of a joint Hindu family. Din Dayal was adopted by his uncle and went out of the family. Another brother died without male issue. This left Duli Chand, Drigpal, and Kanhaya.

Sir Waller
Phillimore

These three brothers separated in estate in the year 1876.

Din Dayal died on the 8th March, 1878, leaving no issue, but leaving surviving him his widow, Rukmini, and two widows of his adoptive father.

The succession to his estate if he died intestate would therefore be as follows :—

The widow Rukmini would take for her life, giving maintenance to the other widows. These, if they survived her, would take for their lives (it matters not for this purpose in which order *inter se*), and then those who at the death of the survivors of the three widows would be the male heirs would take the property. At the moment of Din Dayal's death these would be the three brothers; but it could not be foreseen who would be the male heirs when the succession ultimately devolved upon them. Din Dayal, though he made no legal will, expressed his last wishes as to the disposal of his estate, and they were, according to the recital in an *Ikrannama*, dated the 3rd April, 1878, and executed by the widow, to the following effect :—

"That after my death you" (that is, Duli Chand and Drigpal) "and Babu Kanhaya Lal shall, as proprietors, enter upon possession of all my properties, moveable and immoveable, all mortgage and simple bonds, all decretal moneys, *zar-peshgi* moneys and *Bhurna* moneys, houses and money at Ramna situated in Sahebgungo, zillah Gaya, and over every other kind of properties belonging to me; that you shall allow my wife to remain during her life time in possession of my dwelling-house situated in Kasba Haswa.....; that you shall pay to her one lakh of rupees in cash to defray the expenses of performing religious rites and pilgrimages, from your own pocket; that shall you allow all money in cash and ornaments which are in the house at Haswa to remain in the possession of the Musammat during her life; that you shall pay her rupees ten thousand in cash annually, besides clothing and grains sufficient for her use; that you shall pay to Musammat Jado Koer and Dhupa Koer, the widows of Babu Murali Ram, who are my mothers, rupees 2,500 each annually in each, besides clothing and grains sufficient for their use; that

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you shall make a *hiba* or gift to Musammat Rama Koer, daughter of Babu Girdhar Lal, my deceased brother, of 16 annas of mouzah Lodipur Jafra and Shaikpara appertaining to Lot Lodipur Jafra, 16 annas of mouzah Korigawan appertaining to Lot Sandha Manjhigawan.....and 16 annas of mouzah Kamharwa Girji Bandbanna appertaining to Lot Samandih, &c., being 12 *kalam*s known as mahal Ratni.....with all the dependencies and all the chunks of the mouzah aforesaid, situate in zillah Gaya; that you shall pay rupees 1,200 in cash annually, and clothing and grains sufficient to meet her requirements, to Musammat Annapurna, Tawaif, provided that she does not lose her chastity and character and continue in the *Pardah*; that you shall make gift to Babu Somar Ram of 16 annas of mouzah Jatsari.....; and that you shall execute deeds in accordance with the above directions in favour of these persons."

All parties were desirous that these wishes should be carried into effect, and accordingly a series of documents were executed, the first being the *Ikrarnama* already mentioned whereby the widow purported to dispose of all the property of her deceased husband in favour of the three brothers.

Then there was a bond given by the brothers to the widow with a mortgage, to secure the payment of the lakh of rupees; a covenant, with a charge on certain property, to pay to the father's widows the stipulated annuities and maintenance; a covenant with the concubine to pay her the agreed annuity and maintenance; a deed of gift in favour of the adopted nephew; and a similar deed of gift in favour of the niece.

The lakh of rupees was paid in two instalments within six months of the death, and the bond was discharged. The money found to pay Rukmini by the three brothers came out of ancestral family property.

The three brothers entered into possession of the estate, and paid the annuities and maintenance to the various ladies. The father's widows died first, and then Rukmini in the course of the year 1882.

The annual income of the property is said to have been rather more than half a lakh, so that the arrangement, as it turned out, was not such a bad bargain for Rukmini, and was advantageous to the father's widows. For the concubine, niece, and adopted nephew it was pure gain.

It was contended on behalf of the defendants that the *Ikrarnama* of the 3rd April, 1878, executed by Rukmini in favour of the three brothers was inoperative to pass more than her life interest, and that the brothers who survived her must be deemed to have taken the property by inheritance, in which case, being an inheritance from a collateral, it would be self-acquired, and not to have

taken it by purchase, in which latter case it would be ancestral family property.

That it was the intention of the deed to pass the whole property is obvious. If Rukmini was only conveying her life interest, and if either of the father's widows had survived her, the survivor's estate would have been interposed before that of the brothers. Even if it be supposed that the father's widows were so far parties to the transaction that they could not have claimed their life interest in the event of their surviving Rukmini, there was, as already observed, no certainty that the three brothers would have all survived Rukmini, so as to be the heirs at her death. Moreover, the gifts in favour of the adopted nephew and niece would have failed.

It may be, however, that though this was the intention of the deed, its only legal operation would be the restricted one for which the defendants contend.

A widow has only a limited power of disposition of the property. She can, however, alienate the estate in certain circumstances and under certain conditions. Whether in the circumstances of this case she could effect a valid alienation is a matter of some difficulty. The Subordinate Judge thought that she could; the High Court held that she could not.

Their Lordships are relieved from pronouncing upon this point of law, because they are of opinion that as regards the property which came from Drigpal the plaintiffs can succeed upon another ground.

Assuming that the three brothers—and in particular Drigpal—acquired this property as collateral heirs, and took it therefore as self-acquired property, it is well established that a member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock; and this is, in their Lordships' opinion, that which happened in the present case.

As already stated, Drigpal and his two brothers had made a partition of their joint family estate in 1876. At the time of the death of Din Dayal and the accession of the three brothers to his property, Drigpal was acting as guardian of his younger brother Kanhaya. Accordingly one book was kept for their joint share of Din Dayal's estate; and this system of book-keeping, which started on the 2nd October, 1878, was continued till the 11th February, 1880, when Kanhaya came of age. Thereafter no separate book was kept by or for Drigpal in respect of the property which had come to him from Din Dayal; but there was one account for all Drigpal's receipts from all sources, whether it was income from joint family property, or from that which he had acquired from Din Dayal, or any other source of revenue, and similarly for all his expenditure of whatever kind.

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Now his son, Radhakant Lal, the first plaintiff and appellant, had been born on the 31st May, 1877, and from that time forward there had been a joint family estate for him and his father. And, if the accounts from 1880 onwards are such as to show a blending of the properties, the ordinary inference to be drawn is that Drigpal had thrown the property which he had acquired from Din Dayal into the common stock.

This matter has come more than once before this Board, and was the subject of decision in the cases of *Lal Bahadur v. Kanhaiya Lal*(1), and *Pandit Suraj Narain v. Pandit Ratan Lal*, decided on the 30th January, 1917 (2)

The Subordinate Judge held that Drigpal had amalgamated the two properties, and the two grounds upon which his decision to this effect is supported by the present appellants are :—

First, the intermixture of and the blending of the receipts and payments in one account with those belonging to the ancestral family property ;

And, secondly, that when Drigpal and his younger brother Kanhaya took the further step of effecting what is called “a *deorh* partition,” that is, not merely a separation of interest, but an actual partition of the several properties constituting their estates, mutual exchanges were made whereby Drigpal gave up his share in some ancestral family property for Kanhaya's share in property which came from Din Dayal, and *vice versa*.

The High Court took the opposite view. As to the argument drawn from the exchange, the judgment of the High Court is as follows :—

“ The first point made was with regard to the *deorh* partition which took place between Drigpal Lal and Kanhaya Lal on the 8th May, 1881. It was argued that, on that partition, Din Dayal's properties were exchanged for joint properties and *vice versa*. When, however, this point came to be investigated it appeared that there was no such general interchange as the plaintiffs would have us believe. Only two possible instances were given us, and of these one is capable of an obvious explanation and the other is not fully proved. The first instance was with regard to mouzahs Sikandarpur and Asarhi. It is doubtless the case that mouzah Sikandarpur was ancestral while mouzah Asarhi had come from Din Dayal. These mouzahs are contiguous and of equal value so far as one can tell from the *jama*. They both form part of mahal Asarhi Sikandarpur. At the partition it seems that Drigpal took 10 annas 8 pies of Sikandarpur, while Kanhaya Lal took 10 annas 8 pies of Asarhi, so that each brother got two-thirds of a separate village instead of a one third

(1) [1907] 34 I. A., 65, s. o. I. L. R., 29 All., 244.

(2) Since reported, [1917] 44 I. A., 201, 15 A. L. J. R., 684.

share in the two. This clearly was a matter of convenience and cannot, we think, be regarded as evidence of amalgamation of properties ancestral and acquired from Din Dayal. Neither of these villages, it may be observed, forms part of the subject-matter of the present suit.

"Then it was said that for mouzah Pillich touzi No. 204 an ancestral mouzah, two mouzahs, Nanand and Sonchari, which came from Din Dayal, were exchanged. For this the evidence is Exhibits 45 and 47, applications made by Drigpal Lal, and Exhibit 64, an application made by Kanhaya Lal, for mutation of names. The exchange of these villages does not appear to have been very satisfactorily established from these two Exhibits. In the absence of any *koras* or other reliable evidence as to the precise details of this partition, it would be impossible to draw the conclusion which the plaintiffs wish us to draw from the very meagre evidence with regard to these two exchanges."

It should be observed that the High Court agrees with the Subordinate Judge in respect of the exchange of Sikandarpur and Asarhi; and their Lordships are of opinion that the exchange of Pillich for the two mouzahs specified was satisfactorily proved by the documentary evidence. This evidence was further supplemented by the oral evidence of the witness, Gajadhar Lal. Moreover, there was oral evidence uncontradicted from this witness and from Bhekhi Lal, proving the exchange of two more villages. A more striking proof of the throwing together of the two properties into a common stock there could hardly be.

Drigpal gives ancestral family property, and receives his brother's share in property coming from Din Dayal. He gives Din Dayal property and receives his brother's share of ancestral family property.

There is not only one case which standing by itself could with difficulty be explained away; but there are four instances.

Turning now to the accounts, the Judges of the High Court agree that, from and after the "*deorh* partition" in 1881, Drigpal's accounts were undoubtedly more or less mixed up. But they observe that Drigpal had five Tehbils or tills. The judgment then proceeds as follows:—

"We have been taken through the accounts at great length by the learned counsel for the respondents, and we do not think that it is possible to draw any very definite conclusion from these accounts; first, because a large number of the accounts which were kept by Drigpal or under his direction, relating to his estate, have not been produced; and, secondly, because the plaintiff Radhakant, who alone could speak with authority as to these accounts, and their precise object and nature, has not ventured to go into the box. All the papers which were in the possession of Drigpal at the time of his death have passed to Radhakant,

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and the fact that he has not produced so many of them must weigh very strongly against him. There is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit. In particular, we may mention that with the exception of Exhibits 16 and 18 no books of account of the mica mining business—either the *Saha* books at the mines or the stock books—are forthcoming. None of the 'Khazana haveli' or of the Calcutta books have been produced, nor have any books after 1808. In 1804 certain mouzabs acquired after the death of Din Dayal, and in 1810 certain of the Din Dayal villages, were set apart for the pocket expenses of Drigpal, and in 1809, it is said, a certain ancestral village was set apart for the pocket expenses of Radhakant. In respect of the village set apart for Drigpal, separate accounts were admittedly kept. None of these books have been produced. The *tamasuki bahis* dealing with bonds and money-lending business are not forthcoming, nor the books of the mail cart business. The learned counsel for the respondents attempted to minimise the effect of this non-production of books; but it is, in our opinion, a very serious matter. If all the books of Drigpal had been produced, it might have been possible to ascertain precisely how his accounts were kept and with what object.

The plaintiffs are said not to have produced the books of the general account already mentioned, which was begun on the 11th February, 1880. The books of the general account were produced to about the end of the year 1892. The explanation offered of the non-production of the later books is that after 1892 they were thought to be of no importance, because all the properties which Drigpal bought had been acquired by this time, and the only object of production the accounts after the first year or two was to show that these properties had been bought out of the common stock, and therefore formed part of it.

This is not strictly accurate, for one property at least was bought after 1892. But once given that the account shows that the properties had been blended, the later accounts are, for this purpose, immaterial. Properties once brought into a common stock cannot be taken out of it again.

Then, as to the 'statement that "there is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit," their Lordships cannot accept this as accurate.

The account already so often mentioned purports to be a general account, into which all receipts and payments are brought. It might, perhaps, be said that it is only a cash book and not a ledger. But it appears to be a similar book to that which was produced to the Board in the case of *Pandit Suraj Narain v. Pandit Ratan Lal*, as to which their Lordships observed: "It is not strictly an account book at all, but a book in which is recorded from day to day

various payments and receipts of money from different sources;" and from which their Lordships drew the inference in that case that the man who kept the account had "so blended his own property with the joint property as to make the whole joint property."

As to the non-production of the *khazana haveli*, their Lordships cannot see what assistance the production of these books, if, indeed, such are kept, would have been.

No doubt the plaintiff, Radhakant, did not give evidence; but the men of business of the family did. And it does not appear that any point was made in cross-examination or in the conduct of the trial, that any material books had been kept back; and no such idea seems to have occurred to the Subordinate Judge.

There remains one piece of evidence which makes in favour of the respondents, and that is furnished by the recitals in the two deeds which are attacked by the present suits. They are in similar terms and are as follows:—

"My income from ancestral properties was only 13,000 rupees, but subsequently I got the estates of Babu Girdhari Lal and Babu Dindyal Lal, yielding an income of 29,000 rupees. After my separation from Babus Dulichand and Kanhayalal, I acquired lots of properties by my own labour and exertions and from my own fund, by means of trade, and the 'ticca' (meaning a ticca lease of Dourchanch, which by making improvement now yields an income of 38,000 rupees). In this way I am now possessed of four kinds of properties, *viz.*:—

- (1st.) The ancestral properties;
- (2nd.) The estate of Babu Girdhari Lal;
- (3rd.) The estate of Babu Dindyal Lal; and
- (4th) The self-acquired properties;

with regard to which I have full powers of transfer."

The effect of these recitals, which were probably intended to make evidence, is somewhat weakened by the fact that, in a deposition made in another suit, Drigpal stated that a property which he gave to a son by one of these concubines, named Sultan Bahadur, had been given with the consent of his lawful son, the plaintiff Radhakant; and this property came from Din Dayal.

Their Lordships cannot attach sufficient countervailing weight to these recitals to displace the strong evidence from the exchanges and the accounts; and upon the whole, they come to the conclusion that, assuming that Drigpal acquired his share of the property of his brother Din Dayal as self-acquired property, he so dealt with it afterwards as to make it joint property with his ancestral family estate, of which family, the first plaintiff and, as they were born, the other plaintiffs were members.

Turning now to the deeds of gift which are attacked by the plaintiffs in the present suits, the four properties purported to be

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conveyed to Musammat Nasiban, which are the subject-matter of the second suit, were properties which form part of the estate of Din Dayal, and therefore could not be conveyed away from the joint family estate.

As to the properties purported to be conveyed to Musammat Nazma Begum and her daughter, the matter is more complicated. There are thirteen properties: two appear to have come from Din Dayal; the rest appear to have been bought by Drigpal at various times after Din Dayal's death.

Drigpal had a nucleus of joint family property, the income of which was nearly half a lakh. He carried on for some years a business of extracting and selling *mica*, as he says in the recitals in the deeds of gift; and he also claims to have carried on a profitable mail-cart business.

It was suggested for the respondents and accepted by the High Court that the profits of these two businesses and the properties purchased with them might be considered self-acquired. But in one instance certainly the land from which the *mica* was extracted was ancestral family property. It appears also from some of the books which have been produced that the moneys paid for wages and other expenses of winning the *mica* were supplied out of the general income of Drigpal, and that the profits were—as the Subordinate Judge has found—devoted to the general maintenance of the family and the education of the son, Radhakant. From whatever source some of the lands from which the *mica* was gotten may have been acquired, the *mica* business was dealt with as part of the joint family property.

As to the mail-cart business, it was doubtful whether there were any profits; and the receipts and payments in connection with it were all brought into the one general account.

The final result therefore is that all the properties purporting to be conveyed to the respondents were joint family property of which Drigpal could not so dispose, and that the plaintiffs and appellants are entitled to recover them from the respondents, that is, the two concubines, and the daughter of the one, and the mortgagees.

It is right to say that their Lordships were informed by counsel at the bar that so far as the deeds of gift purported to pass personal property, they are not to be deemed to be attacked in the present suits, and that the recovery is to be limited to the lands.

The Subordinate Judge only gave a judgment in respect of five-sixths of the property, taking it that, at the time of Drigpal's death, there were six members of the family, namely, Drigpal himself, Radhakant, and the latter's four sons, and being of opinion

that Drigpal had therefore one-sixth share in the properties which he could pass by the deeds of gift.

This, however, is an error. Drigpal had no separate sixth share. The whole property belonged to the one Hindu family, and accrued upon his death to the surviving members.

The plaintiffs appealed in respect of this matter to the High Court, and their Lordships are of opinion that their appeal should have been allowed.

Their Lordships will therefore humbly advise His Majesty that these appeals should be allowed; that the judgment of the High Court should be reversed; that the judgment of the Subordinate Judge should be varied by declaring that the plaintiffs have right to the whole, and should get possession of the whole, of the landed properties covered by the two deeds of gift, instead of five-sixths only, and that it, so varied, should be restored; and that the plaintiffs should have their costs in the High Court, and on appeal to His Majesty in Council.

The judgment of the Subordinate Judge decreeing that each party should bear his own costs of the proceedings before him should be allowed to stand.

A. P. P.

Appeal decreed.

Heath and Hamilton:—Solicitors for the appellants.

E. Dalgado:—Solicitor for the respondents.

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BANERJI, J.
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HIGH COURT.

CHATURI SINGH (*Plaintiff*)*versus*RAMIA AND ANOTHER (*Defendants*)*

Code of Civil Procedure (Act V of 1908), section 24 (4)—Provincial Small Cause Courts Act (IX of 1887), section 35—Suit pending in court of Subordinate Judge invested with Small Cause Court powers—Subordinate Judge on privilege leave—Officer not having Small Cause Court powers to the same extent succeeding him—Transfer of suits of certain value pending in Small Cause Court—Jurisdiction—Munsiff not having Small Cause Court powers—Appeal—Jurisdiction.

A Subordinate Judge was invested with the powers of a Small Cause Court Judge up to Rs. 500. A suit was filed in that jurisdiction valued at Rs. 273. The officer in question went on privilege leave and was succeeded by a Munsiff as Subordinate Judge. That Munsiff had Small Cause Court powers up to Rs. 250. After this officer had taken charge the District Judge transferred all suits above Rs. 250 in value pending in the Small Cause Court jurisdiction to another Munsiff. The suit was tried and the Munsiff decreed the suit for a very small amount. The plaintiff appealed and objection was taken on behalf of the defendants that the suit was a Small Cause Court suit and no appeal lay. The objection being allowed, the plaintiff applied to the High Court for revision of that order:—*Held* that the suit being of a value exceeding Rs. 250 remained pending on the Small Cause Court side, the presiding officer of the court by reason of taking leave for a short time did not cease to be invested with the jurisdiction of a Small Cause Court Judge, and the suit was tried as a Small Cause Court suit by the Munsiff to whom it had been transferred and consequently no appeal lay.

CIVIL REVISION from an order of BABU LAL GOPAL MUKERJI, Second Additional Subordinate Judge of Aligarh.

A suit of a Small Cause Court nature, and valued at Rs. 273, was instituted in the court of the 1st Additional Subordinate Judge of Aligarh. Mr. Shams-ud-din Khan, the presiding officer of that court, was invested with Small Cause Court powers up to Rs. 500, and the suit was accordingly lodged on the Small Cause Court side. Before it came on for hearing, Mr. Shams ud-din Khan went on five weeks' privilege leave and made over charge of his office on 17th November, 1916. Mr. Piarey Lal Chaturvedi was appointed to officiate

*Civ. Rev. No. 182 of 1917.

as 1st Additional Subordinate Judge, and by an order, dated 24th November, 1916, he was invested with Small Cause Court powers up to Rs. 250. On 29th November, 1916, the District Judge ordered that all suits of over Rs. 250 in value which were pending on the Small Cause Court side of the court of Mr. Shams-ud-din Khan should be transferred to the court of the Munsiff of Haveli. This order applied to the present suit, which was thereafter tried and disposed of as a suit on the regular side by the Munsiff of Haveli on 24th February, 1917. Mr. Shams-ud-din Khan rejoined his post on 22nd December, 1916. The plaintiff preferred an appeal from the decree of the Munsiff. The appellate court held that under the circumstances the suit must, according to law, be deemed to have been decided by a Court of Small Causes, and so no appeal lay. Against this decision the plaintiff applied in revision to the High Court.

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Peary Lal Banerji, for the applicant.—On the date on which the District Judge passed the order of transfer there was no existing Court of Small Causes competent to entertain the present suit. In fact *qua* that suit the Court of Small Causes ceased to exist as soon as Mr. Shams-ud-din Khan went away. At the date of the order of transfer, therefore, the suit could not be deemed to be pending in a Court of Small Causes, and the order of transfer could not come under Clause (4), section 24, Civil Procedure Code.

The court in which the suit was instituted, namely the court of the 1st Additional Subordinate Judge invested with Small Cause Court powers up to Rs 500, having on the 17th of November, 1916, ceased to exercise jurisdiction in the suit, the result was that by operation of section 35 of the Provincial Small Cause Courts Act the suit automatically and without any order of transfer stood transferred to the court which would have jurisdiction to try it if it were instituted on that date; namely, the court of the Munsiff of Koel. So that, at the date of the District Judge's order of transfer, the suit was, according to law, pending as an ordinary suit in the court of the Munsiff of Koel; it was thence that the District Judge's order operated to transfer it to the court of the Munsiff of Haveli.

[TUDBALL, J.—From which court did the Judge's order profess to transfer the cases?]

That does not appear; no express mention was made of the court from which the cases were being transferred.—The descriptive words used in the order only served to indicate the cases to which the order was to apply, without stating the court in which they might at that moment be pending. The case was pending either in the court of Mr. Piarey Lal Chaturvedi as a Subordinate Judge or, by the operation of section 35 of Act IX of 1887, in that of the Munsiff of Koel; and then it was transferred to the Munsiff of Haveli. In neither view would cl. (4) of section 24, Civil Procedure Code, apply; and so, the suit would not carry with it its

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Small Cause Court character. There is no law that the court to which a suit goes by reason of the operation of section 35 of Act IX of 1887 must be deemed to be a Court of Small Causes *qua* that suit.

There are no decided cases which are exactly in point, but the case of

Shiam Behari Lal v Kali, [1914] 12 A. L. J. R., 109,

is a near one, and points out the true scope and the automatic operation of section 35 of Act IX of 1887. A nearer case is that of

Kauleshar Rai v. Dost Muhammad, [1883] I. L. R. 5 All., 274,

but it was decided under the former Small Cause Courts Act, XI of 1865, in which there was no provision corresponding to the present section 35; hence this case does not really apply. There are observations as to the mode of operation of section 35 in the case of

Udho Singh v. Mulchand, [1916] 14 A. L. J. R., 705, at pp. 707, 708.

[BANERJI, J.—They are *obiter dicta*. In that case the last transfer was made from a court invested with Small Cause Court powers; section 24 (4), Civil Procedure Code applied to the case, and there was no question of section 35.]

Then, the case of

Mangal Sen v. Rupchand, [1891] I. L. R., 13 All., 324,

supports me to this extent that it expressed a doubt whether section 25 of the former Code of Civil Procedure, corresponding to section 24 of the present Code, could apply where the Judge's order professed to transfer the cases *after* the Subordinate Judge who had Small Cause Court powers had proceeded on leave. As to the point actually decided by it, the case was dissented from in that of

Sarju Prasad v. Mahadeo Pande, [1915] 13 A. L. J. R., 639,

which held that where a suit goes, by operation of section 35 of Act IX of 1887, from a court invested with Small Cause Court powers to a court not having such powers, the latter is to try the suit as a regular suit and is not to be deemed a Court of Small Causes for the purpose of that suit.

[TUDBALL, J.—There was no order of transfer by the District Judge in that case.]

No; that case does not decide the actual point which has arisen in the present case, but it points out that the operation of section 35 of Act IX of 1887 is not analogous to that of section 24 (4), Civil Procedure Code.

Two other cases may be cited, having only a remote bearing:—

Chhotey Lal v. Lakhmi Chand, [1916] 14 A. L. J. R., 549; at 553;

Tirbhuvan v. Sham Sunder, [1913] 11 A. L. J. R., 360.

Prima facie, under the Code of Civil Procedure, there is an appeal from a decree of a Munsiff, and it is for the opposite party to fully and clearly substantiate that the appeal in the present case was barred by some provision, about the applicability of which there can be no ambiguity. If there is any doubt about the applicability of section 24 (4), Civil Procedure Code, the benefit thereof should be given in favour of an appeal.

Kailas Nath Katju, (for *Sarat Chandra Chaudhri*), for the opposite party.—According to the applicant, as soon as Mr. Shams-ud-din went on leave, *ipso facto* the case went at once to the court of the Munsiff of Koel. So that, supposing he got his leave cancelled, and returned the next day and was reinstated in his office, he would find that he could not do anything in any of the cases which had been pending on the Small Cause Court side of his court the day before; although there had been no order transferring those cases, and although the parties had not taken any steps therein. For, according to the applicant, all such cases would, of their own motion, have gone to another court immediately Mr. Shams-ud-din had left.

There is nothing, however, in section 35 of Act IX of 1887, to warrant this proposition. That section gives power to the parties to take further proceedings in the other court, but it does not say that the case shall, of its own motion, go to that other court. The section is permissive, not obligatory. The word used is "may," not "shall." The suit remains where it was, unless and until a party moves the other court to take some proceedings therein, or unless there is an order transferring it. The moment that court is moved to do something in the case it becomes seized of it, but not before; and thereafter the character of the suit is determined by the nature of the jurisdiction of that court. In the present case the parties did not seek to take any proceeding relating to the suit in the court of the Munsiff of Koel; nor did that court take any proceeding of its own motion. Hence section 35 was not brought into operation at all.

The next question is, whether section 35 was applicable to the case. It is important, in this connection, that Mr. Shams-ud-din did not permanently leave the district. He went away temporarily, on short leave, and resumed his office on his return. Although during his absence Mr. Chaturvedi was appointed his *locum tenens*, still the latter had not conferred on him Small Cause Court powers in suits above Rs. 250 in value. So that, so far as such suits were concerned, it was practically as if no *locum tenens* had been appointed. It has been held, under such circumstances, that the Judge proceeding on leave does not cease to be a Judge of the court invested with Small Cause Court powers; *i. e.*, he does not cease to have jurisdiction with respect to such cases. •

Narayan Ravji v. Gangaram Ratanchand, [1909] I. L. R., 33 Bom., 664. •

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So that the condition precedent to the applicability of section 35, namely that the court should have ceased to exercise jurisdiction with respect to the case, was not fulfilled and section 35 could not come into operation.

Unless a court having Small Cause Court powers is abolished under section 30 of Act IX of 1887, the court continues to exist although the Judge may have gone on leave and no successor may have been appointed, or a successor may have been appointed having lesser powers. This is further borne out by a consideration of the provisions of sections 19 to 22 of Act IX of 1887. The appointment of Mr. Chaturvedi was immaterial so far as the cases of over Rs. 250 in value were concerned; with regard to them the position was as if no successor had been appointed, i. e., the court of Mr. Shams-ud-din continued to exist, and those cases remained pending in that court. And the order of the District Judge operated to transfer the said cases from that court to the court of the Munsiff of Haveli.

It is a fiction of the applicant that the District Judge's order transferred the cases from the court of the Munsiff of Koel to that of the Munsiff of Haveli. The District Judge never professed to do so; on the contrary, he transferred the cases from Mr. Shams-ud-din's court; there is no doubt about that. It is a different matter whether his order was right or whether it was wrong.

The use of the word "transferred" in section 17 of the Civil Courts Act, XII of 1887, which is the corresponding provision to section 35 of Act IX of 1887, shows that the Legislature contemplates the possibility of "transfer" of cases even from a court which has ceased to exercise jurisdiction or has been abolished.

Further, even supposing that section 35 applied to the case, my next submission is that the suit would still retain its Small Cause Court character, and would continue to be deemed and treated as a Small Cause Court suit. I rely on the case of

Mangal Sen v. Rupchand, [1891] I. L. R., 13 All., 324.

No doubt, a contrary view was taken in

Sarju Prasad v. Mahadeo Pande, [1915] I. L. R., 37 All., 450.

It is submitted that the view taken in the earlier case was correct. The language of section 35 obviously contemplates a mere continuation of the same proceedings; naturally, with the same results and retaining the same character. The result is the same, whether there is a transfer under section 24 (4), Civil Procedure Code, or by operation of section 35; the suit preserves its character in both cases. This is supported by reading with section 35 the provisions of section 150, Civil Procedure Code; that the latter applies to courts exercising Small Cause Court powers is seen from section 7, Civil Procedure Code. According to the applicant, the business of Mr. Shams-ud-din's court on the Small Cause Court side

was automatically transferred *en bloc*, by operation of section 35, to the Munsiff of Koel ; and section 150, Civil Procedure Code enacts that when such transfer of business *en bloc* takes place, the court to which the business is transferred shall have the same powers in dealing with it as the original court had. Accordingly, the Munsiff of Koel would be deemed to have Small Cause Court powers in dealing with the case, and the suit would retain its original character throughout section 150, Civil Procedure Code, gives effect to the consideration, expressed in the case in I. L. R., 13 All., 324, that what section 35 intended was a continuation of the same proceeding.

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There is an observation in the case of

Atwari v. Maiku Lal, [1908] I. L. R., 31 All., 1 ; at p. 2,

which supports my contention ; it was there observed that if in accordance with section 35 proceedings in execution of a decree passed by a Court of Small Causes are taken in a Munsiff's court, those proceedings may be regarded as proceedings held by a Court of Small Causes.

As regards the case in I. L. R., 37 All., 450, already cited, it is to be observed that one of the cases approved by it was that in I. L. R., 23 Bom., 382. But the exact contrary to that decision of the Bombay court was laid down by the Allahabad High Court in the case of

Chhotey Lal v. Lakhmi Chand, [1916] 14 A. L. J. R., 549, S. C., I. L. R., 38 All., 425,

and the Bombay decision was expressly dissented from in the case of

Sukha v. Raghunath Das, [1916] 15 A. L. J. R., 69, S. C., I. L. R., 39 All., 214.

Another case relied on in I. L. R., 37 All., 450, was that of

Shiam Behari Lal v. Kali, [1914] 12 A. L. J. R., 109,

and it was observed that there KNOX, J., had altered the view which he had taken in I. L. R., 13 All., 324. It is to be remarked that the decision in 12 A. L. J. R., 109, is inconsistent. The effect of the decision was that an appeal lay in the case ; accordingly, the revision should have been rejected ; but it was allowed. And the case in I. L. R., 13 All., 324, does not seem to have been brought to the notice of KNOX, J., in 12 A. L. J. R., 109.

Another of the cases on which I. L. R., 37 All., 450, would seem to be based is that of

Dulal Chandra v. Ram Narain, [1904] I. L. R., 81 Cal., 1057.

One part of the decision therein, namely that following the case in I. L. R., 23 Bom., 382, cannot, in view of the Allahabad cases mentioned above, be regarded as good law. The reasoning of the other part, which dealt with section 35, was one of expediency mainly.

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A Munsiff to whom a Small Cause Court suit comes under section 150, Civil Procedure Code, has, by the section, all the powers which the Small Cause Court had. He need not take down the evidence *etc.*, in full, as in a regular suit. To hold that an appeal lies from his decision in such a suit would be a contradiction in terms, as the appeal would practically be fruitless.

Peary Lal Banerji, in reply.—The argument built on section 150, Civil Procedure Code, is fallacious. That section does not apply here; but assuming it does, it does not follow that the court to which the business is transferred becomes *ipso facto* a Court of Small Causes. The distinction between a suit of a Small Cause Court nature and a suit decided by a Court of Small Causes has to be remembered. It is not denied that the suit remains of a Small Cause Court nature, but that is very different from, saying that the court to which it comes by operation of section 150, Civil Procedure Code, or section 35 of Act IX of 1887 becomes a Court of Small Causes. The denial of a first appeal is not provided for a suit of a Small Cause Court nature as such, but for a suit decided by a Court of Small Causes.

A Court of Small Causes is either constituted as such, or is a court on which Small Cause Court jurisdiction has been conferred, or is a court which for particular cases is deemed to be such by a fiction sanctioned by section 24 (4), Civil Procedure Code. There is no other way provided for making a court a Small Cause Court. Neither section 150, Civil Procedure Code, nor section 35 of Act IX of 1887 makes any such provision.

Further, section 150 applies only where the entire business, and not a portion of it only of a court is transferred. So, it does not apply to the present case. Transfer of business signifies much more than the transfer of a certain number of pending cases.

Comparing the language of section 17 of the Civil Courts Act and that of section 35 of the Small Cause Courts Act, it is remarkable that the former does and the latter does not speak of the "business" being transferred. This signifies that the scope of section 35 is not to transfer the "business" of the court; hence section 150, Civil Procedure Code, has no application where section 35 has come into operation.

The operation of section 24 (4), Civil Procedure Code, is subject to the discretion and choice of the District Judge; that of section 35 of Act IX of 1887 is one over which no one has a hold. The Legislature may well have taken this into consideration in not enacting that in the case of section 35, the court shall be "deemed to be a Court of Small Causes," as it is in the case of section 24 (4).

Regarding the contention of the opposite party against the applicability of section 35, it is submitted that there is no warrant

for the fiction that Mr. Shams-ud-din's court consisted, after he had gone on leave, of an existing Small Cause Court for cases up to Rs. 250 in value, and of another existing Small Cause Court for cases between Rs. 250 and Rs. 500 in value, but the Judge of which was absent on leave. What happened was that the Small Cause Court with powers up to Rs. 500 ceased to exist, and in its place a Small Cause Court having powers up to Rs. 250 came into existence. The fresh court was not a part of the old court, but an altogether new and different court with smaller powers.

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The mere fact that the case continued to be on the register of Mr. Shams-ud-din's court on the Small Cause Court side after he had gone on leave does not prove that it was pending there in a Small Cause Court. A case cannot properly be said to be pending in a court unless that court is competent to deal with it. The successor of Mr. Shams-ud-din was not competent to do anything in the case; it could not be said, therefore, that the case remained pending in the Small Cause Court in which it was filed.

If Mr. Shams-ud-din continued to exercise jurisdiction in the case, then the order of transfer was illegal, according to the case of

Baijoo v. Musammal Tulsha, [1917] 20 O. C., 350.

[TUDBALL, J.—That is directly against section 24 (4), Civil Procedure Code.]

As there was no Court of Small Causes competent to try the case at the date when it was transferred, the transfer could not have been from a Court of Small Causes.

The judgment of the Court was delivered by

BANERJI, J.—This application for revision arises under the following circumstances, a suit to recover Rs. 273 upon a bond was instituted in the court of the first Additional Subordinate Judge of Aligarh who was invested with the jurisdiction of a Court of Small Causes to try suits cognizable by a Court of Small Causes not exceeding Rs. 500 in value. Whilst the suit was pending on the Small Cause Court side of the court, Mr. Shams-ud-din Khan, the presiding officer of the court, proceeded on privilege leave for five weeks and made over-charge of his office on November 17, 1916. Mr. Piarey Lal Chaturvedi was appointed to act for him as Subordinate Judge, but by an order of the 24th of November, 1916, he was invested with the jurisdiction of Small Causes in respect of suits, the value of which did not exceed Rs. 250. On the 29th of November, 1916, the District Judge passed an order transferring to the court of the Munsif of Haveli Aligarh, all suits pending in the Small Cause Court side of the Additional Subordinate Judge's court exceeding in value Rs. 250.

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The present suit was accordingly transferred to the court of the Munsif of Haveli Aligarh and was tried and decided by him on 24th February, 1917. From his decree an appeal was preferred by the plaintiff but a preliminary objection was taken to the hearing of the appeal on the ground that no appeal lay as the court of the Munsif must be deemed to have been a Court of Small Causes for the purposes of the present suit. This objection prevailed in the court below which held that no appeal lay and on this ground dismissed it. The plaintiff has applied to this Court for revision of this order and it is contended on his behalf that the suit must be deemed to have been tried by the Munsif as an ordinary suit cognizable in the Munsif's court, that an appeal therefore lay from the decree passed by him and that the court below has wrongly refused to exercise jurisdiction.

The case has been ably argued on both sides, and a large number of rulings have been cited. Whilst it is contended on behalf of the plaintiff that section 35 of the Provincial Small Cause Courts Act applies to the case and that the suit must be deemed to have been transferred to the court of the Haveli Munsif from that of the Munsif of Koel in which the suit would have been instituted had there been no court invested with the jurisdiction of a Court of Small Causes and that consequently an appeal lay, it is urged for the opposite party that at the time of its transfer the suit was pending in a Court of Small Causes within the meaning of section 24 of the Code of Civil Procedure and was tried by the Munsif as a Small Cause Court suit, and that in any case section 150 of the Code of Civil Procedure applies.

Holding the view that we do, we do not deem it necessary to refer to or consider the various rulings which have been cited to us. In our opinion neither section 150 of the Code of Civil Procedure nor section 35 of the Small Cause Courts Act is applicable to this case. The business of the court in which the suit was pending was not transferred to another court, nor did that court cease to have jurisdiction with respect to that suit. As we have stated above the suit was instituted in the court of Mr. Shams-ud-din Khan who was invested with Small Cause Court jurisdiction in suits up to the value of Rs. 500. When he proceeded on privilege leave a *locum tenens* was appointed with powers to try suits of value not exceeding Rs. 250. As regards suits the value of which exceeded that amount no one was appointed to take his place. Therefore the present suit the value of which was Rs. 273, remained pending in the court of Mr. Shams-ud-din Khan. By reason of his taking leave for a short period he did not cease to be invested with the jurisdiction of a Small Cause Court Judge, and suits of value ranging from Rs. 250 to Rs. 500 must be deemed to have been pending in his court. We do not agree with the contention that under section 35 of the Small Cause Courts Act, the suit should be regard-

ed as having passed to the court of the Munsif of Koel and been transferred from that court. The court of the Munsif of Koel was never seized of the case and no proceeding in it was had in that court. In our opinion the suit was, at the time of its transfer to the court of the Munsif of Haveli, Aligarh, pending in a Court of Small Causes and the court to which it was transferred must under sub-section (4) of section 24 of the Code of Civil Procedure, be deemed to be a Court of Small Causes as regards this suit, and to have tried it as such. Its decision was therefore not appealable.

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It has been held in this Court in a number of cases that a court invested with the jurisdiction of a Court of Small Causes is a Court of Small Causes within the meaning of section 24, and we see no reason to depart from this course of rulings.

• We agree with the court below in holding that no appeal lay from the decree of the Munsif in this case and accordingly dismiss the application for revision with costs.

B. K. M.

Application dismissed.

DEODATT SINGH (*Plaintiff*)

versus

RAM CHARITTAR JATI (*Defendant*)*

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Muafi Zabti Sarkari—Mortgage—Mortgagor claiming proprietary interest—Suit for sale on mortgage decreed—Formal possession obtained by mortgagee after purchase—Mortgagor recorded as tenant—Mortgagee's application for entry of name rejected by Revenue Court—Suit for possession—Whether mortgagor entitled to plead that his interest not saleable according to law—Mortgagor barred.

May, 11.
—
TUDBALL, J.
A. RAOOF, J.

A owned some land known as *muafi sarkari*. This was resumed and became *muafi zabti sarkari*. He sold half of it and the other half passed to his heir B. B sold half of his share to plaintiff and made a mortgage to him of the remaining half. A admittedly claimed proprietary interest in the land. Plaintiff brought a suit on his mortgage and obtained a decree for sale. He applied in execution for sale of this property and B pleaded that it was ancestral. It was accordingly sold by the Collector and purchased by the plaintiff. The plaintiff obtained formal delivery of possession. In the *khatauni jamabandi* B was recorded as a tenant the entry being in the words "*sir khud*." The plaintiff then applied to the Court of Revenue for the entry of his name in place of B. B successfully pleaded there that the land was his *Sir* and he had become ex-proprietary

* S. A. No 492 of 1916.

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tenant. The plaintiff having failed there brought this suit claiming to be maintained in possession or in the alternative for recovery of possession. He treated *B* as a proprietor and this was not denied. *B* also pleaded in the alternative that the land was his *Sir* and he had become an ex-proprietary tenant:—*Held* that the plea that *B*'s original interest in the land was not saleable ought to have been raised in the course of the previous litigation and not having been so raised *B* was precluded from raising it in the present litigation.

SECOND APPEAL from a decree of BABU RAM PRASAD, District Judge of Ghazipur, reversing a decree of Babu Pearey Lal Govil, Munsif of Rasra.

M. L. Agarwala, for the appellant.

Janki Prasad, for the respondent.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—This is a plaintiff's appeal and the facts out of which it has arisen are as follows:—

One Din Dayal was the owner of 47 bighas 9 biswas *muafi sarkari* in the village in question. This revenue-free holding was resumed by Government and it became what is called *muafi zabti sarkari*. On the 31st of March, 1887, Din Dayal sold half to Sheo Harak. Sheo Harak sold this to Jagdeo. The other half passed to the heir of Din Dayal, namely, the defendant-respondent Ram Charittar. He sold one-half of this half to the plaintiff on the 29th of September, 1907, and he mortgaged the other half to the plaintiff. It is admitted before us that Din Dayal claimed a proprietary interest in the land. The plaintiff brought a suit upon his mortgage and obtained a decree for sale. He applied in execution for sale of the property. Ram Charittar pleaded that the property was ancestral and that it ought to be sold through the Collector. His plea was successful and the decree was transferred for execution to the Collector; the property was sold and purchased by the plaintiff and the decree entered as satisfied. The plaintiff then applied for and obtained formal delivery of possession. Then the plaintiff's difficulty arose. The proprietary interest which was mortgaged and sold was not recorded in the *khewat*, but in the *khatauni jamabandi*. Ram Charittar was recorded as in possession of the land in the capacity of a tenant, the entry being in the words "*Sir khud*." The plaintiff applied to the Revenue Court for the removal of Ram Charittar's name and the entry of his name in place thereof in the *jamabandi*. Ram Charittar pleaded in defence that the land was his *Sir* land, that he had acquired an ex-proprietary right as tenant therein, and that his name should remain recorded. The Revenue Court came to the conclusion that the original interest of Ram Charittar in the land was that of a tenant

with occupancy rights. It accordingly rejected the plaintiff's application whereupon the plaintiff brought the present suit in which he asks for a decree for maintenance of possession or in the alternative for possession if he be found not to be in possession. The court of first instance gave the plaintiff a decree for possession as an auction-purchaser of resumed *muafi* land as entered in the relief and declared that the decision of the Revenue Court was invalid and not binding upon the plaintiff. In paragraph 1 of the plaint the plaintiff stated as follows:—"The defendant is a hereditary *muafidar* of the resumed *muafi*, land situated in mauza Banjri, pergunah Bhadaon, granted by the Government. He has been, as such, in possession of the same."

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This was clearly an allegation of proprietary interest.

* In paragraph 1 of the written statement the defendant replied as follows.—

"The particulars set forth in paragraph 1 of the plaint are admitted."

In paragraph 5 of the written statement, however, the defendant pleaded that his original interest in the land was that of an occupancy tenant, that that interest was not transferable, hence the plaintiff by the sale acquired no title whatsoever. His claim for possession of the land was improper and should be dismissed. In paragraph 6, however, he pleaded in the alternative that if according to the plaintiff's allegation (which he had made in paragraph 1 of his written statement already admitted to be correct) the land claimed was *muafi* then it was his (the defendant's) *Sir* land and he by reason of a subsequent sale had acquired the interest of an exproprietary tenant therein and that therefore he was not liable to ejectment in the suit as brought by the plaintiff.

The court of first instance held that the defendant had a proprietary interest in the land and that the decision of the Revenue Court in mutation proceedings was wrong and it gave the plaintiff a decree as we have stated above for proprietary possession as auction purchaser.

The defendant appealed. He again pleaded in the alternative: (1) that his right was not saleable under the law, and secondly that if he had a saleable right then he was an exproprietary tenant and as such not liable to ejectment from the land by this suit. His appeal was allowed. The plaintiff appeals. The first plea taken, and it has considerable force, is that it is not now open to the defendant to raise the plea that his original interest in this land was not saleable according to law; that this was a plea which if he wished to raise it he ought to have raised it in the course of the previous civil suit on the basis of the mortgage; that he at no time raised it, not even in execution proceedings, and that it is no longer

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open to him to raise it. We think that this is correct. Mr. Janki Prasad on behalf of the defendant-respondent also states that the position which he takes up on behalf of his client is that his client's interest in this land was a proprietary interest; that it was his client's *Sir* land and that he now holds the land with the right of an ex-proprietary tenant and as such is liable to pay rent but not to ejectment in the present suit. The court below has come to a finding that the defendant was originally an occupancy tenant of this land, that he had no transferable right and that the plaintiff acquired no title by the decree and the sale thereunder. It has given no reason whatsoever for its decision. In view of the plea taken up before us that it is no longer open to the defendant to raise this plea, (and this we think is a good plea) and also in view of the position taken up by the defendant-respondent's counsel in the case, the decision in this suit must go upon the assumption that the defendant's original interest in the land was a proprietary interest which was mortgaged, sold in execution of the decree and purchased by the plaintiff. Therefore it simply remains to be seen whether the defendant's claim to be an ex-proprietary tenant is a good one. That will depend upon the question as to whether the land in suit was the defendant's *Sir* land at the time that the sale took place. We therefore remit to the court below the following issue:—

Assuming that the defendant's original right was a proprietary interest at the date of the sale and purchase by the plaintiff, was this land the defendant's *Sir* within the meaning of the law?

The parties will be allowed to give fresh evidence on this issue. We allow ten days on receipt of the findings for filing objections.

On receipt of the finding the judgment of the court was delivered by

Tudball, J.

TUDBALL, J.—The finding of the Court is that the land in dispute has not been proved to be the defendant's *Sir* within the meaning of the law. No objection has been filed. The result therefore is that the appeal must succeed. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance. The plaintiff will receive his costs throughout.

Appeal allowed.

SUNDAR KUNWAR (*Plaintiff*)*versus*RAMGHULAM AND OTHERS (*Defendants*)*

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May, 9.

Transfer of Property Act (IV of 1882)—Mortgage made after—Mortgage by conditional sale—Decree for foreclosure—Pre-emption—Wajib-ul-arz—Cause of action.

RICHARDS,
C. J.
TUDBALL,

In 1895 a mortgage was made. In 1906 a suit was instituted on this mortgage treating it as a mortgage by way of conditional sale. A decree for foreclosure was obtained and in 1911 the decree was made absolute. Shortly after possession was obtained under it. In 1914 a suit was brought claiming to get possession by virtue of a custom set forth in the *Wajib-ul-arzes*. The clause relating to pre-emption was as follows:—"If a *pattidar* wishes to transfer his share by sale or mortgage, he should do so first, to another *pattidar* of the same *thok*, and in case of his refusal, to the *pattidars* of another *thok* of the village. If the *pattidar* wants to sell his share to a stranger by entering an excessive and fictitious price, the *pattidar* having the right of pre-emption shall be entitled to acquire the property on payment of the price awarded by the arbitrators." Held that having regard to the whole context of the *Wajib-ul-arzes* the "sale" mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale, and the *Wajib-ul-arzes* did not give him a right of pre-emption under the circumstances under which the mortgagee became the owner of the property. Held also that if the plaintiff intended to take advantage of the custom then he should have brought a suit to step into the shoes of the mortgagee as soon as the mortgage was made. *Alu Prasad v. Sukhan*, [1881] I L. R., 3 All., 610, distinguished.

FIRST APPEAL from a decree of PANDIT PIARE LAL KATARA, Subordinate Judge of Mainpuri.

Tej Bahadur Sapru and J. M. Banerji, for the appellant.

B. E. O'Connor, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The facts may be very shortly stated. In the year 1894 the owner of the property mortgaged it. There had been two prior mortgages, mortgages in 1892 and 1893. The mortgage of 1894 was a consolidation of these mortgages with a further advance. This mortgage was again consolidated by a last mortgage in the year

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* F. A. No. 151 of 1916.

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1895. This mortgage will be found printed at page 9 of the respondents' book. It was in form what is called a simple mortgage, except for the last clause which provided that if the period mentioned in the mortgage expired and the money had not been paid up the document should be treated as a sale. In the year 1906 a suit was instituted on this document treating it as a mortgage by conditional sale and a decree for foreclosure was obtained. This decree was made absolute in the year 1911, and shortly after that the decree-holder mortgagee obtained possession. In the year 1914 the present suit was instituted, the plaintiff claiming to get possession of the property by virtue of a custom set forth in the *Wajib-ul-arzes* appertaining to the various villages. The court below dismissed the plaintiff's suit. The pre-emptor has appealed.

The custom as recorded in the several *Wajib-ul-arzes* does not materially differ from the *Wajib-ul-arz* for Mauza Patti Yakubpur. It is as follows:—"If a *pattidar* wants to transfer his share by sale or mortgage, he should do so first to another *pattidar* of the same *thok*, and in case of his refusal to the *pattidars* of another *thok* of the village. If he (the *pattidar*) wants to sell his share to a stranger by entering an excessive and fictitious price the *pattidar* having the right of pre-emption shall be entitled to acquire that property on payment of the price awarded by the arbitrators appointed privately or by the court."

We think (subject to what may be said having regard to certain authorities which have been quoted) that the question which the court had to consider was whether or not the plaintiff proved by this record the existence of a custom which entitled him to get possession of the property under the circumstances of the present case as set forth above. We may here point out that the mortgages in the present case were made after the passing of the Transfer of Property Act. Even assuming that the mortgage of 1895 was in reality a mortgage by conditional sale as defined by section 58 of the Transfer of Property Act, it was one of the modes recognised by the Act itself by which an owner mortgages his property. If one reads again the extract from the *wajib-ul-arz*, which we have quoted above, it can hardly be doubted that the sale referred to in the *wajib-ul-arz* was the ordinary voluntary sale which a co-sharer makes. This is clear from the language of the *wajib-ul-arz* itself. It begins by stating that if he "wishes," which we take to mean "has necessity" to sell, he must do so to another *pattidar* in the same *thok* etc. Again the reference to price shows that the sale referred to was the voluntary sale of the co-sharer. If he was observing the custom, the moment he wanted to sell his duty would be to go to the other co-sharers as recorded in the *wajib-ul-arz*. The very same remark will apply to the mortgage. If the transaction was a mortgage then his duty, if he observed the custom, was to first ask the other co-sharers if they would take a mortgage of

the property. In either case it would seem that the right of pre-emption in case of non-observance of the custom was to step into the shoes of the vendee in the case of a sale and in case of a mortgage to step into the shoes of the mortgagee. Now let us consider for a moment what the pre-emptor did in the present case. He never sought to step into the shoes of the mortgagees of 1892 and 1893. He never sought to step into the shoes of the mortgagees of 1894 and 1895. He waited until about three years after the defendant had obtained possession of the property in due course of law through the intervention of the court and the suit was brought something like nineteen or twenty years after the latest mortgage transaction. We are perfectly satisfied that the plaintiff in the present case failed to prove by the production of these extracts from the *wajib-ul-arzes* the existence of a custom which gave him a right to get the property under these circumstances. It is true no doubt that the mortgagee eventually became the owner of the property but there never was a "sale of the nature referred to in the *wajib-ul-arz*."

A great difficulty is created in the case by the ruling of the Full Bench in the case of *Alu Prasad v. Sukhan* (1). In that case the mortgage had been made prior to the passing of the Transfer of Property Act of 1882. The majority of the court in the case no doubt held that the pre-emptor had a right of pre-mortgage when the original transaction took place, and that he had a further right of pre-emption when that mortgage ripened into a complete sale after the expiration of the period of grace which was prescribed for by the regulation. The case was argued before that Bench on a different basis from the arguments in this Court. We think that the decision of the court must have reference to the custom which the court finds to exist in each case, and if in the present case after considering the evidence we do not believe, or do not consider, a custom to be "proved" (see definition in the Evidence Act of the expression "proved") to exist which entitles the pre-emptor to get the property under the circumstances of the present case, we are not bound simply by reason of the Full Bench case to give the plaintiff a decree. We may mention here as having a distinct bearing upon the question of the existence or non-existence of such a custom a case which was decided by this Bench, namely S. A. No. 252 of 1911, decided on the 7th of July, 1911. In that case the custom as recorded in the *wajib-ul-arz* expressly provided for pre-emption upon ordinary sale and conditional sale. The record was as follows :—

"If any co-sharer wishes to sell conditionally or absolutely his share he can transfer it for the price that may be offered him by others, first to a near co sharer, next to other co-sharers in the *patti*, and in case of their refusal to his near co-sharers in another *patti* should they also refuse,

(1) [1881] I. L. R., 8 All., 610, (F. B.)

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then to others in the mahal and lastly to a stranger. If the share of any co-sharer be mortgaged or sold conditionally to a stranger and he be unable to redeem then any of the co-sharers in his *patti* may if the term of the mortgaged share is about to expire, pay up the money and take possession and when the mortgagor or his heir has paid the money in accordance with the condition of the deed between the original mortgagor and the co-sharer with title he may enter into possession."

We were also referred to a decision of their Lordships of the Privy Council in which, under circumstances very like the present, the pre-emptor got a decree for pre-emption. The only question however which was argued before their Lordships of the Privy Council was one of limitation, namely the article of the Limitation Act which was applicable to the circumstances of the case, and they simply held that article 120 governed that case because physical possession was an impossibility. Finding as we do in accordance with the court of first instance that no custom was proved entitling the plaintiff under the circumstances of the present case to get the property by pre-emption, we think that the decree of the court below was quite correct. In our opinion the deed of 1895 made as it was after the passing of the Transfer of Property Act was a "mortgage" and the plaintiff's right arose in 1895 to step into the shoes of the mortgagee.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

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 April, 20.
 RICHARDS,
 C. J.
 BANERJI, J.

NAULAKHI KUAR AND OTHERS (*Defendants*)

versus

JAI KISHEN SINGH (*Plaintiff*) *

Hindu Law—Gift to a Hindu female—Malik mustaqil, meaning of—Absolute estate.

The word *malik* alone used in a deed of gift executed by a Hindu in favour of a female unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate.

Where *D*, a Hindu, executed a deed of gift in favour of his daughter-in-law and constituted her thereunder *malik mustaqil* in respect of the property gifted to her, *held* that in the absence of any surrounding cir-

S. A. No. 710 of 1916.

circumstances to indicate that the donor intended the lady to take a mere life-estate, the lady must be deemed to have taken an absolute estate.

A grant should be construed in favour of the grantee rather than in favour of the grantor.

SECOND APPEAL from a decree of E. E. P. ROSE ESQR., District Judge of Azamgarh, reversing a decree of Pandit Suraj Narain Majju, Subordinate Judge.

The facts shortly stated were as follows :—The plaintiff sought for a declaration that the deed of gift executed by Musammât Naulakhi Kuâr in favour of the other defendants was null and void after her death because if she took anything under the deeds of gift executed by her father-in-law, Dirgaj Singh it was only a life interest. He further alleged that his father and Dirgaj Singh were joint. The defence was that the plaintiff's father and Dirgaj were separate and that Musammât Naulakhi had taken an absolute estate under the deed of gift was competent to make the gift in question. Both the courts below held that the family was not joint, but while the Subordinate Judge held that Musammât Naulakhi Kuâr took an absolute estate, the District Judge decreed plaintiff's suit on the ground that Dirgaj Singh was unaware of the introduction of the words "*Malik mustaqil*" in the deeds of gift or he was unaware of their true significance and that at any rate he never intended to convey an absolute estate to his widowed daughter-in-law. The defendants appealed.

S. N. Gupta (for *Surendra Nath Sen*), for the appellants.—The learned District Judge has made out an entirely new case for the plaintiff. In construing the terms of a deed the question is not what the parties may have intended but what is the meaning of the words they had used.

Manindra Chandra Nandi v. Durga Prasad Singh, [1917] 15 A. L. J. R., 432 (P. C.)

Whenever the word "*Malik*" is used in a deed of gift or will, the donee or devisee, whether he is a male or female, always gets an absolute heritable and alienable estate unless there is something in the document to qualify the same ; and that inasmuch as no restrictions had been imposed upon the donee's power of alienation, the word "*Malik*" (which in this case is further strengthened by the use of the word "*Mustaqil*") is to be given its natural significance. He referred to

Suraj Mani v. Rabi Nath Ojha, [1907] I. L. R., 30 All., 84 (P. C.)

The same rule of construction has been laid down in

Padam Lall v. Tek Singh, [1906] 4 A. L. J. R., 68 ;

Thakur Prasad v. Jumna Kunwar, [1909] 6 A. L. J. R., 420.

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The mere use of the word "maintenance" cannot take away from the absolute nature of the grant in the absence of anything qualifying and restricting the grantee's powers of disposition over the property.

Lalit Mohan Banerji (with him *Tej Bahadur Sapru* and *J. M. Banerji*), for the respondent, supported the judgment of the lower appellate court and contended that according to the ordinary notions and wishes of Hindus with respect to the devolution of property, it was proper to assume that there was always a desire in their minds that an estate especially an ancestral estate, should be retained in the family, and as a general rule, women would not take absolute estates of inheritance which they could alienate.

S. N. Gupta, was not heard in reply.

The following judgment was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit brought by the plaintiff for a declaration of his title to certain property. On the findings the only question which is open to consideration is whether or not Musammât Naulakhi Kunwar took an absolute estate under a deed of gift executed by one Dirgaj Singh. The court of first instance dismissed the plaintiff's suit. The lower appellate court held that on the true construction of the deed of gift, the lady took only a life-estate. Under the terms of the deed the lady is made absolute owner. The words used are "*malik mustaqil*." Their Lordships of the Privy Council held in the case of *Surajmani v. Rabi Nath Ojha*⁽¹⁾, that the word "*malik*" alone unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate. Here we have the word "*malik*" followed by the word "*mustaqil*" which even makes it stronger. The learned District Judge seems to have treated Dirgaj Singh as if he had been a *parda-nashin* lady. He says that Dirgaj Singh may not have been aware of the meaning of the expression *malik mustaqil*. We cannot agree with this line of reasoning. The grant should be construed rather in favour of the grantee than of the grantor. Admittedly Dirgaj Singh had sufficient estate in him to enable him to make a full grant to the Musammât. There are absolutely no surrounding circumstances to indicate that the donor wished the lady to take a mere life-estate. He does not say in the deed that she is to have it only for her life, nor does he even say that she is to have no power of alienation. We think that the learned District Judge was wrong in the view that he took of the construction of the deed of gift. The result is that we allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

(1) [1907] L. L. R., 30 All., 84, P. C.

JAGUJI RAI AND ANOTHER

versus

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Criminal Procedure Code (Act V of 1898), sections 107, 112—Notice, sufficiency of.

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Under section 107 of the Criminal Procedure Code there may be cases in which a Magistrate of the first class upon mere information to the effect that a person is likely to disturb the public tranquillity without any information being given of that person's intent to do any wrongful act, may issue a notice in writing to such person giving the substance of the information received without specifying any definite acts which that person intends to commit.

CRIMINAL REVISION from an order of BABU LAKSHMI SHANKAR, Magistrate First Class of Azamgarh.

W. Wallach, for the applicants.

R. Malcomson (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

KNOX, J.—Jaguji Rai and Inderjit Rai have been bound over to keep the peace for a year. They are to furnish each of them a reliable surety for Rs. 100 and to execute a personal bond in the same amount for this purpose. They were bound over by a Magistrate of the first class of Azamgarh. They do not appear to have gone to the District Magistrate and asked him to cancel this bond as they might have done under section 125 of the Code of Criminal Procedure. When a person bound over to keep the peace does not adopt this procedure. I always have considerable doubt as to his general reputation in the district, and it is open to the applicants at any time hereafter to satisfy the District Magistrate that there is no necessity any longer for this bond being kept in existence. They have come to this Court with the contention (1) that the evidence on the record does not justify an order under section 107 of the Code of Criminal Procedure, (2) that if they had committed a substantive offence as alleged by some of the witnesses for the prosecution, the proper procedure against them would be to proceed against them for the said offences and not to proceed under section 107 of the Criminal Procedure Code. The learned Counsel for the applicants took exception to the notice which had been issued to them under section 112 of the Code. Now section 112

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has to be read along with section 107. Section 107 lays down that whenever a Magistrate of the first class is informed that any person is likely to commit a breach of the peace or to disturb the public tranquillity, or to do any wrongful act which may occasion a breach of the peace, or disturb the public tranquillity, he may require that person to show cause why he should not be ordered to execute a bond. As I read this section there may be cases in which a Magistrate of the first class is merely informed that a person is likely to disturb the public tranquillity without any information being given as to his intent to do wrongful acts. The Magistrate is responsible for the peace of the district. He acts upon this information and he is required to set forth in writing the substance of the information received. In this case we are not told that the Magistrate has received any information of definite acts intended. Apparently from the information he received he was satisfied that the persons concerning whom the information had been given were likely to commit some act which might occasion a breach of the peace. The reason given for this probability was that they were on terms of enmity with each other. Where the Magistrate can go into further particulars, he should certainly go into them. But it may well be that all the information he receives is that there will be a breach of the public peace, and if he considers that information to come from a reliable source, he has jurisdiction to make the order required by section 112. Any how in the present case the matter has gone far beyond the stage of the order under section 112. Certain information was given. The order calling upon the applicants to show cause was duly communicated to them. They questioned the reliability of the information. Evidence was offered and recorded at considerable length. Some of it is hearsay evidence. Some of it is evidence of actual acts not of a peaceful nature committed in the past. Some of it is words or expressions which, if true, point to the fact that a breach of the peace would be a probable result unless some strong hand was put upon the persons in question. The evidence of the two Chaukidars, Sheoraj Ahir and Chiraghan was read to me at full length, and I have glanced at the other evidence given in the case. A perusal of that evidence certainly leaves an impression upon my mind that an idea prevailed in Deohatta that a breach of the peace would take place. I have also glanced through the evidence given to rebut the evidence for the prosecution. It is of a very vague description and some of the witnesses in cross-examination had to admit that they very seldom came to Deohatta and one who said that no quarrel had taken place had also to confess that he had not been in the village for the last two years. It is not said that the terms are too severe. I see no reason for interfering and dismiss the application.

Application dismissed.

PRIVY COUNCIL.

JYOTI PRASHAD SINGH DEO BAHADUR

(Defendants)

versus

KUMUD NATH CHATTERJI AND OTHERS (Plaintiffs.)

Land Law of Bengal—Patni Taluks—Power of samindar to bring to sale for arrears—Bengal Patni Taluks Regulation, 1819 (Bengal Regulation VIII of 1819), section 14—Money had and received—Money paid under a claim in legal proceedings—Not ordinarily recoverable—Chota Nagpur Encumbered Estates Act, 1876 (Act VI of 1876)—Has no application to immovable property outside of Chota Nagpur.

In proceedings under section 14 of the Bengal Patni Taluks Regulation 1819 (Bengal Regulation VIII of 1819) the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not in the same position as persons who pay a claim brought against them in an ordinary suit in which they had a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so hereafter. Whether or not he contests the claim, a talukdar to stop a sale under section 14 has to deposit the full amount claimed: and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit.

The Chota Nagpur Encumbered Estates Act, 1876, (Act VI of 1876) has no application to immovable property outside the limits of Chota Nagpur.

Bicha Ram Sahu v. Bishambar Nath Sahu, 16 Calo., L. J., 527, approved.

APPEAL from a decree of the Calcutta High Court, dated July 23rd, 1914, affirming a decree of the Subordinate Judge of Burdwan.

The facts of the case are sufficiently set out in their Lordships' judgment. Respondents sued to recover sums paid by them to appellant in proceedings taken by the latter under the Patni Taluks Regulation to realise arrears of *patni* rent: they alleged that no such arrears were due. Appellant contended that the mortgage bond executed by his predecessor, which the *patni* rents were set off against the interest due to them under the mortgage, had been paid off by the Manager appointed under the Chota Nagpur Encumbered Estates Act, 1876, and also that

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plaintiffs could not recover the sums paid, as even if not legally due, those sums were paid voluntarily, or if not voluntarily, under stress of legal proceedings in which the plaintiffs had not chosen to defend themselves. The Subordinate Judge over-ruled these contentions and decreed the suit and his decree was affirmed by the High Court. Defendant appealed.

Upjohn, K. C., (De Gruyther, K. C. and J. M. Parikh with him), for the appellant, submitted that this was a case for money had and received, and that the money having been paid under stress of legal proceedings, plaintiffs could not recover. The Raja issued notice under section 8 of the Regulation: respondents had it in their power to take summary proceedings under section 14, and in such proceedings the validity of the Raja's claim would have been decided. They failed to raise in any such proceedings the question whether the mortgage was discharged, and they cannot raise it now.

Marriott v. Hampton, [1797] 7 I. R., 269; S. G., 2 Smith's L.C., 11th ed., 421;

Moore v. Vestry of Fulham, [1895] 1 Q. B., 399.

[The Board referred to

Cooper v. Phibbs, [1867] 2 H. of L. Cases, 149;

Beauchamp v. Winn, [1873] 6 H. L. Cases, 223,

and observed that the question was whether the respondents knew their rights when they paid? It seemed they did not discover their rights till afterwards. Could they not then sue?]

We submit not. There is no evidence of any mistake at all: if they made any mistake, it was as to the construction of a general Act, (the Chota Nagpur, Encumbered Estates Act) and that is a mistake of law, not of fact: it is a mistake as to *lex*, not as to *jus privatum*.

Reference was made to

Dooli Chand v. Ram Kishen Singh, [1882] 8 I. A., 93; S. C., I. L. R., 7 Cal., 648.

Seth Kanhaya Lal v. National Bank of India, [1913] 40 I. A., 56; S. C., I. L. R., 40 Cal., 598.

The lands concerned are outside Chota Nagpur, but the application of Act VI of 1876 is not limited to lands in Chota Nagpur. Section 2 vests in the Manager appointed under the Act all the immovables of the land-holder wherever situate and all immovables which may be acquired by or devolve on him or his heir. The acquisition or devolution of the property is not confined to property situated in Chota Nagpur. Under section 3, the bar as to process in respect of debts and liabilities extends to all courts in

British India. Debts must include secured debts: there is nothing in the context to limit the generality of the provision. The disability as to contract is extended to the land-holder's heir. Appellant's contention is borne out by a review of the whole Act, and a consideration of the purpose which the Act was intended to effect: if unsecured creditors are barred all over British India why should secured creditors outside Chota Nagpur escape? We admit the contrary view has been taken in

Bicha Ram Sahu v. Bishambar Nath Sahu, [1912] 16 Cal. L. J., 527,

but that case was wrongly decided.

Dunne K. C., (*Ramsay* with him), for the respondents, were not called on.

Their Lordships' judgment was delivered by

VISCOUNT HALDANE—This is an appeal from a decree of the High Court, Fort William, in Bengal, affirming a decree of the Subordinate Judge of Burdwan. The respondents as plaintiffs brought a suit to recover 6,848 rupees 8 annas, being the amount of *patni* rents for the years 1902-1910, paid by them, as they alleged, although not due, in order to save their lands from sale under the powers conferred on zemindars by section 14 of Regulation VIII of 1819.

The appellant, on whose behalf as having rights conferred on a zemindar, it had been proposed to put the power of sale in force, contended, in the first place, that the money could not now be recovered, on the ground that even if not legally due it was paid voluntarily, or, if otherwise than voluntarily, as the result of proceedings in which the respondents had not chosen to defend themselves, and which consequently could not be reviewed. In the second place he contended that the amount paid was due under the provisions of "The Chota Nagpur Encumbered Estates Act" (VI of 1876).

The facts do not appear to be obscure, and if the appellant's contentions are right on either of the points stated he may be entitled to succeed. As, however, their Lordships are of opinion that the argument addressed to them from the Bar fails on both points, they have not found it necessary to call on the respondents to support the judgments in the courts below, either on the two questions referred to, or on certain minor points which their Lordships did not consider to be tenable.

The appellant is Raja of Pachete in Chota Nagpur. He succeeded to the title and estates on the death of his grandfather, the late Maharajah Nilmoni Singh Deo. The late Maharajah, in 1887, borrowed from one Mahesh Chandra Chatterji, a resident of Madanapur, in Burdwan, 22,435 rupees, giving the latter security in

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the form of a usufructuary mortgage of lands constituting four lots : three in the district of Bankara, and one in the district of Burdwan. Of these four lots the Maharajah had previously granted *patni* leases to Mahesh Chandra Chatterji. The respondents are the successors-in-title of the latter in respect both of the leases and of the mortgage security. All of the four lots, the subjects of the leases and the mortgages, lie outside the boundaries of Chota Nagpur.

The mortgage was effected by a *sud-bandhaki* mortgage bond under which it was stipulated that interest at the rate of 14 annas per 100 rupees, equivalent to $10\frac{1}{2}$ per cent. per annum, should be payable, and that this interest, which was substantially equivalent to the amount of the annual rents payable under the *patni* leases, should be set off against the interest until repayment of the principal sum due under the mortgage.

In 1895 the affairs of the late Maharajah having become embarrassed, the provisions of the Chota Nagpur Act were applied to his case. The language and scope of this Act their Lordships will refer to later. For the present it is sufficient to state that the management of the Maharajah's estate was vested in a manager appointed under section 2 of the Act, and that a vesting order appears to have been published in the "Calcutta Gazette," in terms wide enough to apply, if the Act enabled it to do so, to all his immovable property both within and outside the boundaries of Chota Nagpur. In response to a notice issued by the manager, the respondents, among other creditors, put in a claim. They submitted their mortgage bond with a petition praying for a settlement. The manager dealt with the claim under section 8 of the Act, and purported to settle the amount of principal due, and, what was in the circumstances still more important, to reduce the future interest to 6 per cent. per annum. He also determined that in every half year the difference between the interest as thus reduced and the amount of the *patni* rents should be applied in satisfaction of the principal. The Commissioner, on whom jurisdiction to do so was claimed to have been entrusted by the Act, sanctioned the arrangement.

In 1907 the debts due by the estate were considered to have been provided for, and the possession and management were made over to the appellant, who had succeeded to the title. Thereafter he collected from the respondents the amounts of surplus *patni* rents in question in the suit, on each occasion applying to the Collector of the district where the lots were situated for authority to put in force the summary provisions for sale for recovery of *patni* rents enacted by the Regulations of 1819 herein-after referred to. The respondents, on receiving the successive notices to this effect authorised by the Collector, paid the amounts for the recovery of which they have brought the present

suit. They appear to have made no formal protest, but the learned Subordinate Judge who tried the case has found that the circumstances were such that they cannot be taken to have made the payments gratuitously, a conclusion of fact from which the High Court did not dissent on appeal, and from which their Lordships do not dissent.

It is important to see what were the terms of section 14 of the Regulation of 1819, under which these payments were insisted on. Section 8 had enacted that zamindars in the position of the present appellant should be entitled in certain cases to apply for sales of *patni* tenures for arrears of rent. Section 14 defines in its first branch the procedure in case the talukdar objects. He may stop the sale by lodging the amount demanded. He may also bring a suit and obtain a reversal of the sale and damages. By its second branch the section provides that if the talukdar desires to contest the zamindar's demand he may apply for a summary investigation. If this takes place and an award results in time the effect of the award is to prevail. But if the proceedings be still pending the sale is none the less to take place unless the amount claimed be deposited, and if such deposit is not made the talukdar is to have no remedy excepting by a regular action for damages and reversal of the sale. Under an amendment of the Regulation passed in 1832, the conduct of the proceedings in regard to such sales is given to the Collector, Deputy Collector or Head Assistant.

Their Lordships are of opinion that the procedure provided for by section 14 is such as not to put those submitting to pay money under it in the position in which they would have found themselves had they paid a claim brought against them in an ordinary suit in which they could have set up a full defence but had failed to do so. In such a case those who pay lose their right to resist however good, because, having had the full opportunity of doing so which the law allows them once for all, they have not availed themselves of the opportunity so given. But section 14 expressly recognises the right to bring a separate suit in an ordinary court, the proceedings before the Collector notwithstanding. If the purchaser at the sale impeached is made a party, the sale may even be set aside. All the talukdar gets by demanding a summary investigation before the Collector is an award the application for which will not stop the sale. The only step by which the sale can be stopped is by a deposit of the full amount claimed, and when this is done the question of title remains capable of being raised in an ordinary suit. Their Lordships are accordingly of opinion that the rule which prevents a person from recovering back money which he has paid on a claim in legal proceedings to which he might have set up a defence but has failed to do so, has no application here. This conclusion is, under the circumstances already referred to, fatal to the first branch of the case presented by the appellant. On the argu-

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ment addressed to them on this part of the case they have only to add the observation that the proceedings before the Collector are of an administrative rather than a properly judicial character. The zemindar who has a power of compelling a sale is to exercise this power through the instrumentality of the Collector himself, who acts, not magisterially, but ministerially, and who has, in the true view of his functions, no capacity to give effect to any enquiry he may make into title comparable to the capacity possessed by an ordinary judicial tribunal.

Their Lordships now turn to the second argument by which the learned counsel, for the appellant, supported the case made. This argument turned on the question whether the powers conferred by the Chota Nagpur Act extend to land outside the limits of Chota Nagpur. The language of the Act is obscure and their Lordships have found it necessary to look at the whole of its provisions somewhat closely in order to arrive at a conclusion on the point. The preamble is material, for it defines the purpose of the measure as the provision of "relief of holders of land in Chota Nagpur who may be in debt, and whose immovable property may be subject to mortgages, charges, and liens." *Prima facie* the immovable property would therefore mean such property in Chota Nagpur, and this is borne out by the title of the Act, which is "The Chota Nagpur Encumbered Estates Act." Section 2 enacts that where "any holder of immovable property" (which plainly means here immovable property in Chota Nagpur, and there only) applies to the Commissioner stating that the holder of the "said property" is subject to, or that "his said property" is subject to debts or liabilities, the Commissioner may, with the consent of the Lieutenant-Governor of Bengal, by Order published in the "Calcutta Gazette," appoint an officer called a manager, and vest in him the management of the whole or any portion of the immovable property of the holder. The application must state the particulars of the debts or liabilities to which the holder is subject, or with which his immovable property is charged, and also the particulars of the immovable property to which he is entitled. Section 3 provides that on the publication of the Order "all proceedings which may then be pending in any Civil Court in British India in respect to such debts or liabilities shall be barred, and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void." Among other things, the section further provides that the holder and his heir shall be incompetent to mortgage, charge, lease, or alienate their immovable property, or to grant receipts for rents or profits, and shall be incompetent to enter into any contract which may involve them in pecuniary liability. Section 4 confers on the manager during his management "of the said immovable property" large powers of management and of settling debts. Section 5

provides that, on the publication of the Order vesting the management in him, the manager is to publish a notice in English, Urdu, and Hindi (not, their Lordships observe, in the remaining languages vernacular in other parts of India), calling for the presentation of claims, and all claims not duly presented are to be barred. Section 8 enables the manager to determine the amounts of principal justly due to the creditors of the holders of the property and to the mortgagees on it. By section 9 the manager may enquire into the consideration given for leases and, if it appears insufficient, cancel them. Section 10 gives an appeal against proceedings of the Collector to the "Deputy Commissioner within whose jurisdiction the property is situate," if not himself the manager. Sections 17 and 18 confer on the manager power to lease and to mortgage and sell (in the latter cases with the assent of the Commissioner). Section 19 enables the Lieutenant-Governor of Bengal (within which Chota Nagpur is situate) to make rules for the administration of the Act. Section 23 saves the jurisdiction of the courts in Chota Nagpur in certain kinds of suits relating to immovable property brought under the operation of the Act.

Their Lordships have not had before them the Order published in the "Calcutta Gazette," by which the Commissioner appointed the manager in the present case, and vested in him the management of some or all of the immovable property of the late Maharajah; but however wide the terms of this Order may have been, the scope of its operation depended on the scope of the Act itself. After considering the Act as a whole, their Lordships have arrived at the conclusion that the primary intention to be collected from its language is that of providing, by a measure of local application, for the relief of the burdens affecting the land within Chota Nagpur owned by a class of land-holders there. The governing purpose related to a particular locality. It is not a statute analogous to a Bankruptcy Act, the controlling purpose of which is provision for creditors in a liquidation. To this end section 16 confers the jurisdiction requisite to enable the manager to recover immovable property in the possession of a mortgagee or vendee in the court of the Deputy Commissioner within whose jurisdiction the property is situate. But in Regulation District, where there is no Deputy Commissioner, these words would be inapt, and the inference is that they were intended to apply only to immovable property in Chota Nagpur, where a Deputy Commissioner has jurisdiction. This conclusion is borne out by section 23, which saves, as already observed, the jurisdiction of the courts of Chota Nagpur over certain questions, and not the corresponding jurisdictions of courts outside it.

Their Lordships agree with the views of the scope of the Act expressed by the learned Judges who decided the case

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of *Bhicha Ram Sahu v. Bishambhar Nath Sahu*(1). They think that the Act has no application to immovable property outside Chota Nagpur. The main purpose is, as they have already observed, the protection of zemindars within that district, and any provisions which affect rights to enforce in jurisdictions outside it personal debts or liabilities are merely ancillary to the main purpose of the Act, which is directed to improving the position of persons owning land within it. If this be so, no claims *in rem* of land outside it ought to be construed as affected by the merely general and ambiguous expressions which the Act contains.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

E. Dalgado.—Solicitor for the appellant.

T. L. Wilson & Co.—Solicitors for the respondent.

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Appeal dismissed.

(1) 16 Calcutta Law Journal Reports, 527.

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RAJKUMAR JAGANNATH PRASAD SINGH (*Defendant*)

versus

SYED ABDULLAH AND OTHERS (*Plaintiffs*)

Evidence Act, (Act 1 of 1872), section 115—Estoppel—Estoppel by representation or action causing another to change his position—Conveyance by person entitled by estoppel—Gives transferee good title against those bound by the estoppel.

The doctrine of estoppel is based upon the change of position brought about by the representations or actings of the person bound by the estoppel.

Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representations or actings have created it, but all claiming under him by gratuitous title.

The estates of *B* a Raja, were taken under Government management under the Encumbered Estates Act. The manager appointed, who had power of sale under the Act, put up a village to sale. *B* bought it *benami* in the name of *K* but the manager never executed any conveyance to *K*. Thereafter the management was removed and *B* restored to his estates. *K* having died *B* procured *K*'s heir *L* to convey the village to *B*'s illegitimate daughter *R*. After *B*'s death *R* conveyed to *S* who sued *B*'s heir *J* for possession. *Held* that *J* was estopped from denying *S*'s title.

Sarat Chandra De v. Gopal Chandra Laha, [1892] 19 I. A., 203 S. C., I. L. R., 20 Cal., 296.

APPEAL from a decree of the Calcutta High Court, dated June 10, 1913, reversing a decree of the Subordinate Judge of Gaya.

The facts of the case are sufficiently set out in their Lordships' judgment. Syed Abdullah's suit was dismissed by the first court, but decreed by the High Court (CHATTERJEA and NEWBOULD, JJ.). Defendant appealed.

Dunne K. C. (*Ramsay* with him), for the appellants.—The estoppel relied on by the High Court is that the Raja's conduct prevented us from alleging that the ostensible title was not the real title. But Rajeshwari here was not even ostensible owner. Her transferor never got a conveyance such as would have given him title. Section 54 of the Transfer of Property Act lays down that to affect immoveable property there must be a registered instrument. The Board has held that until registered a contract has no effect; and that if registration is not effected all equitable rights under the contract are extinguished.

[LORD DUNEDIN.—referred to LORD SHAND's judgment in

Sarat Chandra De v. Gopal Chandra Laha, [1892] 19 I. A., 203; S. C., I. L. R., 20 Calo., 296.]

That was a clear case of a representation being acted on; it was not so here. Rajeshwari did not act on any misrepresentation; it has been found she paid no consideration. If the Raja wished to make a gift of the village to her, section 123 of the Transfer of Property Act requires a registered instrument signed by him or on his behalf. Syed Abdullah cannot avail himself of section 41 of that Act, for he neither made reasonable enquiries nor acted *bona fide*; there are recitals in the deed, but the smallest enquiry would have shown him that they were untrue, and indeed the deed itself recites that he relied on Rajeshwari's representations as to her title.

Sir W. Garth, for the respondents, was not called on.

Their Lordships' judgment was delivered by

LORD DUNEDIN.—In this suit Syed Abdullah sues the Raja of Deo for possession of a village called Badam. The plaintiff is purchaser from a dancing girl, Rajeswari Koer, who is the natural daughter of the late Raja Bhikham of Deo, father of the present Raja, defendant.

The history of the matter is this:—Raja Bhikham having got into involved circumstances, his estate was put under management under the provisions of the Chota Nagpur Encumbered Estates Act, which had been made to apply to Deo by a special Act. The manager appointed under the Act one Bhuan Lal, who had, in terms of the Act, powers of sale, put up to public auction the village of

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Badam. It was bought by Kashi Nath Singh for the sum of 2,000 rupees. As a matter of fact, Kashi Nath had been put forward by the Raja himself, who provided him with the money. No conveyance was executed by Bhuan Lal in favour of Kashi Nath. The management came to an end in 1896, and the Raja was restored to his estate. In 1897, the Raja who had expressed his desire to benefit Munni Bibi, the mother of Rajeshwari and his infant daughter by her, caused Lajjadhari, the adopted son of Kashi Nath who had by this time died, to execute a conveyance of Badam in favour of Rajeshwari. The deed of conveyance bore to be in respect of a consideration of 5,000 rupees, but in reality no money passed. Lajjadhari merely acted on the command of the Raja. On the 22nd April, 1898, Rajeshwari, being a minor, applied through her mother as guardian for registration and mutation of names in respect of the village of Badam. On the same day the Raja presented a petition in which he narrated the fact of Badam having been sold by Bhuan Lal, the manager, set forth that Kashi Nath had died without having obtained a conveyance and that Lajjadhari his son had sold the property to Rajeshwari, and prayed that Rajeshwari's petition should be granted and her name inserted in the register, "to which your petitioner has no objection whatever." Rajeshwari's name was accordingly entered in the Government register as proprietrix of the village of Badam.

In October 1898, Raja Bhikham died and the present Raja being a minor the estate came under the management of the Court of Wards. Sometime in 1899, Mr. Wright, the manager, turned out Rajeshwari who was in possession, *via facti* and without process. In 1901 Mr. Wright conveyed Badam to Ranee Chandra Koer, the surviving widow of Raja Bhikham, on the idea that it was *gur* property descending from Ranee to Ranee. In 1902 the Ranee applied for mutation of names. Her application was opposed by Rajeshwari and was refused. In 1904 the Ranee raised a civil suit for a declaration that the property was hers. To this suit she called as defendants Rajeshwari and the young Raja, the present defendant. The whole facts were gone into. The Ranee had based her case on an allegation that Kashi Nath was a *benamidar* for her. The Subordinate Judge held that Kashi Nath was the *benamidar* of Raja Bhikham, and not of the Ranee, and dismissed the suit adding an opinion that Raja Bhikham himself would have been estopped from denying that the property belonged to Rajeshwari. On appeal the District Court affirmed the judgment, but did not repeat the *dictum* as to estoppel. In 1908 Rajeshwari executed a conveyance in favour of the present plaintiff, who in the same year raised the present suit.

The defence to the suit was, after discounting irrelevant pleas, based on two grounds first, a denial of Rajeshwari's title to convey anything to the plaintiff; second, a denial that Rajeshwari had

conveyed to the plaintiff on the allegation that she was a minor at the time of the conveyance. The learned Subordinate Judge upheld both defences and dismissed the suit. The Appeal Court reversed and gave judgment in favour of the plaintiff.

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It will be convenient to dispose of the second ground of defence first, as it depends on a pure question of fact. The Subordinate Judge, while commenting on the unreliability of the witnesses, three in number, adduced by the defendant to prove the minority, gave judgment on the ground that the rebutting evidence was not what it might have been. The High Court agreeing with the criticism on the defendant's witnesses, came to the conclusion that the defendant had not made out his allegation. Their Lordships agree with the High Court. The *onus* to prove minority is on the defendant who asserts it. He brings no reliable evidence to prove this assertion. This defect in his proof cannot, their Lordships think, be cured by a mere criticism of the evidence brought by the plaintiff. It would further seem to their Lordships that the evidence tendered by the brother is not open to any obvious objection. But it is enough to say that the matter being left in doubt the defendant fails to prove his assertion.

The sole question then is whether there was a title in Rajeshwari. Formal title by progress there was not. Both courts find that the sale by auction, though it gave a right to the purchaser to get a title, did not give him an actual title. Admittedly Kashi Nath never got the actual title, to which as purchaser he was entitled. The plaintiff in the court below attempted to prove that Kashi Nath was a true purchaser for value. In this he failed, and both courts are agreed as to this. He was only trustee for the Raja Bhikham. The argument in the lower court then turned mostly on the effect of the judgments of 1905 and 1906 in the suit by the Ranee. The plaintiff urged that as between Raja Bhikham and the defendant, who were both co-defendants to the Ranee's suit, these judgments formed a *res judicata* to the effect that the property belonged to Rajeshwari. In deciding—rightly—that this was not so, the learned Subordinate Judge overlooked the fact that, though the *dictum* of the Subordinate Judge in the Ranee's suit that Raja Bhikham was in a question with Rajeshwari estopped from denying that the property was hers was an *obiter dictum*, yet on the emergence of the same facts as were found in that suit, the question arose to be decided in this suit, it being obvious that if Raja Bhikham was estopped, the present Raja, his son, taking by gratuitous title from him, was equally estopped. But the High Court took up that point and decided it in favour of the plaintiff. The question before their Lordships is whether that view was right.

Their Lordships think that it was. In the first place, they are satisfied that the facts are as have been stated above. When,

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therefore, Lajjadhari executed the conveyance in favour of Rajeshwari at the instance of Raja Bhikham, he (Raja Bhikham) was the true owner. Kashi Nath was a trustee for Raja Bhikham, and Lajjadhari could only succeed to his father's trusteeship. Further, Raja Bhikham was the proprietor of the estate of which Badam was a part. So that if by renunciation or limitation the right of Kashi Nath to get a conveyance became extinct, the full right as well as the title was in him. In this position of affairs not only did Rajah Bhikham cause Lajjadhari to execute the conveyance, but when Rajeshwari proceeded to give effect to that conveyance by applying for registration he actively assisted her. By so doing he caused her to change her position, for by registration she became bound for all the State liabilities which attach to the registered holders of immoveable property. If then Raja Bhikham had lived and attempted to regain the property these actings of his would, in their Lordships' view, have estopped him from making the claim. He did not do so. The present defendant is his son, and succeeded by gratuitous title, and he therefore cannot do what his father would have been unable to do.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

A. P. P.

Appeal dismissed.

T. L. Wilson & Co.:—Solicitors for the appellant.

E. Dalgado:—Solicitor for the respondent.

HIGH COURT.

SURAJ BHAN (*Defendant*)*versus*HASHIM BEGAM AND OTHERS (*Plaintiffs*)*

Contract Act (IX of 1872), section 70—Sale—Money left with vendees for payment to mortgagees—Property mortgaged to secure the sum due different from property sold—Vendees paying interest to mortgagees owing to delay on the part of vendors to get sale-deed registered—Suit for unpaid purchase-money—Vendees claiming set-off in respect of the interest paid—Gratuitous payment.

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Certain immoveable property was sold and the vendors left a portion of the consideration in the hands of the vendees for payment to certain of their (vendors') creditors who held a mortgage over property other than that sold. Owing to delay in the registration of the sale-deed which was due to action on the part of the vendors, the vendees did not pay the money to the creditors. When, however, the sale-deed was registered and the vendees tendered the money left with them to the creditors, the latter refused to accept it without the interest which had accrued in the meantime. The vendees paid the interest also. In a suit brought by the vendors for recovery of the unpaid portion of the purchase money the vendees claimed a set-off in respect of the money they had to pay to the vendors' creditors as interest:—*Held* that the vendees were not entitled to recover the amount claimed inasmuch as the money paid as interest was a gratuitous payment, the property mortgaged to secure the sum due to the creditors being no part of the property sold, and the fact that the vendors benefited by the payment was immaterial.

SECOND APPEAL from a decree of E. C. ALLEN Esq., District Judge of Moradabad, confirming a decree of Babu Ram Chandra Saksena, Subordinate Judge.

Out of the amount of consideration for a sale the vendors left with the vendee a sum of Rs. 8,150 for payment to a certain person in respect of a mortgage held by him over certain property of the vendors which was other than the property comprised in the sale. After the sale the vendors threw some difficulties in the way of registering the sale-deed. Eventually when the sale-deed was registered the vendee offered the Rs. 8,150 to the mortgagee, who refused to take it on the ground that the money was insufficient, as a further sum of Rs. 749 odd had accrued due by way of interest in the meantime. It was alleged by the vendee that he paid the mortgagee this further sum of Rs. 749 as well. The vendors sued the vendee for recovery of an unpaid portion of the purchase

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money, and the vendee claimed credit for this sum of Rs. 749. Both the courts below refused to allow the set-off claimed. The defendant vendee appealed to the High Court

Kailas Nath Katju, (for *Tej Bahadur Sapru*), for the appellant.—The appellant is entitled to be re-imbursed for having paid the amount in question. Section 70 of the Contract Act applies to the case. The payment was not made gratuitously, and the plaintiffs have benefited by it. Under the circumstances of the case, the payment must be deemed to have been made “lawfully” within the meaning of section 70. The meaning of that expression has been explained in the case of

Chedi Lal v. Bhagwan Das, [1888] I. L. R., 11 All., 234, at p. 243.

It was at the express request of the vendors that the vendee was to pay, and did pay, the mortgagee the sum of Rs. 8,150, which was calculated to discharge in full the amount then due on the mortgage. There can be no question that the payment of Rs. 8,150 was a “lawful” payment. The further sum of Rs. 749 was a natural and necessary addition to the original amount, brought about by the accumulation of interest during the period of delay in making the payment. Had this delay been the fault of the appellant the case might be different; but the plaintiffs, and not the appellant, were to blame for the delay. The payment of the additional sum of Rs. 749 by the appellant was a direct and natural corollary to his obligation to pay the Rs. 8,150.

[RICHARDS, C. J.—If the sale-deed had not directed the vendee to pay any sum to the creditor, and the vendee had of his own accord paid him, could the vendee have claimed a set-off?]

No. That would have been a clearly gratuitous payment. Here, it is submitted, the payments of the two amounts are correlated, and they stand on the same footing. The vendors’ direction to pay the sum of Rs. 8,150 justified by implication the reasonable inference that for the payment of the further necessary sum the vendee was entitled to look for compensation to the vendors, for whose benefit the payment was made. The intention of the parties obviously was that the mortgage was to be fully paid off.

[BANERJI, J.—That does not appear from the sale-deed.]

The plaintiffs are seeking relief from the court, and they must do equity *vide* observations in the case of

Ram Tahul Singh v. Beseswar Lall Sahoo, [1875] L. R., 2 I. A., 181.

S. M. Sulaiman, for the respondents, was called upon only on the question of costs.

The judgment of the Court was delivered by

Richards,
• C. J.

• RICHARDS, C. J.—The point which arises in this appeal is as follows. Certain immoveable property was sold for a considerable sum of money. In the sale-deed the consideration is stated to have

been received in a certain way (as per details at the foot of the deed). According to this detail the vendee was to retain a sum of Rs. 8,150 for payment to a certain creditor of the vendors who had a mortgage upon other property belonging to the vendors, and which was no part of the property sold to the vendee. Some delay seems to have taken place in the registration of the deed and as a consequence, the vendee alleges that he did not pay the Rs. 8,150. Eventually when he succeeded in getting the sale-deed registered, he went to the creditor and offered him the Rs. 8,150 which the creditor refused to receive because further interest had in the meantime accrued amounting to the sum of Rs. 749 or thereabouts. The present suit was instituted by the plaintiffs to recover portion of the purchase-money which they alleged had not been paid. The defendant admitted that portion of the purchase-money had not been paid but he claimed credit as against the amount that remained unpaid for the sum of Rs. 749 interest which he alleged he had paid the creditor of the vendors. Both the courts below held that assuming that the defendant had paid the creditor the extra sum of Rs. 749 for the interest which had accrued, he could not plead this as a set-off against the plaintiff's claim for the unpaid purchase-money upon the ground that there was no obligation on the vendee to pay any money to the creditor except the Rs. 8,150, which had been left with him by the vendors. In second appeal to this Court it has been urged that the view taken by the courts below was incorrect and section 70 of the Contract Act is relied upon. That section provides that "where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered." We do not think that this section applies to the circumstances of the present case. It was admitted at the Bar that if the sale deed had been silent about payment to the creditor of the vendors and that the vendee of his own motion had paid off the creditor, he could not have pleaded such payment as a set-off against the purchase-money. We think that exactly the same reasoning applies to the present case. According to the sale-deed the only sum which the vendee was requested to retain out of the purchase-money and pay to the creditor, was the sum of Rs. 8,150. The payment of the balance was a payment gratuitously made. We have already pointed out that the property mortgaged to secure the sum due to the creditors was no part of the property sold. It may be of course that the plaintiffs have benefited by the payment to the creditor but this by itself is no sufficient ground to entitle the defendant to set it off against the plaintiff's claim. We dismiss the appeal with costs.

B. K. M.

Appeal dismissed.

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PIGGOTT, J.
WALSH, J.UMRAO SINGH AND ANOTHER (*Plaintiffs*)*versus*UMRAO SINGH (*Defendant*)*

Partition Act (IV of 1893), sections 2 and 3—Construction—Parties not at issue on the question that a dwelling-house could not be reasonably or conveniently partitioned—Application for withdrawal of suit—Application rejected as having been made at a late stage—Discretion of court—Civil Procedure Code (Act V of 1908), Order XXIII, rule 1.

Plaintiffs and defendant were co-owners of a certain dwelling-house, the plaintiffs having $\frac{8}{9}$ ths share and the defendant $\frac{1}{9}$ th share. Plaintiffs sued for partition and stated that as the house could not be reasonably or conveniently divided, the house might be sold by auction and in the alternative offered to purchase it. The defendant contended that the house might be partitioned without inconvenience to either party; but in the alternative he also offered to purchase the plaintiff's share at a valuation, should the court be of opinion that the partition could not be effected. The defendant subsequently withdrew his contention that the house might be conveniently partitioned. The court, thereupon, appointed Commissioners who valued the plaintiffs' share and the defendants were allowed to purchase it. The court also disallowed the plaintiffs' application for permission to withdraw the suit:—*Held* (1) that the court had acted in accordance with sections 2 and 3 of the Partition Act when the parties were not at issue on the point that a division could not be reasonably or conveniently made; (2) that the court had exercised a sound discretion in disallowing the application for withdrawal of the suit inasmuch as it had been made at a stage at which the defendant had become entitled to the benefit of section 3 of the Partition Act and because the application did not satisfy the requirements of Order XXIII, rule 1 of the Civil Procedure Code.

FIRST APPEAL from a decree of BABU MAN MOHAN SANYAL, Additional Subordinate Judge of Meerut.

The plaintiffs owned $\frac{8}{9}$ ths share of a dwelling-house, and the defendant owned $\frac{1}{9}$ th. The plaintiffs sued for partition, and they stated in their plaint that regard being had to the accommodation in the house, its partition would altogether spoil it so that it would not at all remain comfortable for residential purposes. They, therefore, asked that in accordance with section 2 of Act IV of 1893 the house might be sold by auction. In the alternative, they offered to purchase the whole house if the court should deem proper to sell it. The defendant replied that it was possible to partition the house without inconvenience to the parties. In the alternative

he claimed to exercise his right under section 3 of the Act to purchase the plaintiffs' share if the court decided that partition could not conveniently be effected. It appeared that subsequently the defendant withdrew his objections to the plaintiffs' allegation that the house could not be conveniently partitioned. The court, thereupon, appointed two pleaders as Commissioners to value the plaintiffs' share of the house; and after taking their report and hearing objections thereto, fixed the value of the plaintiffs' share at Rs. 6,000. The court passed a decree permitting the defendant to purchase the plaintiffs' share for Rs. 6,000. The plaintiffs made an application under Order XXIII, rule 1 of the Code of Civil Procedure in which they prayed for permission to withdraw the suit. This application was disallowed by the lower court. The plaintiffs appealed to the High Court.

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Surendra Nath Sen, (with *B. E. O'Connor*), for the appellants.—The lower court has misinterpreted sections 2 and 3 of Act IV of 1893. As a condition precedent to the court deciding to act under section 2 or section 3, it had first to satisfy itself that a division of the house could not reasonably or conveniently be effected and that an auction sale thereof would be most beneficial to the parties. The plaintiffs were entitled to claim a sale and not the defendant, because the latter owned less than a half share. The words "under the last foregoing section" used in section 3 govern the application of that section. Section 3 does not admit of application so long as the preliminary conditions laid down in section 2 are not strictly complied with. Under section 2, the issue for the court to decide was whether a division of the house could or could not reasonably or conveniently be effected and whether an auction sale would or would not be more beneficial for all the share-holders. The court did not frame this issue, took no evidence in respect of it and arrived at no decision thereon. On the contrary, it proceeded forthwith to appoint Commissioners to value the house.

The application for leave to withdraw the suit ought to have been allowed by the court below.

Tej Bahadur Sapru and *Girdhari Lal Agarwala*, for the respondent, were not called upon.

The judgment of the Court was delivered by

Piggott, J.—The appellants in this Court were the plaintiffs in a suit for partition. They owned between them $\frac{8}{9}$ ths of a certain house. The defendant owned the remaining $\frac{1}{9}$ th share. In their plaint at paragraph 4 the plaintiffs stated that, regard being had to its accommodation, the partition of the house in suit would spoil the house altogether so that it would not "at all remain comfortable for residential purposes." Hence the plaintiffs asked the court under section 2 of the Partition Act (No. IV of 1893) to order a sale of the house. In reply the defendant raised alterna-

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tive pleas. In the first place he alleged that a partition of the house by metes and bounds could be effected to the mutual convenience of the parties, provided it were effected in a certain way. In the alternative he pleaded that, if the court held that the house could not reasonably or conveniently be partitioned and was prepared to accept the plaintiffs' prayer for an auction sale, then the defendant claimed to exercise his right under section 3 of the same Act to buy the plaintiffs' share at a valuation. At a later stage it is quite clear that the defendant was prepared to withdraw, and did withdraw, his objection to the plaintiffs' allegation that the house could not conveniently be partitioned. He elected to abide by his alternative claim to purchase at a valuation to be fixed by the court. The court proceeded accordingly to cause a valuation to be made, obtained a report from Commissioners, heard objections to that report and fixed the value of the plaintiffs' share at Rs. 6,000. It has framed its decree accordingly, permitting the defendant to purchase at this price. In the memorandum of appeal before us it is contended, firstly, that the court below has misinterpreted sections 2 and 3 of the Partition Act. We think that on the contrary the court below has properly applied those sections according to their plain meaning. The suggestion that the court could not legally take the action which it did, without first taking evidence and recording an affirmative finding to the effect that the house could not conveniently be partitioned and that its sale by auction would be more beneficial to the share-holders, comes with an ill grace from the plaintiffs appellants. They are, as a matter of fact, trying to make it a grievance that the court accepted their own allegations of fact to be correct. Moreover, as we have already pointed out, the defendant in a subsequent pleading had virtually accepted the same position. Finally it has been urged upon us that, at a later stage of the trial, when the plaintiffs discovered what the result of the proceedings was likely to be, they asked permission of the court to withdraw from their suit, with leave to bring a fresh suit, and that this request was refused. Under the circumstances the court below exercised a sound discretion in refusing to allow this application. Matters had reached a stage at which the defendant was entitled to the benefit of the claim which he had put forward under section 3 of the Partition Act, and in any case the application for withdrawal filed by the plaintiffs does not satisfy the conditions laid down by Order 23 of the Code of Civil Procedure. In the memorandum of appeal before us there is no definite plea that the finding of the court below, fixing the value of the plaintiffs' share at Rs. 6,000 is incorrect. Even if we can understand paragraph of the memorandum of appeal before us as suggesting such a plea, it seems to us that the finding of the court below is in accordance with the weight of the evidence. The result is that this appeal fails and we dismiss it with costs.

B. K. M.

Appeal dismissed.

MUSLEHA BIBI AND OTHERS (*Defendants*)*versus*RAM NARAIN AND OTHERS (*Plaintiffs*)*

Civil Procedure Code (Act V of 1908), Order 51, rule 22—Cross-objection against co-respondent when may be entertained—Mortgage deed—Executants—Two females and four males.

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PIGGOTT, J.
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Plaintiffs sued for sale on the basis of a mortgage deed. The bond was held to be proved against the male executants, but not against the females. Against the decree the male executants preferred an appeal and the plaintiffs preferred cross-objections against the female executants who had been arranged on the same side with them as respondents and contended that the deed had been proved against the females too:—*Held* that the plaintiffs were entitled to file cross-objections against their co-respondents.

FIRST APPEAL from the decree of J. B. MUNDLE, Esq., Subordinate Judge of Jaunpur.

Tej Bahadur Sapru (with him *S. M. Sulaiman*), for the appellants.

B. E. O'Connor (with him *Gokul Prasad*), for the respondents.

The following judgments were delivered.

PIGGOTT, J.—This is a suit on a mortgage of the 17th of September, 1900. The executants of this deed were six persons. Jamil Ullah and Jalil Ullah, the two sons, and Musammat Khatun Bibi, the surviving widow, of one Khalil Ullah deceased were the first three. The other three executants, Zohra Bibi, Mohammad Shibli and Mohammad Makki, were members of the same family, connected more or less distantly according to a pedigree which is to be found at page 2 of the printed record. The only point I desire to make about these three executants at present is that the pedigree does not show that they could have inherited any property from the deceased Khalil Ullah so as to be liable for payment of any portion of that gentleman's debts. The suit as brought is against the executant Jamil Ullah in person and the heirs of the remaining five executants all of whom are since deceased. The court below has found execution proved as against the four male executants and not proved as against the two ladies, Khatun Bibi and Zohra Bibi. The mortgaged property as specified in the deed in suit consists of shares in three villages and certain house property and a grove, but the present suit is for realisation of the entire

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mortgage debt from an 8 anna share of the judgment-debtors in a single village, the name of which is variously written as Gowai or Gowaipur, and also from the dwelling-house and the grove. We have no information before us as to the respective shares of the various executants of the deed in the dwelling house or in the grove; but as regards the principal item involved in the plaintiff's claim, namely the share in village Gowaipur, an extract from the register of proprietary rights is printed at page 60R. This shows that in the village in question the six executants of the deed owned in the year 1900 an entire mahal of 16 annas and that they owned the same in certain specified shares. For our purposes it is sufficient to note that the shares of the two ladies came to $\frac{2}{5}$ ths of the whole and the shares of the 4 male executants to $\frac{3}{5}$ ths of the whole. The deed in suit purports to mortgage an 8 anna share out of the whole 16 annas, the said mortgaged share being the property of all the executants, but without any further specification. Now the learned Subordinate Judge, while finding it not proved that the two ladies, Musammât Khatun Bibi and Zohra Bibi, had executed the deed in suit, has nevertheless given a decree for the sale of an 8 anna share, on the ground that the male executants of the deed in suit did own between them more than an 8 anna share out of the entire 16 annas, even after excluding the shares owned by the two ladies.

We have before us an appeal by those defendants against whom the suit was decreed, and a petition of cross-objections under Order 41, rule 22, Civil Procedure Code, has been filed by the plaintiffs. The appeal raises in the main three points.

Firstly.—It is contended that execution of the deed in suit is not proved as against any of the executants other than Jamil Ullah.

Secondly.—It is contended that, even if execution be proved against any or all of the other executants, there has been no valid registration of the document as against any of the executants other than Jamil Ullah.

Thirdly.—It is contended that, in any event, the decree should have been for the sale of $\frac{3}{5}$ ths of an 8 anna share and not an entire 8 anna share.

The remaining pleas in the memorandum of appeal are either summed up in the three contentions above stated or have not been seriously pressed.

In the memorandum of cross-objections the plaintiffs contend that execution was proved as against the two ladies, Khatun Bibi and Zohra Bibi, and that effect should be given to this contention, if allowed, in any decree which this Court may pass.

It will be convenient to state at once that this petition of cross-objections was met at the outset by those defendants who represent

the estate of Khatun Bibi and Zohra Bibi by a plea that the plaintiffs were not entitled to challenge the order of the court below dismissing the suit as against the representatives of these ladies by way of a petition of cross-objections. The point is that the representatives of these ladies are arrayed along with the plaintiffs as respondents to this appeal. They were content to accept the decree of the court below as passed and have not themselves appealed against it. In support of this contention reliance is placed upon a decision of this Court in *Kallu v. Manni*⁽¹⁾, in which the principle contended for is laid down in broad terms. As a matter of fact the position has since been re-considered by this Court in *Abdul Ghani v. Mohammad Fasih*⁽²⁾, we have been referred also to decisions of other High Courts to be found in I. L. R., 26 Cal., 114; I. L. R., 30 Cal., 655; 16 Calcutta Weekly Notes, 612; I. L. R. 37 Bom., 511; I. L. R., 38 Madras, 705. It may be noted at once that it was in any event open to the plaintiffs, as respondents to the appeal, to support the decree of the court below, in so far as that decree ordered the sale of a share of 8 annas, upon a ground which had been decided against them by the trial court, namely, upon the allegation that the document in suit had, contrary to the finding of the court below, been duly executed by Khatun Bibi and Zohra Bibi. It was impossible therefore to close the mouth of the learned Advocate for the respondents or to refuse to re-consider this question of execution by the two ladies. As a matter of fact, under the peculiar circumstances of this case, it seems clear that the plaintiffs could not be blamed for acquiescing in the decree of the trial court so long as that decree entitled them to bring to sale a full 8 annas share; but they had ground for re-asserting their original claim, as soon as an appeal was filed on the plea that in any event only $\frac{3}{4}$ ths out of an 8 annas share should be ordered to be sold. Under the circumstances we think it was within the competence and discretion of this Court to permit the petition of cross-objections to be heard, even as against those original defendants to the suit who were arrayed as respondents to this appeal. If we had found the contentions urged in the petition of cross-objections to be well founded in fact, we should have been prepared to give effect to them in our decision.

It is as well to take up at once this question of the execution of the deed in suit by Khatun Bibi and Zohra Bibi.

[His Lordship then discussed the evidence in the case.]

I certainly do not feel prepared to reverse the finding at which the trial court has arrived on this point. I think therefore that this finding must stand and that the execution of this deed by Khatun Bibi and Zohra Bibi is not satisfactorily proved. It is not necessary therefore, so far as these ladies are concerned, to go into

(1) [1901] I. L. R., 23 All., 93.

(2) [1906] I. L. R., 28 All. 95.

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the question whether there was a valid registration on their behalf

* * *

There has therefore been sufficient proof of execution and of valid registration as against all the male executants. The only point on which the appeal must succeed is the third point. The reasons given by the learned Subordinate Judge for ordering the sale of an entire 8 annas share, after his finding against the validity of the execution of the mortgage deed by Khatun Bibi and Zohra Bibi, will not bear examination.

* * *

The result is that this appeal should succeed to this extent only that the order for sale be not for the sale of an 8 annas share but for the sale of $\frac{3}{4}$ ths out of the share of 8 annas claimed in the plaint; otherwise the appeal fails. The appellants will pay and receive costs in this Court, including fees on the higher scale, in proportion to failure and success. The cross-objections are dismissed, with costs including fees on the higher scale.

WALSH, J.—I agree in the order proposed.

Appeal decreed,

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1916

May, 25.
RICHARDS,
C. J.
BANERJI, J.

DEO NARAIN SINGH AND OTHERS (*Defendants*)

versus

SITLA BAKSH SINGH AND OTHERS (*Plaintiffs*) *

Agra Tenancy Act (II of 1901), section 202—Suit brought in Civil Court against defendant as trespasser—Defendant pleads tenancy—Suit referred to Revenue Court—Suit instituted there for declaration of nature of tenancy—Objection to jurisdiction over-ruled—Appeal to District Judge—Jurisdiction.

Defendant sued in the Civil Court for ejectment as a trespasser raised the plea that he was a tenant of the plaintiff. The Civil Court referred the defendant to the Revenue Court under section 202 of the Tenancy Act. A suit was instituted by the defendant under section 95 of the Tenancy Act for a declaration of the nature of his tenancy. An objection on the score of jurisdiction was overruled by the Revenue Court. The Revenue Court having made a decree, an appeal was preferred to the District Judge who entertained it on the ground that the question of jurisdiction having been decided an appeal lay to him:—*Held* that no appeal lay to him, an objection on the score of jurisdiction under the circumstances being absolutely untenable.

* S. A. No. 429 of 1916

SECOND APPEAL from a decree of B. J. DALAL, Esq., District Judge of Benares, modifying a decree of Babu Bhagwati Dayal Singh, Assistant Collector, First Class of Jaunpur.

Harbans Sahai, for the appellants.

A. P. Dube, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises under the following circumstances. The present defendants brought a suit in the Civil Court for possession against the plaintiff as trespassers. The latter pleaded that they held the land as tenants to the plaintiffs. The Civil Court thereupon made an order directing the defendants in that suit to institute within three months a suit in the Revenue Court for determination of the question. This order was made under the provisions of section 202 of the Tenancy Act. This suit was thereupon instituted asking for a declaration of the nature of the tenancy under section 95 of the Tenancy Act. An objection was taken as to his jurisdiction to hear the suit which he at once over-ruled. He then dealt with the suit and made a decree. An appeal was preferred to the District Judge and cross-objections filed by the other side. The learned District Judge entertained the appeal on the ground that a question of jurisdiction had been decided. He then dealt with the case on the merits. An appeal has been preferred by the defendants and the plaintiffs have filed cross-objections. In our opinion no question of jurisdiction was in reality decided by the Assistant Collector. In the first place the suit was brought in compliance with the order of the Civil Court that a suit should be instituted in the Revenue Court. In the next place the suit was under section 95 of the Tenancy Act, which Act expressly provides that suits under section 95 must be brought in the Revenue Court and no other. It was therefore absolutely absurd to contend that the Revenue Court had no jurisdiction to hear the present suit. It would be reducing matters to an absolute absurdity to hold that the defendants in a Revenue suit could by formally raising an absolutely untenable plea of jurisdiction take every case from the Revenue Court to the Civil Court. We accordingly allow the appeal to this extent that we set aside the decree of the learned District Judge and remand the case to him with directions to return the memorandum of appeal and the cross-objections for presentation to the proper court. Costs here and heretofore will be costs in the cause.

Appeal decreed. Cause remanded.

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DEO NARAIN

SINGH

v.

SITLA

BAKSHI

SINGH.

Richards,

C. J.

CIVIL

1918

April, 11.

PIGGOTT, J.
WALSH, J.RADHEY SHIAM (*Plaintiff*)

versus

BIHARI LAL (*Defendant*)*

Contract Act (IX of 1872), section 65—Infant—Contract—Money lent—Fraudulent misrepresentation as to age—Equitable relief—Costs—Discretion—Interference by appellate court.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

R. Leslie, Limited v. Sheill, [1914] 3 K. B., 607, followed.

The plaintiff brought a suit for sale on two mortgage bonds. The defendant pleaded that at the time of execution of the bonds he was a minor. There was no allegation nor proof that the defendant had made any fraudulent misrepresentation as to his age whereby he had induced the plaintiff to advance him money:—*Held* that the plaintiff was not entitled to recover.

The court below had deprived the successful defendant of his costs because in its opinion he was responsible for the litigation. There was also no proof of any wrongful conduct on the part of the defendant:—*Held* that there being no evidence of this fact, the successful defendant ought to have been awarded costs.

Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made.

FIRST APPEAL from a decree of BABU GOKUL PRASAD, Subordinate Judge of Allahabad.

Tej Bahadur Sapru (with whom *B. E. O'Connor* and, *Sital Prasad Ghosh*), for the appellant.

Gokul Prasad and *Radha Kant Malaviya*, for the respondent.

The judgment of the Court was delivered by.

Piggott, J.

PIGGOTT, J.—This is an appeal from a decree dismissing a suit in effect by two judgments, dated respectively the 13th of September, 1915 and the 30th of September, 1915, on what were really two preliminary points. The suit was brought upon a mortgage-deed for sale of the property hypothecated in respect of a default

made by the defendant at an early stage of the transaction. The plaintiff chose to shelter himself behind the legal arguments of counsel and did not go into the box, and at present there is nothing before us to show why and how the defendant was persuaded in January, 1915, to enter into a fresh transaction at compound interest with security in order to get rid of some comparatively recent unsecured liabilities which are not even shown to have borne compound interest. We do not know either, whether the defendant ever received a single rupee in respect of this transaction. The uncontradicted evidence of the defendant is that he did not, and the general conduct of the plaintiff raises some inference that he has not paid a rupee more than he was obliged to pay.

Two grounds are raised in appeal against the judgments which I have mentioned, each deals really with a separate judgment. By the fourth ground of appeal it is contended that the defendant as to whom it has been found that he was a minor, is estopped by his fraudulent misrepresentation from relying upon this defence. This is the latter of two judgments to which I have referred. The law is well settled and this point has been disposed of by the learned Subordinate Judge in an excellent judgment in which he relies very largely upon the recent decision of the English Court of Appeal in a considered judgment of three Lords Justices in *Leslie Limited v. Sheill* (1). That decision, by the way has been recently approved by the Privy Council. See *Mahomed Syed Ariffin v. Yeohooi Gark* (2), in a case which was cited to us for another purpose. The learned Judge of the court below cites a passage from the judgment of Mr. Justice A. T. LAWRENCE who was then sitting in the Court of Appeal to the following effect:—"Wherever the infant requires, as a plaintiff, the assistance of any court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner." So far Mr. Justice LAWRENCE has given expression to the equitable principle recognised in England and adopted in the case relied upon by Dr. Sapru, *Jagar Nath Singh v. Lalta Prasad* (3). "But" continues Mr. Justice LAWRENCE, "I think that it is incorrect to say that he can be made to repay money which he has spent merely because he received it under a contract induced by his fraud." And that was in substance the decision of the Court of Appeal which has been consistently adopted by the courts in India. The contention as to the legal proposition therefore fails and we agree with the judgment of the court below on this point. We desire however to add, lest it should be supposed that this decision conveys any reflection upon the defendant, that not only has no fraudulent representation been found against the defendant but it has not even been alleged. There is a faint suggestion in paragraph (c) of

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(1) [1914] 3 K. B., 607. (2) [1916] 2 A. C., 575, 582.

(3) [1908] I. L. R., 31 All., 21.

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the reply which the plaintiff made to the written statement where the defendant set up his minority at page 9 of the printed book, which suggests that the defendant put forward some active misrepresentation with regard to his age in the form of a document. It is not alleged that that was done fraudulently, and applying the principle which has always been applied by Courts of Justice in a case of this kind, this point really ought not to have been allowed to have been argued by the plaintiff at all. The plaintiff, as we have said, was not called and there is no suggestion from first to last by any positive evidence of any active misrepresentation by the defendant before the contract was entered into. Further than that it would be necessary for the plaintiff to establish that he was induced by such misrepresentation, if in fact it had been made. One's experience of these cases in courts is that the plaintiffs who carry on money-lending businesses like the present plaintiff in this case, and enter into similar transactions are not as a rule so much influenced by the statements of their respective debtors as by the desire to get inexperienced young men into their clutches and to make as much profit out of them as the Law will permit, or which the fears of criminal charges, or other consequences of that kind may prevent the debtors from preventing. As we have already said we are inclined to think that the plaintiff himself entertained grave doubts as to the age of the defendant and therefore it is unlikely that he was influenced by anything the defendant had said to him. So much for the first point raised on the fourth ground of appeal which is dealt with in the later of the two judgments.

With regard to the other point namely the judgment of the 13th of September, 1915, on the pure question of fact as to the actual age of the defendant one really cannot improve upon the able and careful analysis of the evidence contained in the judgment itself. Out of respect to the arguments addressed to us however we will add this. It seems to us that the evidence with regard to the defendant's actual age is overwhelming. The best evidence of course is the evidence of a minor's parents. In this case the mother was dead but it so happened that she made an application in 1900 with reference to her child who if the rest of the evidence be believed had been born only three years before. It is almost impossible that she could have been mistaken at that time, and no reason is suggested of any kind why she should have desired to mislead any body. The sister who was a *purda-nashin* lady and called on commission gave strong and clear evidence which we have no reason to suppose to be dishonest and which was not shaken by a long and determined cross-examination. The brother's evidence is much to the same effect. In the result the family evidence in this case is peculiarly strong and clear. It is therefore unnecessary to say anything about the weight or admis-

sibility of horoscopes and other matters of that kind which have been much discussed. As against such evidence as exists in this case expert evidence, horoscopes and medical certificates are of very little, if any, value. In this case they are in our opinion of no value whatever. The appeal fails on both grounds and must be dismissed with costs.

The matter however does not rest there. There is a cross-objection by the defendant upon the ground that he has been deprived of his costs. We agree with Dr. Sapru in his contention upon this point that this is a matter for the discretion of the trial court. At one time it was thought that a Court of Appeal would never interfere with the exercise of such discretion, but where the Judge has given his reason and all the circumstances are before the Court of Appeal it is now settled that the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. We think that there was really no evidence to support a finding that the defendant was "mostly responsible for this litigation." The presumption usually is that a plaintiff is responsible for a suit which he has brought into court. In this case the plaintiff was in a peculiar hurry to bring the case into the court. We cannot agree with the ground upon which the learned Subordinate Judge has proceeded. It has been held in the English Courts of Appeal that the mere fact that a defendant relies upon a right which a statute gives him is not a sufficient ground for depriving him of his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a statute of limitation, or the Gaming Act or a defence of infancy but it has been distinctly held that neither of those grounds is a judicial ground for depriving the defendant of his costs. In the case which was relied upon by the appellant and was referred to in argument (*Leslie Limited v. Sheill*) the defendant was deprived of his costs even of that part of the suit on which he succeeded. He had been found guilty by a Jury of fraudulently deceiving the money-lender. There is nothing of that kind in this case. The plaintiff has chosen to come into court with a hopeless case. The defendant has succeeded in establishing a legal defence. We see no reason why the costs should not follow the result.

The appeal is dismissed with costs and the cross-objections are allowed. We modify the decree of the court below by allowing the defendant his costs throughout.

Appeal dismissed.

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1918

RADHEY
SHIAM

v.

BIHARI LAL.

Piggott, J.

CRIMINAL

1918

April, 11.

KNOX, J.

KARIM-UD-DIN

versus

EMPEROR*

*Penal Code (Act XLV of 1860), section 408—Embezzlement as servant or clerk
—Three items charged—Joinder at one trial illegal.*

One *R* was a station master. Under an agreement with the Railway Company he employed *K* as a marksman. *R* also allowed him to write the registers. On *R* taking leave he was succeeded by *R. L.* and he allowed *K* to receive cash payments and enter them in the cash registers. The Railway Company did not sanction nor were they aware of this state of things. The charge against *K* was that he demanded an over-charge of Rs. 5-10 and appropriated it and that he misappropriated two other sums which he had received from two other persons. He was charged with three offences under section 408 of the Penal Code and tried at one trial:—
Held (1) that no offence under that section was committed in respect of Rs. 5-10 the money over-charged not belonging to the Railway Company, (they having repudiated the demand), and it not being entrusted to *K*, who was neither their clerk nor servant; (2) that the offence of embezzlement not having been committed in respect of it, the joint trial of it for all the three sums was illegal.

CRIMINAL REVISION from an order of F. D. SIMPSON, Esq., Sessions Judge of Allahabad.

Raghunath Prasad, station master of Sirathu station on the East Indian Railway, had entered into an arrangement with the Railway authorities, under which he employed his own men to do the marking, loading and unloading work at the station. The station master got a certain allowance for the performance of this work, and himself paid the men engaged by him. The accused Karim-ud-din had been engaged by him as a marksman, whose duties were to mark the packages received at the station. Raghunath Prasad, however, got or allowed Karim-ud-din to write certain registers which the station master should have done himself. Raghunath Prasad went on leave and was succeeded by Rikhi Lal, who allowed Karim-ud-din to receive the cash payments and to make the entries in the cash register. It did not appear that the Railway authorities had ever sanctioned, or were even aware of, this state of things.

The allegation against Karim-ud-din was that he demanded an over-charge of Rs. 5-10 from one Babu Lal, in respect of goods consigned, and appropriated the money himself, and that he also misappropriated two other sums received by him from other consignees of goods. He was charged with three offences under section 408, Indian Penal Code, in respect of these three sums and was tried at one trial for them. He was convicted and sentenced to six months' rigorous imprisonment on each count. On appeal, the Sessions Judge affirmed the conviction but reduced the sentence to four months on each count. The accused applied in revision to the High Court.

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v.
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Peary Lal Banerji, for the applicant.—The charge with respect to the first item of Rs. 5-10 could not possibly constitute an offence under section 408, Indian Penal Code. The money which Babu Lal, the consignee, was made to pay over and above the correct amount due, was not money due to the Railway Company. The Railway Company denied Babu Lal's liability to pay the excess demanded, and repudiated the demand and the realisation made by the accused. The money, therefore, was not money belonging to or due to the Railway Company, nor had it ever come into their hands. It could not, therefore, be said that the accused was entrusted with the money and that he misappropriated it. The case of

Queen-Empress v. Imdad Khan, [1885] I. L. R., 8 All., 120, is instructive in connection with this point.

The offence, if any, in respect of the first item, was that of cheating, and it was brought in under section 408, Indian Penal Code, to allow of a joint trial. The trial was, therefore, illegal.

Further, the accused was merely a servant of Raghunath Prasad or of Rikhi Lal, and was not a "clerk or servant" of the Railway Company, nor was he "entrusted in such capacity" with property; consequently, he could not be convicted under section 408, Indian Penal Code. The Railway Company had never authorised the entrusting of cash to the accused.

R. Malcomson, (Assistant Government Advocate), for the Crown.—Although the Railway Company may not have actually engaged the accused as its servant, he was, in actual fact, acting in that capacity and using his position as such servant in obtaining the money. Having chosen to take upon himself the position and responsibilities of a clerk of the Railway Company, and as such got hold of the money, he cannot repudiate that position. He received the excess amount on behalf of the Railway Company, and he is accountable to the Company, for it. His appropriation of the money to his own use is, therefore, criminal misappropriation. He cannot be allowed to say that, notwithstanding his actual performance of

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the duties and responsibilities of a clerk in the employment of the Railway, and the recognition by the general public of such performance, he was in reality not such a clerk, as he had not been duly appointed. I rely on the case of

Queen-Empress v. Parmeshar Dat, [1886] I. L. R., 8 All., 201.

Peary Lal Banerji, in reply.—That case deals with a “public servant,” which expression as specially defined in section 21, Indian Penal Code, expressly includes every person “who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.”

The following judgment was delivered by

Knox, J.

KNOX, J.—Karim-ud-din has been convicted of three offences, each offence under section 408 of the Indian Penal Code and sentenced to six months' rigorous imprisonment on each offence, the sentences to run consecutively. It appears from the record and the arguments addressed to me that station masters on the East Indian Railway get some kind of allowance from the Railway in return for goods to be despatched by the Railway to be marked and loaded or otherwise handled. The station master Raghunath Pershad appointed Karim-ud-din and gave him Rs. 10 a month for doing this work. There was no contract of any kind between the East Indian Railway Company and Karim-ud-din. Raghunath Pershad appears to have made or permitted Karim-ud-din to write a number of Railway registers. It is not for a moment asserted that the East Indian Railway Company sanctioned this allotment of work to Karim-ud-din or were in any way cognizant of it. Raghunath Pershad took leave and was succeeded by one Rikhi Lal. Rikhi Lal appears to have gone a step further than Raghunath Pershad in employing Karim-ud-din in this kind of work and to have given him the cash registers to write up. The result or alleged result of these proceedings was that certain items of money disappeared. The accused was charged with embezzling three separate different items. The nature of these items is somewhat different. The first item is an item of Rs. 5-10. The prosecution allege that this was an over-charge upon certain goods consigned through the East Indian Railway to one Sat Narain. Sat Narain appears to have paid the sum under protest, to have written to the Railway Company on the point. The item was represented in a letter, the writing of which is traced to the accused but the signature on the writing is that of Rikhi Lal's. The money never came into the hands of the East Indian Railway Company. It was described as a demurrage charge, while I understand that the Railway have never put it forward as money due to them either on account of goods consigned or demurrage thereon. The other two items are of the same description but for the purposes of this revision I need not go into them. The contention raised before me is that with reference to the first item no offence coming within section 408 of the Indian

Penal Code has been proved and the trial of the accused for the three offences under section 408 of the Indian Penal Code is illegal, a joint trial of the three items not being allowable by law. It is really round this first charge that the argument in revision centres. I accept the plea that even if the facts be considered proved, the first is not an offence which falls within section 408 of the Indian Penal Code. Karim-ud-din was neither clerk nor servant of the Railway Company, he was not employed as clerk or servant of theirs and not being so he could not be entrusted in such capacity with this sum of Rs. 5-10. It is contended before me that Karim-ud-din having chosen to take upon himself the duties and responsibilities of a clerk of the East Indian Railway Company, must be regarded as a clerk and cannot afterwards say that he is not such a clerk, and my attention was called to the case of *Queen-Empress v. Parmeshar Dat* (1). There is, however, an important difference in the case cited and the present case. Parmeshar Dat was recognised by the authorities as filling the position of a public servant. There was no such recognition in this case nor can I suppose that there would ever have been such a recognition. The probabilities are that if the attention of the East Indian Railway Company had been called to the fact that this marksman was posting up registers and receiving monies, they would have utterly refused to recognise him and would have called Rikhi Lal to account for such an irregularity. Then further my attention was called to what was argued, how far the sum of Rs. 5-10 taken under the circumstances stated would come at all under the crime of embezzlement. It was not property of the East Indian Railway Company, it was repudiated as not being their property and whatever may have been the offence committed in respect of that Rs. 5-10 it was not the offence of embezzlement. The joint trial under the circumstances was illegal. I quash it, set aside the convictions and sentences. Karim-ud-din must be released.

B. K. M.

Conviction set aside.

(1) [1886] I. L. R., 8 All., 201.

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Knoxx J.

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1918

May, 23.

BANERJI, J.

HARNAM SINGH AND ANOTHER

versus

EMPEROR *

Penal Code (Act XLV of 1860), section 406—Criminal breach of trust—Movable property attached in execution of decree—Property entrusted to accused—Non-production of property at time of sale.

Where the accused were entrusted by a court officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice, held that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust.

CRIMINAL REVISION, from an order of A. G. P. PULLAN, Esq., Sessions Judge of Mainpuri.

Satya Chandra Mukerji, for the applicants.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicant in this case has been convicted under section 406, of the Indian Penal Code. What happened was this. Certain moveable property was attached in execution of a decree. The officer of the court who made the attachment placed the property in charge of the accused. When the time for auction sale of the property arrived notice was issued to the accused to produce the property. They evaded service of the notice on several occasions and the property was not produced. For this they have been held to be guilty of criminal breach of trust. The accused were no doubt entrusted with the attached property but they would not be guilty of criminal breach of trust unless they dishonestly misappropriated or converted the property to their own use or dishonestly used or disposed of it in violation of any direction of law describing the mode in which the trust which they undertook was to be discharged. In the present case the property was not misappropriated or converted to the use of the accused, nor was it used or disposed of in any manner contrary to the terms of the trust. Therefore they could not be convicted under section 406. They were no doubt guilty of contempt of court and their offence amounted, if at all, to one under section 172, of the Indian Penal Code. For this they could only be sentenced to one month's simple imprisonment. They have already undergone rigorous imprisonment for nearly three weeks. The result is that I set aside the conviction, acquit the accused of the offence under section 406 and convict them under section 172, of the Indian Penal Code. The imprisonment already undergone is more than sufficient for their conviction under this section. The sentence of fine is remitted and the accused need not surrender to their bail. The fine, if paid, must be refunded.

Conviction altered.

PRIVY COUNCIL.

BASUDEO ROY AND OTHERS (*Defendants*)*versus*JUGAL KISHWAR DAS AND OTHERS (*Plaintiffs*.)

CIVIL

1918

Hindu Law—Religious endowments—Debottar—Asthal (math), nature of—Purchases out of asthal income—Alienation by guardian of minor mahant with leave of court—How for binding on asthal property. Feb. 1, 5, 7.
March, 21.

The Mahant of a Hindu asthal or math holds the property in trust for the institution itself. He can only alienate it in case of necessity.

Acquisitions with the income of an asthal are subject to the same trust as the original property.

In the absence of a necessity which would render the debts contracted by him binding on the institution a Mahant has no power to alienate its properties for the purpose of discharging those debts, and if the asthal was not liable for such debts, his successor is entitled to have the sales set aside.

J, a Mahant, appointed the first respondent, a minor, his successor and left a will whereby he appointed *C*, guardian of the first respondent. *J* had mortgaged the asthal property. The mortgagees after his death brought or threatened proceedings on the mortgages. To pay off these liabilities *C* obtained from the District Judge leave to sell certain of the asthal properties.

Held that *C*'s powers could not be larger than those of the actual mahant. In the absence of proof that the original debts were binding on the asthal, the sales were set aside.

CONSOLIDATED APPEALS from two decrees of the Calcutta High Court, reversing decrees of the District Judge of Durbhanga.

The facts of the case are sufficiently stated in their Lordships' judgment. The present mahant of an asthal sued to set aside certain alienations of asthal property made during his minority by his guardian appointed by the will of the former mahant. The trial Judge dismissed the suits, holding that necessity for the alienations was proved: the High Court (CHITTY and TENNON, JJ.) reversed this decision and decreed the suits. Hence this appeal.

Sir W. Garth, for the appellants.—These are suits to set aside alienations made by an executor with the leave of the court. They

VISCOUNT
HALDANE,
SIR
JOHN EDGE,
MR. AMEER
ALI,
SIR WALTER
PHILLIMORE.

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are founded on allegations of fraud: plaintiff knew he could not succeed without such allegations, but no fraud is proved. The property alleged to be *debottar* was not really such, on the proper construction of the *sanads* and on the other evidence the truth is that it was held in beneficial ownership by the successive Mahants, subject only to a trust to devote a part only of the income to feeding mendicants. The powers of the guardian of an infant heir are set out in

Hunooman Parsad Pande v. Musammat Baboos Munraj Koonveree, [1856] 6 M. I. A., 393.

The authority of the *shebait* of an idol or of a mahant are similar.

Prasunno Kuwari Debya v. Golab Chand Baboo, [1875] 2 I. A., 145 at p. 151; S. C., 14 B. L. R., 450.

The mahant is estopped by what the executor has done if it were done *bona fide*.

[VISCOUNT HALDANE, referred to

Allenborough v. Solomon, [1913] A. C., 76.]

Reference was also made to

Palaniappa Chetty v. Sreemath Devasikamony Pandara Sannidhi, [1917] I. L. R., 40 Mad., 709 (P. C.)

As to how far the compromise with the mortgagees is binding on the present Mahant, *vide*

Hosseini Ali Khan v. Mahant Bhagavan Das, [1906] I. L. R., 34 Cal., 249, 255.

The property here is not really *debottar*. There is no suggestion that it was dedicated to an idol or idols; there is no mention of idols in the *sanads*.

[MR. AMER ALI.—It will be difficult to show that in all such cases there must be an idol to which *Bairagis* come.]

The District Judge held himself bound by

Sheo Shankar Gir v. Ram Shewak Chaudhri, [1896] I. L. R., 24 Cal., 77, 80,

but that case is distinguishable, the grant there was to a Mahant, while here the grantee was only a *Gossain*, though he was called a Mahant later, further, the grant here is not entirely for maintenance.

Even assuming that the property is *debottar*, still, if a Mahant sells *bona fide* his successor is bound. If the executor acts without fraud or collusion, he is in exactly the same position as the Mahant.

Reference was also made to

Banga Chundra Dhur Biswas v. Jagat Kishore Chowdhari, [1916] 43 I. A., 249; S. C., I. L. R., 44 Cal., 186;

Murugesam Pillai v. Manickavasaka Pandara, [1917] 44 I. A., 98; S. C., I. L. R., 40 Mad., 402.

De Gruyther. K. C. (Dube with him), for the respondents.—If the mortgagees' decrees were not binding on the present Mahant, no amount of pressure under them would justify the sales. We say neither the decrees nor the mortgages on which they were based were binding. A person in charge of *asthal* property who desires to mortgage, whether as manager or guardian, must show necessity: and in the case of a *math* the necessity must be the necessity of the institution itself, not of the incumbent.

The *onus* is on the person dealing with a qualified owner to show one of two things.

1. Actual necessity, or
2. That he made a proper enquiry, which led him to believe there was necessity.

There is no proof of either in the present case, and the High Court were right therefore in setting aside the sales.

Their Lordships' judgment was delivered by

MR. AMEER ALI.—These two consolidated appeals from a judgment and two decrees of the High Court of Calcutta, bearing date the 22nd July, 1913, arise out of two suits brought by the plaintiff respondent in the court of the Subordinate Judge of Darbhanga on the 8th July, 1907. The object of both suits was to recover possession of certain landed property alleged to have been improperly alienated during the plaintiff's minority by one Chattar Pandey, purporting to act as his guardian.

The facts on which the two actions are based are fully set forth in the judgment of the High Court. It is not necessary, therefore, to give more than a bare outline.

The plaintiff respondent is admittedly the present Mahant of the *Bairagi Asthal* of Lowthwa, in the district of Darbhanga. His predecessor, Janki Das, died in 1894. Before his death he appears to have appointed the plaintiff (his nephew by blood relationship) his successor to the office of Mahant, and it is alleged, and not controverted, that his nomination was confirmed, in accordance with the custom governing the succession to the Mahantship, by the Mahants of the neighbouring *Asthals*. It is not disputed that at the time of Janki Das's death the plaintiff was a minor and that in consequence thereof Janki Das had, by a testamentary document executed shortly before, appointed Chattar Pandey as his guardian. Chattar obtained probate of Janki's will on the 6th February, 1894, and from that time purported to act as the guardian of the minor and manager of the *Asthal* property.

It is quite clear that for some years before his death Janki Das was heavily involved in debt. On the 29th January, 1885, he

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had executed a mortgage in favour of one Tej Narain Roy in respect of six annas of the village of Majhowra for 5,500 rupees. On the 31st May, 1889, he had created a mortgage in favour of one Ram Narain Roy, in respect of four annas of Majhowra for a sum of 3,500 rupees; and a third also in favour of Ram Narayan for 2,605 rupees on the 17th May, 1892, in respect of another share of the same village. All three mortgages were outstanding at the time of his death, though on the first a sum of 9,000 rupees is said to have been repaid, leaving a balance of something like 6,000 rupees. For the realisation of this amount, the defendants to the first action, who are representatives of Tej Narain Roy, the mortgagee under the first deed, brought a suit on the 20th February, 1899, against the present plaintiff as the legal representative of Janki Das. The plaintiff (defendant to that action), being a minor at the time, was sued as such under the guardianship of Chatter Pandey. Before, however, any defence was entered, Chatter entered into a compromise with the mortgagees by which, in consideration of the remission by them of 600 rupees, he consented on behalf of the minor to a mortgage decree against the six annas share of the village of Majhowra that had been mortgaged to Tej Narain Roy. The decree of the Subordinate Judge embodying the terms of the compromise bears date the 27th April, 1899.

Three years later, on the 16th June, 1902, Ram Narayan Roy brought a suit on the second mortgage for the realisation of this debt, which ended similarly in a decree based on a compromise entered into by Chatter Pandey. This decree bears date the 21st July, 1902. Subsequently Ram Narayan Roy obtained a decree absolute for sale, and in fact initiated proceedings to have the mortgaged property sold under process of the court.

It is stated that although no proceedings had actually been taken to enforce the third mortgage, an action was threatened, and in consequence thereof an agreement was arrived at between the creditors and Chatter Pandey.

In order to pay off these liabilities Chatter Pandey, on the 9th July, 1905, applied to the District Judge of Tirhoot for leave to sell an eight-anna share of the village of Majhowra to the two sets of purchasers whose sales are impugned in the present suits, one of whom was in fact the representative of the original mortgagee; and on the 12th August, 1905, obtained the sanction prayed for. On the 19th of the same month Chatter executed in favour of the appellants Basudeo Roy and his brothers a deed of sale in respect of six annas; and in favour of the appellants in the second appeal a deed in respect of two annas of the village.

The plaintiff sues to have these sales set aside on the allegation that the property forming the subject-matter of the present actions

was *debottar*, or endowed property, and that neither Janki Das nor Chattar Pandey had any right or power to encumber or alienate it. He further charges that there was no valid necessity for the alienation, nor were the debts of Janki Das binding on the property of the *Asthal*. The defendants controverted both allegations, and the parties went to trial on two simple issues: *firstly*, whether the property was *debottar*, and consequently subject to rules governing religious or charitable endowments, and, *secondly*, whether there was any such justifying necessity as would render its alienation valid under the Hindu Law.

Both the courts in India found that the property was acquired with the funds of the institution, and was *debottar*, but they have differed on the question of necessity. The trial Judge was of opinion that the defendants—the purchasers under the two deeds of sale which the plaintiff seeks to set aside—had sufficiently established a legal necessity of a pressing kind “to justify the alienations made by him,” and he accordingly dismissed both suits. On appeal, the learned Judges of the High Court of Calcutta, on the issue of valid and justifying necessity, came to an opposite conclusion, and in that view decreed the plaintiff’s claim.

Before this Board counsel for the defendants assailed the findings of the High Court on both points. He contended that under the grant to which reference will be made presently the Mahant for the time being is absolutely entitled to the income of the property attached to the *Asthal*, and that any property bought out of such income became the personal property of the Mahant. And he argued in the alternative that even if the property were to be regarded as part of the *Asthal* property, the facts proved in the case amply established pressing legal necessity as found by the trial Judge.

Their Lordships have therefore to examine, in the first place, the character and scope of the original grant to the founder or Lowthwa *Asthal*. The nature of these institutions and the circumstances under which they come into existence are described in the judgment of this Board in *Ram Parkash Das v. Anand Das* ⁽¹⁾ “An *Asthal*, commonly known in Northern India as a *Math*,” says LORD SHAW, who delivered the judgment of the Board—

“is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites. . . . The Mahant is the head of the institution. He sits upon the *gaddi*; he initiates candidates into the mysteries of the cult; he superintends the worship of the idol and the accustomed spiritual rites; he manages the property of the institution; he administers its affairs; and the whole assets are vested in him as the owner thereof in trust for the institution itself.”

(1) [1916] 43 I. A., 73; S. C. I. L. R., 43 Cal., 707.

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And LORD SHAW went on to add :—

“ The nature of the ownership is, as has been said, an ownership for the *Math*, or institution, in itself, and it must not be forgotten that, although large administrative powers are undoubtedly vested in the reigning Mahant, this trust does exist and must be respected.”

The grant in the present case is set out *in extenso* in the judgment of the High Court. It is an ordinary *birt*, or charitable and religious grant, by a pious Hindu Raja to a Hindu *Gossain* (Batan Das). The following words clearly show that, though the property was granted to an individual, it was burdened with an explicit and unambiguous trust :—

“ Mouzah, with boundaries, you will, at ease of mind, make cultivation and settlement of, and, making distribution out of the proceeds that may arise among *sadhus* and *sants* (holy and religious men), you with your disciples and companions will enjoy (the remainder) without any anxiety. Knowing this to be a grant made for the love of the deity named above, no one will offer any opposition.”

The subsequent confirmation of this grant in 1786 by one of the successors of the original grantor removes all doubt and ambiguity as to the meaning of the grant. By that time the present *Asthal* had sprung up, and the *guru* or preceptor had become the head of an institution with a seat of honour (the *gaddi*). The *Asthal* was henceforth an institution devoted to the cult of the worshippers who congregated there. Their Lordships concur with the learned Judges of the High Court and the Trial Judge that the village of Lowthwa attached to the *Asthal*, is endowed property subject to the trust set out in the grant, and that all acquisitions with the income thereof are subject to the same trust. This being their Lordships' view regarding the character of the village in suit, the next question is :—Have the defendants discharged the *onus* which rests on them to establish justifying necessity? Chattar Pandey, whether acting as executor to the will of Janki Das or as guardian of the minor Mahant, cannot be said to have possessed larger powers than the actual Mahant, and the validity of his transactions in relation to the *Asthal* property must be judged by the same rules as apply to the acts of the *de jure* head of the institution. In the absence of a necessity which would make the debts contracted by him binding on the institution the Mahant has no power to alienate its properties for the purpose of discharging those debts, and if the *Asthal* was not liable for such debts, his successor would be clearly entitled to have the sales set aside. *A fortiori*, the same considerations apply to the dealings of Chattar Pandey.

Although the defendants throughout appear to have contended that Majhowra was the personal property of Janki Das,

upon the facts proved there can be no doubt they must have known that it was part of the *Asthal* property. It is contended that the mortgages for the discharge of which the sales now impugned were effected, were executed by Janki Das for the satisfaction of some older debts. There is no evidence that the defendants made any enquiry as to the character of those debts, whether they were incurred for the benefit of the *Asthal*, or for the benefit of Janki Das, in his capacity as Mahant. It is in evidence that Janki Das was a man who did not live up to the standard of the community to which he belonged, and of which he was the head. There is nothing to show that any portion of the monies borrowed in the first instance went for purposes which would make them binding on the *Asthal*. On the whole their Lordships concur with the reasons given by the learned Judges of the High Court in holding that the defendants in these suits have wholly failed to establish any justifying necessity for the sales by Chatter Pandey; and they are of opinion that these appeals should be dismissed with costs. They will humbly advise His Majesty accordingly.

A. P. P.

Appeal dismissed.

T. L. Willson & Co., Solicitors for the appellants.

Watkins and Hunter., Solicitors for the respondents.

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HET RAM (*Defendant*)
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SHADI RAM AND OTHERS (*Plaintiffs*).

Transfer of Property Act, (Act IV of 1882), sections 67, 69, 85, 88 and 89.—Mortgage—Suit for sale by mortgagee—Effect of not making puisne mortgagee a party—Order absolute for sale—Substitutes right to a sale for right under the security.

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Feb. 21, 22.
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VISCOUNT
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ALI,
SIR WALTER
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Under section 85 of the Transfer of Property Act, 1882, a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit.

On the making of an order absolute for sale under section 89 the mortgagee's security as well as the mortgagor's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

APPEAL from a decree of the Allahabad High Court, dated May, 19, 1913, modifying a decree of the Assistant Sessions Judge of Moradabad, exercising the powers of a Subordinate Judge.

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Certain property was mortgaged *first* to Lachman Das on February 25, 1880; *second* to Shadi Ram, on October 15, 1881. Lachman Das brought a suit for sale, but did not make Shadi Ram a party, although he had notice of Shadi Ram's mortgage: he obtained a decree for sale in 1892, and an order absolute in 1895, but did not proceed further. Shadi Ram brought the present suit for sale in 1910. Het Ram, who had succeeded not only to the rights of the mortgagors, but to the rights (if any) of Lachman Das, claimed that the sale could only be subject to the latter's mortgage. This contention was allowed by the trial Judge, but on appeal the High Court (RICHARDS, C. J., and LYLE, J.) held that Lachman Das's mortgage merged in the decree, and therefore expunged the trial Judge's direction that the land should now be sold subject to such mortgage. Hence this appeal.

A. M. Dunne K. C., (*Ramsay* with him) for the appellant.—Appellant has succeeded to the rights of both parties in the earlier mortgage suit. The decree in that suit may be barred by limitation, but Het Ram's right to use the mortgage as a *shield* remains. It was no one's intention that the first mortgage should be extinguished for the benefit of Shadi Ram, who was not a party to the suit at all, according to the rule of justice, equity and good conscience, it should be treated as remaining alive:

Gokuldoss Gopaldoss v. Rambuc Sheochand, [1884] 11 I. A., 126; S. C. I. L. R., 10 Cal., 1035;

Dinobandhu Shaw Chaudhri v. Jogmaya Dasi, [1901] 29 I. A., 9; S. C., I. L. R., 29 Cal., 154.

[Reference was made to

Whitely v. Delany, [1914] A. C., 132].

The mortgagee's security and the mortgagor's (or puisne mortgagee's) right to redeem go together. Shadi Ram was not a party to the suit, and retained his right to redeem. The provisions of section 89 of the Transfer of Property Act apply only between the parties to a suit.

Limitation does not apply, as appellant is not suing. Further, he could not execute the decree in any case, as he is now proprietor.

B. Dube, for the respondents.—Any rights under the decree are barred by limitation. Not only was the decree itself barred after three years, but even if Lachman had never sued at all, he would be time barred after 12 years. The fact that Het Ram, assuming him to be assignee of Lachman, subsequently became proprietor makes no difference: once limitation has begun it runs on:

Lala Soni Ram v. Kanhaya Lal, [1913] I. L. R., 35 All., 227, [P. C.]

*This case depends on the procedure laid down in India in the Transfer of Property Act. By section 89 of that Act the security,

after the decree for sale was obtained, ceased to exist: there was substituted for it the decree itself, which is now time barred.

Dunne in reply.—Shadi Ram was not a party to the suit; section 89 and the order absolute for sale can only operate in favour of the plaintiff in that suit against the defendant in that suit. The fact that I have not executed the decree is immaterial: the respondent's only security is subject to mine. I am not bound by limitation, as I am not pursuing any remedy: I still have my right.

[VISCOUNT HALDANE.—Section 89 says your right is converted into a right to sell a right you cannot now enforce.]

[SIR W. PHILLIMORE.—How can you be considered an encumbrancer? If you have any rights under the decree, go and execute it.]

• [VISCOUNT HALDANE.—Why should the Statute turn a mortgage for all purposes into a mortgage for some purposes only? I think there is no mortgage left.]

Their Lordships' judgment was delivered by

VISCOUNT HALDANE.—The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under section 88 of the Transfer of Property Act, 1882, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This mortgage was dated the 25th February, 1880; Shadi Ram's mortgage was dated the 15th October, 1881.

The appellant had become the successor in title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1892 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgage and obtained a decree for a sale under the Act referred to. But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor in title took any steps to execute, and under article 179 of the second schedule to the Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the decree becoming absolute. It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Transfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered, and that the first mortgagee must be taken to have had notice of it when he brought his suit, and obtained a decree for sale in 1892.

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The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of section 58 of the Transfer of Property Act, and under section 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as section 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under section 85 the first mortgagee was bound to make the second mortgagee a party to his suit for sale and as he did not do so, the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Section 89 is important. Under this section, where an order for sale under section 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made, as happened here, an application may be made for an order absolute, and for payment of the amount realised into court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

A. P. P.

Appeal dismissed.

T. L. Wilson & Co.—Solicitors for the appellant.

Peyke Franklin & Gould.—Solicitors for the respondent.

HIGH COURT.

NARAIN DAS (*Plaintiff*)*versus*HET SINGH AND OTHERS (*Defendants*)*

CIVIL

1918

May, 11.

Practice—Suit for possession and damages—Suit brought within six months of dispossession—Suit based on title—Suit dismissed in toto as being one in which upon plaint as framed no relief could be given—Dismissal wrong.

TUDBALL, J.
A. RAOOP, J.

Plaintiff was a mortgagee with possession of certain zemindari for a period of five years. He entered into possession and had the land cultivated. His sub-tenants were dispossessed, as alleged by him, by the defendants. Within six months of the dispossession he brought the suit for recovery of possession by declaration of his title and also asked for recovery of damages. He purported to bring the suit under section 9 of the Specific Relief Act. The plaint was subsequently amended by striking out the claim for declaration of title. The Munsif granted him a decree for possession under section 9 as prayed, but dismissed the claim for damages as being improper in conjunction with a claim for possession under the said section. Upon appeal the District Judge dismissed the suit *in toto* because in his opinion upon the plaint as framed no relief could possibly be granted to the plaintiff. Upon second appeal *held* that the suit being one for possession based upon title inasmuch as a claim for damages had been made in the plaint, it could not be dismissed *in toto* but ought to have been remanded for a decision on the merits.

SECOND APPEAL, from a decree of W. T. M. WRIGHT ESQ., District Judge of Budaun, reversing a decree of Babu Madan Mohan Seth, Munsif of Bisauli.

M. L. Agarwala, for the appellant.

Tej Bahadur Sapru, for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—This appeal arises out of a suit brought for possession of property and damages. The plaintiff in paragraph 1 of his plaint stated that Musammat Gulabo, defendant No. 2 was the zamindar and owner of nine bighas and nineteen biswas of land in a certain village, that she and her husband, defendant No. 1, mortgaged the same with possession to the plaintiff for a period of five years under a registered mortgage-deed for Rs. 600 on certain conditions, one of which was that the principal mortgage-money should be deposited in the month of *Jeth* before the property could

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be redeemed. He went on to state that he, the plaintiff obtained possession of the property and had it cultivated through his sub-tenants. In paragraph 2 of the plaint he stated that on the 1st of September, 1915, the two principal defendants mentioned above, ejected his sub-tenants who were made *proforma* defendants to the suit and without paying the mortgage money, unlawfully took possession of the property and that they were still in such possession; that they had refused to deliver possession to the plaintiff or to pay him his mortgage money or to pay him the damages which he had suffered. He dated his cause of action as the 1st of September, 1915, the date of the trespass. In paragraph 3 of his plaint he merely stated that he had impleaded the sub-tenants as *proforma* defendants. In paragraph 4 of the plaint he stated that the suit for the purposes of jurisdiction and payment of court-fees was valued at Rs. 600 the mortgage money, *plus* Rs. 114 the amount of damages, but with regard to the claim being under section 9 of the Specific Relief Act, the court-fee had been paid on half the mortgage money and the entire amount of damages, that the village was within the local limits of the jurisdiction of the court, hence the suit was cognizable by the court. The following reliefs were prayed for :—

(1) That the plaintiff's rights may be declared and (the principal defendants dispossessed and) the plaintiff as mortgagee may be put into possession of the 9 bighas 19 biswas of land numbered as below, situate in mauza Bhursaya.

(2) That Rs. 114 due on account of damages for 1323 Fasli may be awarded to the plaintiff as against the principal defendants.

(3) The costs of the suit may be awarded.

(4) That any other relief to which the plaintiff may be entitled may also be granted.

It will be noticed that it is only in paragraph 4 of the plaint that the plaintiff mentions section 9 of the Specific Relief Act and he only mentions it to show why he paid court-fees on half the mortgage money. In their defence the defendants urged that the claim was one based on title and therefore could not be brought under section 9 of the Specific Relief Act. They pointed out that the claim for damages along with that for possession could not be maintained under section 9 of the Specific Relief Act. They then went on to deny the allegations of fact and raised other points in defence. When the case came on for trial the learned *vakil* for the plaintiff amended the plaint by striking out in the first relief the words "The plaintiff's right may be declared," and retaining the following words "the principal defendants may be dispossessed and the plaintiff, as a mortgagee, may be put in possession of the nine bighas and nineteen biswas *pukhta* of land." The claim for damages was allowed to remain. The learned Munsif thereupon

treated the suit as a suit under section 9 of the Specific Relief Act, held that the suit was not barred by limitation; held that no claim for damages could be joined with the suit claiming possession under section 9 of the Specific Relief Act; dismissed the claim as to damages and gave the plaintiff a decree under section 9 for possession of the property without going into the merits of the other defences at all. The defendants appealed to the District Judge. Objection was there taken that no appeal could lie in a suit brought under section 9 of the Specific Relief Act. The Judge treated the suit as a suit based on title. He held it to be of that nature but instead of remanding it to the court of first instance for decision on the merits, he held that in view of the decision of this Court in *Nazir Ahmad v. Abid Ali* (1), he was bound to dismiss the suit *in toto*. He accordingly dismissed it. There are two pleas raised before us in the alternative. The first is that the suit being a suit under section 9 of the Specific Relief Act, no appeal lay to the court below. The second is that if it was not such a suit, then the first court ought to have remanded it to the court of first instance for decision on the merits. The facts are as stated above. The first question before us is whether or not the suit as it stands is really a suit based on title, or is one under section 9 of the Specific Relief Act. As pointed out above the only mention of section 9 of the Specific Relief Act is to be found in paragraph 4 of the plaint and it was mentioned more as an excuse or an explanation of the amount of court-fees paid on the plaint. Even after the amendment made, that is, after the striking out of the words "the plaintiff's right may be declared," it seems to us that the suit is clearly a suit based upon title and that in so holding the court below was correct. There remains the point as to whether the lower appellate court was justified by the ruling quoted above, in dismissing the suit *in toto*. We do not think that that ruling is any authority for the decision at which the lower appellate court has arrived. In that case really what this Court decided was that the suit as brought was a suit based on title in which an appeal did lie to the lower appellate court and that the lower appellate court had rightly dismissed the suit on the merits. In the present case the suit being really a suit based upon title, the Munsif wrongly dealt with it as a suit under section 9 of the Specific Relief Act. The case ought to have been sent back to that court to be dealt with as a suit based upon title, to have the proper issue framed and to be decided on the merits. We therefore allow this appeal. We set aside the decree of the court below, we direct that the record be sent back through the lower appellate court to the court of the learned Munsif, to be restored to its number upon the file and to be heard and decided according to law. The costs of this appeal will be costs in the cause and will abide the result.

Appeal allowed, cause remanded.

(1) [1911] 8 A. L. J. B., 910.

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v.

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Tudball, J.

CRIMINAL

1918

May, 23.

BANERJI, J.

MANOHAR

versus

EMPEROR *

Penal Code (Act XLV of 1860), section 182—Gist of offence—Giving false information to public servant—Construction.

Section 182 (a) of the Indian Penal Code, applies to a case in which it is intended that a public servant should do or omit to do something which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a public servant to do an act which would be an illegal act, even if true facts were stated to him would not come within the purview of the section.

CRIMINAL REVISION from an order of H. J. BELL, Esq., Sessions Judge of Jhansi.

Satya Chandra Mukerji, for the applicant.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicant Manohar, has been convicted under section 182 of the Indian Penal Code, under the following circumstances. He submitted a petition to the District Magistrate in which he stated that certain tenants occupying his houses had absconded leaving the houses locked up and he prayed that the houses might be unlocked and opened to enable him to execute repairs as otherwise the houses would fall down when the rains began. The application was sent to the Police for compliance and report. The Sub-Inspector reported that the allegations in the petition were untrue. Thereupon the District Magistrate sanctioned the prosecution of the accused under section 182, of the Indian Penal Code and he was tried and convicted. The question is whether the conviction is legal. Under section 182, a person who gives to a public servant any information which he knows or believes to be false, intending thereby to cause, or knowing it to be likely that he will thereby cause such public servant to do any of the things mentioned in clause (a) or clause (b) of the section, would be liable to punishment. In this case it is not alleged that clause (b) is applicable. The question is whether clause (a) applies. Under that clause the false information must have been given with

the intention or the knowledge that the public servant would do or omit anything which he ought not to do or omit if the true facts were known to him. In the present case if the true state of facts were known to the District Magistrate he would not be legally competent to issue the order which he issued or which was asked for. It is equally clear that he would not be competent to make the order if the information given to him was untrue. It seems to me that clause (a) of section 182, applies to a case in which it is intended that a public servant should do or omit to do something which he ought to do or omit to do if he knew the true facts, that is, which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a Magistrate to do an act which would be an illegal act even if true facts were stated to him would not, it seems to me, come within the purview of the section. The information must be information regarding a fact which would induce the Magistrate to do something which he would be legally competent to do if he had been cognizant of the true facts. As I have already stated, if the true facts were before the Magistrate he could not have issued the order which he issued to the Police. By reason of the true facts not being stated he issued an order which he could in no case have issued. Therefore it seems to me that the present case is not a case to which the section applies. I allow the application, set aside the conviction and sentence, and direct that the fine imposed on the applicant, if paid, be refunded.

Application allowed.

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MANOHAR

v.

EMPEROR.

Banerji, J.

KURE AND OTHERS

versus

EMPEROR *

CRIMINAL

1918

Penal Code (Act XLV of 1860), sections 149, 304A, 325—Causing death by rash and negligent act—Rioting—Grievous hurt.

April, 17.

PIGGOTT, J.

Section 304 A, of the Indian Penal Code must be read along with sections 336, 337 and 338 ; and all these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient.

The accused who were five in number attacked the complainants with *lathis*. In the course of the affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death.

* Cr. A. No. 156 of 1918.

CRIMINAL

1918

KURE

v.

EMPEROR.

The accused, in addition to being convicted of an offence punishable under sections 147 and 323 of the Penal Code, were also convicted of an offence under section 304A, the sentences to run consecutively :—

Held that the offence of which the accused were guilty was not that of causing death by a rash or negligent act but of voluntarily causing grievous hurt.

CRIMINAL APPEAL from an order of L. JOHNSTON Esq., Sessions Judge of Meerut.

The facts are fully set forth in the judgment and may be briefly stated as follows, for the purpose of this report. The five appellants were convicted under sections 147, 323 and also under section 304A of the Indian Penal Code for having assaulted the complainants with *lathis* and for having accidentally caused the death of a little girl who was sitting among the complainants and who received two *lathi* blows on her head. They were sentenced to one year's rigorous imprisonment under each of the two charges, the sentences to run consecutively. They appealed.

Harendra Krishna Mukerji, for the appellants.—It has been found that the injuries to the girl were purely accidental. The accused did not intend to hurt her ; it was no part of the common object of the accused to cause any injury to her. Hence the conviction of all the accused under section 304A cannot stand. Sections 34 or 37, Indian Penal Code, cannot apply to a case like this. I am supported by the case of

Kamal-ud-din v. Emperor, [1916] 14 A. L. J., (Reporter's Diary) p. 17.

There is no finding as to which of the accused struck the girl and caused her death ; hence, none of them can be convicted under section 304A. At all events, a consecutive sentence in respect of these accidental injuries was not called for.

Lalit Mohan Banerji, (Government Pleader), for the Crown.—The accused were members of an unlawful assembly, and under the provisions of section 149, Indian Penal Code, all of them were liable for any injury that resulted or was likely to result from the prosecution of the common object. Hence the accused were rightly convicted, in respect of the injuries caused to the girl.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—This is an appeal by five persons, Kure and his sons Daka, Khumma and Kalu, and a caste-fellow and neighbour of theirs named Bhikan, who have been convicted on separate charges of offences punishable under sections 147 and 323 of the Indian Penal Code and also of an offence punishable under section 304A, of the same Code. It is common ground that on the night of the 28th of November last, being the night following the bathing

festival of the *Kartiki Purnamashi*, there was an affray in the village of Shaudan between two parties of Chamars in the course of which serious injuries were suffered and inflicted. The first report was made by the prosecution witness Bhaggan Chamar, who brought to the Police Station his niece Musammatt Kesi, a girl about 10 years of age. Kesi was at that time suffering from serious injuries on the head and she died shortly after having been sent to the dispensary. Bhaggan himself and his brother Mukkha, father of the girl Kesi, were subsequently found to be suffering from injuries such as might have been received in the course of a *lathi* fight. On the other side the appellant Kure had received injuries on the head, on the left shoulder and on the left hand, and his right wrist was apparently broken : of his sons, Khumma had received a contused wound on the head and another injury of an unimportant nature, while Kalu and Dana were also slightly marked. The girl Kesi had received two distinct blows on the head by which the bones of the skull had been seriously fractured. The evidence as to what took place is contradictory and unsatisfactory in many respects, as is not unfrequently the case where there has been an affray between two factions made up of men belonging to the same caste and residents of the same village.

[His Lordship then discussed the evidence.]

I see no reason to doubt that there was a fight in which five persons or more were concerned on each side, the common object on each side being to cause hurt to members of the opposite party. Putting aside as unreliable the evidence of Balle, I certainly do not find that the remaining two witnesses called for the defence, Musammatt Manbhari and Chhuttan, suffice to show that the appellants now before me were acting in the lawful exercise of their right of private defence. It follows that they have been rightly convicted at least of rioting and causing hurt. The question of the hurt caused to the girl Kesi is more difficult. The prosecution witnesses do not suggest that the accused intended to kill this child. Their case is that she happened to be sitting with her father and uncle when an attack was made upon them by the accused, and that one or more of the accused must have hit her on the head in the course of the affray. I must take it that the man who struck these blows had no intention of causing this girl's death, or of causing injury likely to result in her death, or any knowledge that he was likely to do so. The question is whether the provisions of section 301, of the Indian Penal Code can be applied to the established facts so as to make the appellants, or any of them, guilty of the offence of culpable homicide by reason of the injuries suffered by this child. I must take it that she was hit by blows intended for some other person, and the question is as to the intention or knowledge with which those blows were struck. I think it may fairly be inferred that persons striking out violently with *lathis* in the

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course of a fight of this sort may be presumed to intend to cause at least grievous hurt, if grievous hurt actually results from the blows inflicted by them. Referring back to the provisions of section 321, of the Indian Penal Code, and reading that section in connection with the one which immediately follows, it is obvious that the guilt of an accused person remains just the same whether in seeking to inflict simple hurt or grievous hurt, as the case may be, upon one person, he actually causes the intended hurt to that person or to some other. I think therefore that the appellants must be held guilty under the provisions of section 325, read with those of section 149, of the Indian Penal Code, of having caused grievous hurt to the girl Kesi. The provisions of section 304A, which have been invoked by the learned Sessions Judge, are quite inapplicable to the facts of this case. That section must be read along with sections 336, 337 and 338 of the Indian Penal Code. All these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient. Where a man strikes at another with a *lathi* he is committing a criminal offence, independently altogether of any element of rashness which may be involved in his conduct by reason of the proximity of a child of tender years to the person at whom the blow is aimed. I set aside the conviction of all the appellants under section 304A of the Indian Penal Code, but in lieu thereof convict them under section 325, read with section 149, of the same Code. I have felt considerable difficulty about the question of sentences. The learned Sessions Judge has passed cumulative sentences, the effect of which is to give each of the appellants a period of two years' rigorous imprisonment. From one point of view this is not excessive in a case in which death has been caused; but I am bound to say that, in the unsatisfactory state of the evidence, I feel reluctant to affirm so severe a sentence upon all the appellants. On the evidence I must take it that the death of this girl Kesi was an accident, something altogether apart from the intention of any of the persons concerned in the affray. I note also that, in order to affirm the conviction under section 325, of the Indian Penal Code, I have found it necessary to invoke the provisions of section 149, of the same Code; and I do not think it sound as a general rule to pass cumulative sentences under section 147 and some other section of the same Code, where the latter of the two sections can only be applied by the aid of the provisions of section 149. The result is therefore that, while maintaining the sentence of one year's rigorous imprisonment passed by the learned Sessions Judge in connection with the fatal injuries caused to the girl Kesi, I direct that the sentences passed under the two charges (that is to say under sections $\frac{147}{325}$ and sections $\frac{325}{149}$ of the Indian Penal Code) do run concurrently. The appeals are allowed to this extent and otherwise dismissed.

B. K. M.

Order modified.

MATA BADAL SINGH AND ANOTHER (*Defendants*)*versus*GOURISH NARAIN SINGH AND ANOTHER (*Plaintiffs*) **Agra Tenancy Act (II of 1901), section 150—Muafi land—Resumption—Proprietor—Perpetual lessee entitled to resume.*

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June, 7.

TUDBALL, J.
A. RAOOF, J.

In section 150 of the Agra Tenancy Act the Legislature has used the word "proprietor" and not "land-holder," and it may thereby have intended that the right to resume should lie only in the proprietor and nobody else. Consequently, a holder of a perpetual lease of certain land under which the lessor reserved to himself, the right to receive an annual payment together with the right to re-enter in case of default is a proprietor of the *mahal* for the purposes of section 150 and entitled to resume.

SECOND APPEAL from a decree of B. J. DALAL ESQ., District Judge of Benares, confirming a decree of Mr. M. Sinha, Assistant Collector, First Class.

Gulzari Lal, for the appellants.

Gokul Prasad, for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—This second appeal arises out of a suit brought for the resumption of a *Muafi Khidmati*. It has been decreed by both the courts below. In the court of first instance a plea was taken that the plaintiffs had no right to sue for resumption. That plea was decided in favour of the plaintiffs. The defendants appealed to the District Judge but in that appeal did not again raise this point. In this second appeal this point has again been raised before us. For the decision thereof it is necessary to state a few facts. The zemindar of this village is His Highness the Maharaja of Benares. The plaintiffs are persons to whom a monthly payment in cash used to be made by His Highness as a grant of some sort or other. They approached him and asked him to substitute for this grant in cash a grant of land which they might hold and possess and if possible develop and improve. Accordingly the Maharaja gave to the plaintiffs a perpetual *Istimrari* lease of the village in question. He transferred to them all rights of all sorts reserving only to himself an annual sum payable as rent with the right to re-enter in case of default of payment by the plaintiffs. In the body of the lease there is specific mention of the *muafi khidmati* and other classes of *muafi*. By the terms of the deed the plaintiffs

Tudball, J.

* S. A. No. 961 of 1916.

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Tudball, J.

were given full powers over this land. The plea taken on behalf of the defendants is that under the terms of section 150, of the Tenancy Act, the only person who can sue for resumption is the proprietor of a *mahal* or a portion of a *mahal*, that the proprietor is the Maharaja and the plaintiffs are not proprietors and therefore have no right to sue under this section. The reply on behalf of the plaintiffs is that the Maharaja's rights under section 150, as proprietor having been transferred to the plaintiffs, such a transfer is not illegal or contrary to law, and as that proprietary right now vests in the plaintiffs, they, in the circumstances of the present case, must be held to be proprietors of the *muafi* for the purposes of section 150. There can be no doubt that the Legislature in section 150, used the word "proprietor" and not "land-holder" and it is highly probable that the Legislature intended that the right to resume should be only in the proprietor and nobody else. We may assume this for the purposes of our decision. The question is whether in the circumstances of the present case this part of the proprietary right is vested in the plaintiffs or not by the terms of the lease. As we have mentioned above the lease is a perpetual one and all that the Maharaja reserved to himself was the right to receive an annual payment from the plaintiffs together with the right to re-enter in case of default. He clearly transferred to them all the other rights which go to make up the bundle of rights which constitute proprietorship. We think therefore that in the circumstances of this case the plaintiffs, for the purposes of section 150, must be deemed to be the proprietors of the *mahal*. It must not be taken for granted that we hold that this would be the case in every instance of a lease granted by a proprietor. The rights of a lessee are defined by the terms of the lease and in each case the court will have to look to the terms of the deed and see what rights were vested in the lessee. The only other point which is raised in the case has no force and requires no discussion. The decree of the court below is, in our opinion, correct. We dismiss this appeal with costs.

Appeal dismissed.

MANSUKH RAM AND OTHERS (*Defendants*)*versus*BIRJRAJ SARAN SINGH (*Plaintiff*)*

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1918

May, 27

PIGGOTT, J.

*Landlord and tenant—Cutting down by tenant of trees on agricultural land—
Suit for damages—Civil Court—Jurisdiction—Agra Tenancy Act (II of
1901), sections 57, 65, 167.*

The plaintiff was the landlord and the defendants were occupancy tenants of a certain agricultural holding. The latter cut down two trees within the boundaries of that holding, and a Munsiff exercising the powers of a Small Cause Court Judge granted the plaintiff a decree for damages in a suit brought for that purpose:—*Held* that the suit was cognizable by a Civil Court.

The cutting down of trees does not raise a presumption that the act is detrimental to the land within section 57 of the Tenancy Act.

CIVIL REVISION from an order of BABU LAKSHMI NARAIN, Munsif, exercising the powers of a Judge of the Court of Small Causes of Meerut.

Haribans Sahai, for the applicants.

M. L. Agarwala, for the opposite party.

The following judgment was delivered by

PIGGOTT, J.—The applicants in this case are certain defendants against whom a decree for Rs. 15 as damages has been passed in favour of the plaintiff by the learned Munsif of Meerut in the exercise of his jurisdiction as Judge of a Court of Small Causes. The question raised by this application is whether the cognizance of the court below was or was not barred by the provisions of section 167 of the United Provinces Tenancy Act, Local Act No. I of 1901. Putting aside certain matters of detail no longer in controversy, the essential facts may be stated thus:—The defendants were tenants with a right of occupancy of two plots of agricultural land, the property of the plaintiff. Somewhere within the boundaries of this agricultural holding there stood two trees, which were not the property of the defendants but of the plaintiff. The defendants cut down those trees and appropriated the timber thereof to their own use. It scarcely requires to be pointed out

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SINGH

Piggott, J.

that, apart from any provision of the Local Tenancy Act restricting the jurisdiction of the Civil Courts in such a matter, the plaintiff's claim for damages on account of this tortious Act was clearly cognizable by a Court of Small Causes and, on the facts found, the decree in favour of the plaintiff is a proper one. The only question therefore is whether the suit is barred by the provisions of section 167 aforesaid. This again depends upon the interpretation to be put upon certain provisions of sections 57 and 65 of the same Act. The latter of these sections merely says that, if a tenant is found liable to ejectment from his holding on any of the grounds specified in clause (b) or clause (c) of section 57, the Revenue Courts have jurisdiction to give the land-holder a decree for compensation in lieu of, or in addition to the ejectment of the tenant. The question therefore is whether, on the facts alleged in the plaint, the defendants were liable to ejectment under the provisions of section 57 aforesaid. I am unable to hold that the cutting down of the two trees under the circumstances alleged was an act detrimental to the land. There is certainly no presumption to that effect, on the contrary, in so far as the land is used for cultivating purposes, the removal of these two trees would presumably be calculated to increase its productiveness. The only question therefore is whether the act of the defendants in cutting down these trees could have been proved by the plaintiff, in a proceeding in the Revenue Courts, to have been an act inconsistent with the purpose for which the land was let to the defendants. There is no allegation to this effect in the plaint; and I am bound to say that in my opinion the plaintiff would have had considerable difficulty in satisfying a Revenue Court that this land had originally been let to the defendants under such circumstances as would make the cutting down of these trees an act inconsistent with the purpose for which the lease was given. If any land-holder under similar circumstances feels himself able to establish such a plea by evidence I would by no means debar him from seeking the protection of the Revenue Courts, but in the present case I find no reason for holding that the plaintiff was in any way debarred from claiming damages in a Civil Court, on the simple allegation that the defendants had taken advantage of their position as tenants of the land in order to cut down and appropriate to themselves two trees which were the property of the plaintiff. I have been referred in argument to a number of rulings supposed to have some bearing upon the question in dispute; but I do not think it necessary to discuss them here. Most of them seem to me to have no bearing upon the particular point to be decided in this case. The only one about which I should not be prepared to say this is the decision of a single Judge of this Court in *Lachman Das v. Mohan Singh* (1). That decision, so far as the question of jurisdiction is concerned, is entirely against the defendants. I take the liberty of saying, with

(1) [1912] 9 A. L. J. R., 672.

all respect to the learned Judge of this Court who decided that case, that he has gone somewhat further in the way of affirming the jurisdiction of the Civil Court to deal with matters of this sort than I should myself be prepared to do, at any rate, without further argument; but as regards the case now before me I find no good reason for holding that the plaintiff could have obtained appropriate relief for the loss which he has suffered by way of any suit or application brought or made before a Revenue Court. The jurisdiction of the learned Judge of the Court of Small Causes was therefore not barred and I dismiss this application with costs.

Application dismissed.

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SINGH.

Piggott, J.

MUHAMMAD SAID

versus

EMPEROR *

CRIMINAL

1918

Motor Vehicles Act (VIII of 1914), sections 11, 16—Rules framed under the Act—Rule 12 cl. (1)—Conviction for violating rule—Lamp affixed on each side in front, meaning of.

May, 31.

BANERJI, J.

Rule 12 of the Rules framed by the Local Government under section 11 of the Indian Motor Vehicles Act provides that "no person shall drive a motor vehicle during the period commencing half an hour after sunset and ending half an hour before sunrise unless such vehicle is provided with lights as follows:—(1) in the case of vehicles other than motor cycles (a) one lamp showing a white light in front affixed on each side of the front portion of the vehicle; (b) one lamp showing a red light at the rear and showing a white light at the side affixed at the back of the vehicle in such manner as to illuminate with the white light and render easily distinguishable the signs and numbers on the plates." Accordingly when a person drives in a motor with two lamps affixed on each side of the front portion of his car showing a white light in front, *held* that the rule was fully complied with and the conviction of such a person for violation of the rule was bad in law.

The words "front portion" in clause (a) must be read as contradistinguished from the rear and the back of the vehicle mentioned in clause (b). It does not mean the extreme end of the bonnet or the extreme end of the front portion, but means the portion which is outside the seats and the steering wheel.

CRIMINAL REVISION from an order of H. C. ROSS Esq., Magistrate, First Class of Cawnpore.

G. W. Dillon, for the applicant.

R. Malcomson, (Assistant Government Advocate) for the Crown.

*Cr. Rev. No. 271 of 1918.

CRIMINAL

1918

MUHAMMAD

SAID

v.

EMPEROR

Banerji, J

The following judgment was delivered by

BANERJI, J.—The applicant Muhammad Said has been convicted under section 16 of Act No. VIII of 1914, the Indian Motor Vehicles Act of 1914. The charge against him was that he had violated Rule 12 of the Rules framed by the Local Government under section 11 of the Act. The case for the prosecution as stated by the learned Magistrate who tried the case was that there were no “head lights” on the car. The Magistrate was of opinion that Rule 12 (clause 1) of the Rules framed by the Local Government refers to “head lights” only, and that as the “head lights” in the case of the car of the accused were not lighted he was guilty of a breach of Rule 12 (clause 1). Rule 12 provides that no person shall drive a motor vehicle during the period commencing half an hour after sunset and ending half an hour before sunrise unless such vehicle is provided with lights as follows:—

(1) in the case of vehicles other than motor cycles ;

(a) one lamp showing a white light in front affixed on each side of the front portion of the vehicle ;

(b) one lamp showing a red light at the rear and showing a white light at the side affixed at the back of the vehicle in such manner as to illuminate with the white light and render easily distinguishable the signs and numbers on the plates.

There is no mention of head lights in this Rule and all that the Rule requires is that there must be affixed on each side of the front portion of the vehicle a lamp showing a white light in front. The words “front portion” in clause (a) must be read as contradistinguished from the rear and the back of the vehicle mentioned in clause (b). The “front portion” does not in my opinion mean, as the learned Magistrate seems to think, the extreme end of the bonnet or the extreme end of the front portion. The front portion is the portion which is outside the seats and the steering wheel. There must be one lamp showing a white light in front affixed on each side, of the front portion of the vehicle. If this is done the rule in my opinion is completely complied with. The rule does not require the fixing of more than three lamps to each car, namely two in front one on each side of the front portion and one at the rear. It would be stretching language to say that lamps fixed beyond the bonnet would be lamps affixed on each side of the front portion of the vehicle. The view taken by the learned Magistrate is in my opinion erroneous. The accused admittedly had two lamps affixed on each side of the front portion of his car showing a white light in front. Therefore he complied with the rule and did not commit a breach of it. I allow the application, set aside the conviction and sentence and direct that the fine, if paid, be refunded.

Application allowed.

SAJJADI BEGAM (*Plaintiff*)*versus*DILAWAR HUSAIN AND OTHERS (*Defendants*) *

Code of Civil Procedure, (Act V of 1908), section 115—Revision—Decree fixing a date for payment of money—Suit to be dismissed if money not paid on date fixed—Part of decree—Court has no jurisdiction to extend the time so fixed.

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1918

April, 25.

RICHARDS,

C. J.

BANERJI, J.

Where a decree embodies certain conditions and provides that a suit shall stand dismissed if those conditions are not complied with, *e. g.*, where the date is fixed in the decree for paying in money and in the event of non-compliance it is provided that the suit shall be dismissed, the court has no jurisdiction to interfere with the decree by altering any of the conditions, namely, by extending the time.

There is no distinction in this respect between a decree for pre-emption and any other decree. The only exception is that of a mortgage-decree in which time may be extended by virtue of the provisions of Order 34 of the Code of Civil Procedure.

CIVIL REVISION from an order of BABU RAM CHANDRA SAXENA, Additional Subordinate Judge of Moradabad.

The plaintiff brought a suit for dower and for cancellation of two deeds. One of the objections raised by the defendants was that the court-fee paid on the plaint was insufficient inasmuch as no court-fee had been paid in respect of the prayer for cancellation of the two deeds. The court framed an issue on this point and decided thereon that the plaintiff should pay an additional court-fee of Rs. 20. The suit was decreed in respect of the dower and the cancellation of one of the two deeds. There was a condition embodied in the decree that the plaintiff was to pay up within a week the deficiency of Rs. 20 in the court-fees, and that in default thereof the suit would stand dismissed with costs. Rs. 10 only was paid on behalf of the plaintiff within the time fixed. Shortly after the expiry of the week the defendants applied for execution of the decree, claiming that by reason of the condition not having been fulfilled the suit stood dismissed with costs, and consequently they were entitled to execute the decree for costs. Notice of this application was issued to the plaintiff. Thereafter the plaintiff made an application stating that she had not been informed that the requisite amount was Rs. 20, and praying for an extension of time under section 148, Civil Procedure Code, in order to enable her to pay in the remaining amount of the court-fee. The

* Civ. Rev. No. 186 of 1917.

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HUSAIN.

court doubted whether it had any power under section 148 to extend the time, and further held that no sufficient grounds had been made out by the plaintiff for extending the time, even if it could be extended. The plaintiff's application was, accordingly, dismissed. Hence this application for revision.

Iqbal Ahmad, (for *Muhammad Yusuf*), for the applicant, submitted that the court below had jurisdiction to extend the time in this case. He relied on the ruling in

Naik Ram v. Bhagwan Chand, [1917] 15 A. L. J. R., 511.

He further submitted that having regard to the circumstances of the case this was a matter in which the court should have properly exercised its discretion in favour of the applicant and granted her an extension of time.

S. A. Haidar, for the opposite party, submitted that the case cited by the applicant went against a long series of cases decided by the pre-emption Bench and the principle underlying those decisions governed the facts of the present case as well. The court would have to modify its decree if it granted an extension of time.

Iqbal Ahmad, replied.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—The facts connected with this and the connected application are shortly as follow :—A suit was brought by the plaintiff for dower and also to set aside certain deeds executed by her deceased husband. A question as to the sufficiency of court-fees arose, and eventually the court made a decree in the plaintiff's favour conditional upon her paying an extra court-fee of Rs. 20, within a week. If this extra court-fee was not paid the suit was to stand dismissed. What we have just now stated was all embodied in and was part of the decree itself. Unfortunately (it is said through the negligence of the plaintiff's pleader) she did not get proper information with the result that she deposited Rs. 10, only within the time allowed. The defendants then made an application for execution of the decree on the ground that the decree was now in their favour, the deposit of Rs. 20 not having been made as provided in the decree. The plaintiff sought in vain to be allowed to pay in the extra Rs. 10. The court doubted that it had jurisdiction to extend time and rejected the application for extension of time. The plaintiff comes here in revision and contends that the court had jurisdiction and it ought to have exercised it. This Court always feels great difficulty in interfering with the discretion of the courts below on matters of discretion. But there seems to be a more formidable objection to the present application namely that once the term about depositing the Rs. 20 was embodied in the decree the court

itself, even if it desired, had no jurisdiction to alter its own decree save on an application for review of judgment under section 114, read with Order 47, rule 1. The case of *Naik Ram v. Bhagwan Chand*(1), is cited. This was a decision of a single Judge and the judgment consists of a single line. The circumstances were no doubt in principle the same as in the present case. The judgment of the court is "The court had undoubtedly jurisdiction to extend the time." It has been over and over held in pre-emption suits, where the decree itself provides that the pre-emptor is to have possession conditional upon his paying the pre-emption money into court within a specified time, and that upon his failure to do so the suit shall stand dismissed, that the court has no jurisdiction to extend the time. The ground for these decisions has always been that the court has no jurisdiction to interfere with its own decree save in the manner we have mentioned above. There is no distinction between a pre-emption decree and any other decree which embodies certain conditions and provides for the suit being dismissed if those conditions are not complied with. The only exception is that of a mortgage decree—time can be extended in mortgage decrees by virtue of the provisions of Order 34. We reject the application but under the circumstances we make no order as to costs.

We may here mention that we think that it would have been better had the court after determining that the extra fee was payable ordered the fee to be paid within a certain time, and delayed passing its decree until that time had expired.

B. K. M.

Application rejected.

(1) [1917] 15 A. L. J. R., 511.

CHABRAJ SINGH AND OTHERS (*Plaintiffs*)*versus*MAHESH NARAIN SINGH AND OTHERS (*Defendants*).*

Pre-emption—Purchase made by vendee on different dates—Suit to pre-empt first sale—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.

Held that a vendee becomes a co-sharer of the property purchased by him from the date of his purchase. Consequently where a vendee purchased shares in a village on two different dates, and a suit was brought to pre-empt the earlier sale and no suit was brought in respect of the second sale, *held* that the suit was not maintainable even though limitation for a suit for pre-emption in respect of the second sale had not expired.

*S. A. No. 1629 of 1917.

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BEGAM

v.

DILAWAN

HUSAIN

Richards,

C. J.

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April, 19.

RICHARDS,

C. J.

TUDBALL, J.

CIVIL

1918

CHABRAJ
SINGH
v.
MAHESH
NARAIN
SINGH.

SECOND APPEAL from a decree of BABU SHEKHAR NATH BANERJI, Subordinate Judge of Jaunpur, confirming a decree of the Munsif.

One Kuber Singh sold to Mahesh Narain Singh his share in a certain village by three sale-deeds, dated 11th November, 1913, 27th November, 1913, and the third in January. For the purposes of this report the third sale is not material. The sale of 27th November, 1913, related to the largest share. The plaintiffs claimed to pre-empt the share sold on 11th November, 1913, but not the share sold on 27th November, 1913. The suit relating to the first sale was filed on 12th December, 1913, in the court of the Munsif who dismissed it on 31st August, 1914, on the ground that the plaintiffs could not prove either a custom or a contract of pre-emption. The plaintiffs appealed. The Additional Subordinate Judge, on 24th July, 1915, allowed the appeal and held that a contract of pre-emption had been proved and remanded the case for trial on the merits. The case came to the Munsif for trial who on 28th April, 1916, again decided against the plaintiffs on the ground that no suit having been filed about the second sale and the time for filing such suit having expired the defendant vendee became a co-sharer in the village and therefore the suit relating to the first sale must fail. This decree of the Munsif was confirmed in appeal.

Plaintiffs appealed.

Akhilnath Sanyal, for the appellants.—The vendor deliberately sold his share on different dates to put the plaintiffs out of the track and prevented enquiry by them. The appellants had no knowledge of the second sale. The defendant vendee should have stated in his defence that he had become a co-sharer by the purchase of 27th November, 1913. The plaintiffs could then have known about this sale and could have brought a suit for pre-emption.

[TUDBALL, J.—Could that have been any defence in the suit?]

According to the trend of rulings of this Court the defendant vendee could not be considered a co-sharer in the village. He had a defeasable right. On 31st August, 1914, when the Munsif decided against the plaintiffs one year from the date of the second sale had not expired. A suit could have been brought to pre-empt that sale and therefore the title of the defendant vendee was not then complete. It follows therefore that on 31st August, 1914, when a decree ought to have been passed in plaintiffs' favour their right to pre-empt could not have been defeated on the plea that the defendant vendee had become a co-sharer.

Rohan Singh v. Bhau Lal, [1909] 6 A. L. J. R., 699.

[RICHARDS, C. J.—The defendant vendee became a co-sharer as soon as the sale deed was executed.]

This Court has all along held that so long as the period to institute a suit for pre-emption had not expired a vendee cannot be considered a co-sharer for the purpose of a pre-emption suit. In the present case on 31st August, 1914, the time to bring the pre-emption suit had not expired.

* *Kaleshar Rai v. Nabiban Bibi*, [1906] I. L. R., 28 All., 642.

[RICHARDS, C. J.—I think that case was wrongly decided. My colleague is of the same opinion]

The defendant vendee should have said in his defence that he had become a co-sharer as soon as he purchased and not having done so he cannot take advantage of it.

The judgment of the Court was delivered by

RICHARDS, C. J.—It appears from the finding of the court below that the vendee had become a co-sharer by purchase on the 27th of November, 1913, that is to say, before the present suit was instituted. No suit for pre-emption was ever instituted in respect of this second purchase. The result is that not only on the day upon which the court of first instance might have made its decree in favour of the plaintiff but even before the institution of the suit the defendant vendee had become a co-sharer. It may be unfortunate that this matter was not gone into by the court in the first instance which might have had the effect of giving the plaintiff express notice of the sale of the 27th of November, 1913, (which the learned vakil says he was ignorant of). This may have been an unfortunate circumstance for the plaintiff and a lucky one for the defendant vendee but the fact remains that when the case was tried the vendee was able to prove that he was a co-sharer with the vendor before the date of the institution of the suit. In this view the decree of the court below was correct. We dismiss the appeal.

A. N. S.

Appeal dismissed.

[See also, *Abdul Ghafur v. Ghulam Husain*, [1913] I. L. R., 35 All., 296.—ED.]

*[*Note*.—The decision was affirmed in Letters Patent Appeal—See [1907] 4 A. L. J. R., 351—ED.]

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v.

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Richards,
C. J.

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1918

June, 7.

BANERJI, J.
RYVES, J.NUR-UD-DIN KHAN (*Judgment-debtor*)*versus*

PRAN KISHAN CHAKARVARTY AND ANOTHER

(*Decree-holders*)*

Code of Civil Procedure (Act V of 1908), Order XLIII, rule 1—Appeal—Memorandum of appeal—Order returning memorandum of appeal to be presented to proper court.

No appeal lies against the order of an appellate court returning a memorandum of appeal to be presented to the proper court.

EXECUTION FIRST APPEAL from a decree of AUSTIN KENDALL Esq., District Judge of Cawnpore.

S. M. Sulaiman, for the appellant.

Peary Lal Banerji, for the respondents.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This appeal has been preferred under the following circumstance:—A suit was brought by the appellant for dissolution of partnership and for the taking of partnership accounts. The matter was referred to arbitration and an award was made which was accepted by the court and in accordance with which a decree was passed. Under the award the defendants were found entitled to Rs. 6,000 and odd from the plaintiff and the award directed that they should realise the said amount by sale of the partnership assets. The defendants who are respondents here, made an application to the court for execution of the decree which we may mention has become final. The application was resisted on the ground that under the terms of the decree the applicants for execution were not entitled to take out execution. This objection was overruled by the court of first instance and the appellant subsequently paid the amount of the decree and under the terms of the award he obtained possession of the property namely partnership buildings and stock-in-trade &c. The plaintiff preferred an appeal to the District Judge. The District Judge held that the decree was capable of execution but he was of opinion that no appeal lay to him, and he directed the memorandum of appeal to be returned to the appellant for presentation to the proper court. In his opinion the value of the suit exceeded Rs. 5,000. From this order returning the memorandum of appeal the present appeal was preferred. In the alterna-

* E. F. A. No. 11 of 1918.

tive it was prayed that the application might be treated as one for revision if no appeal lay. In our opinion no appeal could be preferred to this Court from the order directing the memorandum of appeal to be returned for presentation to the proper court. Under Order 43, rule 1 an appeal lies from an order returning a "plaint," but a "memorandum of appeal" is not a "plaint," and therefore that order has no application to the present case. It may be an omission on the part of the Legislature but under the law as it stands we are unable to hold that the word "plaint" includes "the memorandum of appeal." This Court in the case of *Nazar Hasan v. Kesri Mal*, (1) held that no appeal lay from an order returning a memorandum of appeal. We see no reason to differ from the view taken in that case. We accordingly hold that this appeal as an appeal is not maintainable. Looking at the case as an application for revision we are of opinion that there are no merits in it inasmuch as the decree made by the court awards to the defendants the amount which they sought to recover by execution and which has been paid to them by the applicant. Whether that decree is a right decree or a wrong decree it is now too late to consider. A court executing a decree is bound to give effect to it as it stands and the decree in this case does award the amount claimed to the defendants. Therefore the case is without merit and we see no reason to exercise our discretionary powers under the revisional section. We accordingly dismiss the appeal, and decline to take action in revision. The respondents will get their costs.

Appeal dismissed.

(1) [1890] I. L. R., 12 All. 581.

[See also *Raghunath v. Shamo Koeri*, [1903] I. L. R., 31 Cal., 345—
Ed.]

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NUR-UD-DIN

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v.

PRAN

KISHAN

CHAKAR-

VARTY.

Banerji, J.

CRIMINAL

1918

May, 31.

BANERJI, J.

BABU RAM

versus

EMPEROR *

U. P. Municipalities Act (II of 1916), section 155—Octroi duty—Person introducing article chargeable with duty liable—Agent.

A person, acting as broker for another, took delivery of certain bags of sugar within the Municipal limits, but did not pay the octroi due thereon. He was convicted under section 155, of the Municipalities Act :—*Held* that the conviction was right inasmuch as he was the person who had introduced the goods into the municipal limits.

CRIMINAL REVISION from an order of SOTI RAGHUVANSA LAL, Sessions Judge of Farrukhabad.

Satya Chandra Mukerji, for the applicant.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicant Babu Ram has been convicted under section 155, of the Municipalities Act, No. II of 1916, on a charge of having introduced into the limits of the Municipality certain bags of sugar without payment of octroi duty. It has been fully proved by the evidence which the court below has believed, that the applicant, who is a broker, took delivery of sixty bags of sugar and did not pay the octroi duty payable for the goods. It is said that as he was merely a broker and the agent of the consignee, the consignee should have been punished. This contention is, in my opinion, not tenable. The person liable to punishment is the person who introduces the goods into the limits of the municipality without payment of octroi duty. It was the accused who did this and therefore he has been rightly convicted. I do not consider the fine inflicted on him to be unduly excessive having regard to the circumstances of the case. The application is dismissed.

Application dismissed.

* Cr. Rev. No. 223 of 1918.

FULL BENCH.

KALIKA BAKSH SINGH AND OTHERS (*Judgment-debtors*)

versus

RAM CHARAN AND OTHERS (*Decree-holders*)*

Limitation Act (IX of 1908), Schedule I, article 182 (6)—Decree—Execution—Date of issue of notice—Time runs from date of order by court to issue notice—Minority—Subsequent disability.

A decree under Order 34, rule 6 of the Code of Civil Procedure was passed on March 4, 1911. Application for execution was put in on March 3, 1914, and on the same date the court passed the order that notices issue to the judgment-debtors. The notices were actually drawn up and signed on March 4, 1914, and that was the date which the notices bore. The application for execution was struck off on March 24, 1914. The next application was made on March 5, 1917, by one of the original decree-holders and the legal representatives of two of the other decree-holders, the legal representatives being minors. March, 4, 1917, was a Sunday. The court below held that the application was within time: *Held*, reversing the court below, that the application was time barred, the time running from the date on which the order of the court issuing notice was passed.

Held also that the time having already commenced to run from 1914 the decree-holders were not entitled to the benefit of section 7 of the Limitation Act by reason of the minority of some of the decree-holders.

EXECUTION FIRST APPEAL from a decree of BABU KUNWAR SEN, Subordinate Judge of Allahabad.

A decree under Order 34, rule 6, Civil Procedure Code having been passed on 4th March, 1911, the decree-holders applied for execution of the decree on 3rd March, 1914, and on the same date the court ordered notices under Order 21, rule 22 to issue to the judgment-debtors. The notices were actually drawn up and signed on 4th March, 1914, which was the date they bore. The application for execution was eventually struck off on 24th March, 1914. The next application for execution was made on 5th March, 1917, by one of the original decree-holders and the heirs, among whom there were some minors, of the other two decree-holders who had died in the meantime. The 4th of March, 1917, was a Sunday. The judgment-debtors objected that the application was beyond time. The court held that it was within time. The judgment-debtors appealed to the High Court.

Panna Lal, (with him *Balmakund*), for the appellants.—Under clause (6) of article 182 of the Limitation Act the decree-holder is entitled to 3 years from the date of issue of the notice referred

E. F. A. No. 285 of 1917.

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1918

May, 10.

RICHARDS,
C. J.
KNOX, J.
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to therein, that is, the notice under Order 21, rule 22, Civil Procedure Code. The question is, what is the exact date signified by the phrase "date of issue of notice?" That date is the date on which the court orders notice to issue, and not any subsequent date on which the office may choose to prepare and send out the notice. The Legislature must have intended to refer to a judicial act as giving a starting point for the period of 3 years, and not to a merely ministerial act. According to this construction, the period of 3 years furnished by clause (6) of article 182 started on 3rd March, 1914, and expired on 3rd March, 1917, and the present application for execution is beyond time.

Under the corresponding provision of Act IX of 1871, namely clause (5) of article 167, it was held by the Allahabad High Court that the "date of issuing notice" meant the date on which the court passed an order directing notice to issue.

Udit Narain v. Rampartab, [1881] A. W. N., 120.

That view has consistently been followed in this Court under the corresponding article 179, clause (5) of Act XV of 1877.

Baldeo v. T. B. Harrison, [1890] A. W. N., 244;

Jumai Kanjor v. Abdul Karim, [1908] I. L. R., 30 All., 536.

The same view has been taken by the Bombay High Court.

Damodar Shaligram v. Sonaji, [1903] I. L. R., 27 Bom., 622;

Govind Valad Dhond v. Dada Valad Udaji, [1904] I. L. R., 28 Bom., 416.

In Calcutta, there seem to have been inconsistent decisions. The cases of

Kadaressur Sen v. Mohim Chandra, [1902] 6 C. W. N., 656;

Ratan Chand v. Deb Nath, [1906] 10 C. W. N., 303,

have adopted the interpretation that the date of *actual issue* of the notice is the date from which the period of 3 years is to be reckoned. But in the case of

Jugol Kishore v. Chintamani, [1914] 24 I. C., 80, (Cal.); S. C., 20 C. L. J., 15,

the Calcutta Court took the same view as this Court. The Madras High Court has taken the opposite view.

Cheruvath Thalungal v. Nerath, [1906] I. L. R., 30 Mad., 80.

In the present Act, art. 182, cl. (6), there has been a slight alteration in the language; in the older Acts the words were "date of issuing notice," and in the present Act they are, "date of issue of notice." There is really no significance in this alteration, but if it indicates anything, it goes to strengthen the view of the Allahabad High Court. Of the two words, "issuing" and "issue," the former is, if at all, the more suggestive of the actual operation of issuing the notice than the latter; and so the change favours the Allahabad view.

Since the passing of the present Act there has been a decision of the Patna High Court, in the case of

Ram Kumar v. Kesho Prasad Singh, [1916] 36 I. C., 999, (Pat.) S. C. [1917] Pat. 52,

in which on a review of the various former decisions the view held by the Allahabad Court was approved. The case reported in 24 I. C., 80, already cited, was also a decision under the present Act.

In the case of

Maharaja of Jaipur v. Lalji Sahai, [1914] 12 A. L. J. R., 1006

a single Judge of this Court was inclined to the view that the change in the language indicated that the date which the notice bore on it ought to be the date from which time was to be reckoned. This view, however, was merely an *obiter dictum*, as it was unnecessary for the decision of the case, which was actually decided on another ground.

Having regard to the long and well-established course of decisions of this Court, the view adopted by it should be maintained unless and until there is an express enactment, or at least a clear indication of intention, of the Legislature to the contrary. The alteration in the language falls far short of either.

Peary Lal Banerji, (with him *Saila Nath Mukerji*), for the respondents.—It is submitted that the view taken by this Court on the wording of the older Acts was erroneous, and the Legislature has now indicated by the use of the words “date of issue of notice” that the interpretation put by this Court on the corresponding words of the older Acts was wrong.

There are several reasons for holding that the Legislature could not have contemplated giving a fresh starting point from the date of the order directing notice to issue. The date of application for execution gives a fresh starting point under cl. (5), and by cl. (6) the intention was to give another starting point which would make a substantial difference. Ordinarily, the order directing notice to issue is passed on the very day the application for execution is filed; in some cases it is made the day following:—It would not be reasonable to suppose that the Legislature would enact a separate clause giving a fresh starting point if the difference between the two starting points was only a day or so. Again, after the order is made, the decree-holder can pay in the process fee and ask that the notice be sent. This act of his would be an application to take a step in aid of execution, as has been indicated in the cases of

Thakur Ram v. Katwaru Ram, [1900] I. L. R., 22 All., 358 ;

Sheo Prasad v. Indar Bahadur, [1908] I. L. R., 30 All., 179,

and would give him a fresh starting point under cl. (5). The Legislature having already given the decree-holder a fresh starting point from the later date of the payment of process fee could not

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reasonably have intended to give him another starting point from the earlier date of the order directing notice to issue, as it would be of no use to him and would never be required to be availed of.

It is, therefore, submitted that the view adopted by the Calcutta and Madras High Courts is the correct view. I rely on

Cheruvath Thalangal v. Nerath, [1906] I. L. R., 30 Mad., 30 ;

Kadaressur Sen v. Mohim Chandra, [1902] 6 C. W. N., 656 ;

Ratan Chand v. Deb Nath, [1906] 10 C. W. N., 303.

This view was accepted by PIGGOTT, J., in

Maharaja of Jaipur v. Lalji Sahai, [1914] 12 A. L. J. R., 1006.

It was also accepted by the Patna High Court in the latest case—

Khoda-Bukhsh v. Bahadur Ali, [1918] Pat., 130 s. c., 45 I. C., 203,

in which the earlier Patna case, cited by the appellants was considered.

The earlier Allahabad cases give no adequate reasons for the view taken ; and the Bombay High Court view is untenable. The latter court has held that cl. (6) can only apply when notice has actually been sent, and not where only an order for the issue thereof has been made :

Hari Ganesh v. Yamunabai, [1897] I. L. R., 23 Bom., 35.

It, therefore, expressly holds that the mere ordering of notice to issue is not issuing the notice ; yet it goes on to hold, following the Allahabad cases, that the date of ordering is the “date of issuing” the notice. It gives two different meanings to the same word “issue” occurring in two places in the same sentence.

The words “date of issue” of notice mean the date which the notice bears, just as date of issue of a currency note means the date which the note bears.

There is another reason why the application for execution is within time. Some of the decree-holders applicants are minors, and consequently the bar of limitation does not arise. I rely on the cases of

Zamir Hasan v. Sundar, [1899] I. L. R., 22 All., 199, F. B ;

Sri Ram v. Het Ram, [1907] I. L. R., 29 All., 279.

Panna Lal, in reply.—The fact that some among the present applicants, whose right to apply for execution accrued after the date of the first application for execution, are minors, would not suspend limitation, as time had already commenced to run from 3rd March, 1914, and no subsequent disability could stop it—subsequent disability is to be distinguished from a case of initial disability. I rely on the following cases :

Bhagat Bihari v. Ram Nath, [1905] I. L. R., 27 All., 704 ;

Jivraj Gulabchand v. Babaji, [1904] I. L. R., 29 Bom., 68 ;

Bhagwant Ramchandra v. Kaji Mahamad, [1912] I. L. R., 36 Bom., 498.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of an application for execution of a decree. Originally there was a decree in a mortgage suit. The mortgaged property having all been sold and found insufficient to satisfy the debt a decree under Order 34, rule 6 was granted on the 4th of March, 1911. An application was made for execution of this decree and on the 3rd of March, 1910, the court ordered that notice should go to the judgment-debtors. The application in execution was subsequently struck off. It appears that notice did go from the court but nevertheless the application was struck off. On the 5th of March, 1917, the present application for execution was made. It was met with the objection on behalf of the judgment-debtors that it was barred by time. The notice which went from the court in consequence of the court's order, dated the 3rd of March, 1914, was dated the 4th of March. The 4th of March, 1917, was a Sunday. Accordingly if the period of limitation is to be reckoned from the 4th of March, 1914, it is just within time; if on the other hand it is to be reckoned from the 3rd of March, 1914, it is just too late. The article which is applicable is article 182 (clause 6). That clause is as follows:—

“(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when, the issue of such a notice is required by the Code of Civil Procedure of 1908.”

Notice was required by the Code of Civil Procedure in the present case, because the decree was more than a year old. The question in the case is as to the meaning of the expression “date of issue of notice.” Under the previous Limitation Act the words were identical, except that instead of the expression “date of issue of notice” the expression is “date of issuing a notice.” Under the previous Act the practice had been uniform in this Court since the year 1881, that the “date of issuing a notice” meant the date of the order of the court directing that notice should go. The Bombay High Court seems to have followed a similar practice, whilst the High Courts of Madras and Calcutta have taken a different view. The expression “issuing of a notice” or “issue of notice” is somewhat ambiguous. What happens in the court is that an application is made for execution. The court orders that notice should go to the party against whom execution is sought. That notice is prepared in the office and is signed either by the Judge or some person whom he deposes to sign for him. In the present case the notice is signed by the Munsarim. After the notice is prepared and signed and sealed it is given to the Nazir who in turn selects a peon, who is to serve it on the party to whom it is directed. It is extremely difficult to say when a notice

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of this kind can be said to have been "issued." The "issue" is certainly not complete when the court makes its order directing that notice is to go. It is still incomplete when it is prepared and signed by the Munsarim. In fact the "issuing" is not fully complete until it has actually left the hands of the Nazir and has been given into the hands of the peon (or process server). If this question which we have had discussed before us in the present case was *res integra*, we would find it extremely difficult to say what was the date of the "issue" of the notice within the meaning of the article. The "issue" of a notice seems to be a proceeding which begins with the order of the court and ends with delivery of a notice to a process server for service. Possibly a convenient date might be the one which has been suggested in the course of the argument, namely the date which the notice itself bears. We however think that we ought to adhere to the practice which has been in force for a very great number of years in these provinces unless we come to the conclusion that there was a deliberate alteration in the present Limitation Act. What is required in the interest of justice is a settled rule and a date that is certain. The date of handing over to the peon for service would be a very inconvenient date. We find it impossible to see that there is any difference between the expression "date of issuing of a notice" and the expression "date of issue of notice." That being so, we think the established practice should prevail and that the order below was wrong.

A second point was mentioned in the course of the argument, namely that some of the decree-holders are minors and that they are entitled to the benefit of section 7 of the Limitation Act. It appears in the present case that at the time the decree was made the decree-holders were all of full age that also at the time of the application of 1914 the decree-holders were of full age, and that it was after the date on which the application was struck off that the minority ensued. Under these circumstances the decree-holders are not entitled to the benefit of section 7. See *Bhagat Behari Lal v. Ram Nath* (1). We were referred to the Full Bench decision in I. L. R., 22 All., 199. In that case there had been an application on behalf of minor decree-holders which gave a fresh starting point and accordingly the decree-holders were within the express provisions of section 7.

We allow the appeal, set aside the order of the court below and dismiss the application for execution with costs in both courts.

B. K. M.

Appeal decreed.

(1) [1905] I. L. R., 27 All., 199.

[See, however, *Nilkanth Lazman Joshi v. Ragho Mahadu Pavale*, [1918] 20 Bom. L. R., 351.—Ed.]

GOBARDHAN (*Defendant*)

versus

MANNA LAL (*Plaintiff*)*

CIVIL

1918

April, 30.

BANERJI, J.
A. RAOOF, J.

Code of Civil Procedure (Act V of 1908), section 11, Expl. 5—Mortgage—Suit on mortgage-bond—Person claiming paramount title—Not a necessary party—Issue as to paramount title cannot be litigated—Res judicata.

In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit.

Joti Prasad v. Asis Khan, I. L. R., 31 All., 11 and *Jaggeswar Dutt v. Bhuban*, I. L. R., 33 Cal., 425 referred to.

A person was impleaded as a subsequent mortgagee in a suit upon a mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. He, however, did not enter appearance in that suit. The mortgagors asserted that he was entitled as owner to a portion of the property. The court held that the mortgagors were estopped from raising that plea and ordered the whole property to be sold. In a subsequent suit by the subsequent mortgagee for a declaration of his right in respect of the portion in controversy in the former suit, held that he was not precluded from raising the question inasmuch as in the former suit he filled two capacities, *viz.*, (1) as a subsequent mortgagee in which capacity he was entitled to raise such defence as was open to the mortgagors, and (2) as claiming a paramount title in which case he could not raise the question in that suit.

SECOND APPEAL from a decree of D. R. LYLE, Esq., District Judge of Agra, confirming a decree of Babu Pirthvi Nath, Subordinate Judge of Muttra.

Misri Lal and Murli held two mortgages dated 20th October 1906 and 8th April 1908, respectively, in both of which the same $4\frac{3}{4}$ biswas of a certain village were mortgaged. Subsequently the mortgagors mortgaged 1 biswa out of the $4\frac{3}{4}$ biswas to Munna Lal. Misri Lal and Murli brought two suits on their two mortgages, and in each suit they impleaded Munna Lal as a subsequent mortgagee. In the first suit, based on the earlier mortgage, Munna Lal did not appear, but the mortgagors raised a plea that they were the owners of only 1 biswa out of the $4\frac{3}{4}$ biswas which they had mortgaged and that Munna Lal was the owner of the remaining $3\frac{3}{4}$ biswas.

*S A. No. 1600 of 1916.

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An issue was framed on the point, but the court decided that the mortgagors were estopped from impugning the validity of their mortgage, and decreed on 25th January, 1913, the sale of the whole property. In the second suit Munna Lal appeared and set up his title to the $3\frac{3}{4}$ biswas. The court held that the question of Munna Lal's paramount title could not be decided in that suit and decreed the suit in respect of the whole property on 26th March, 1914, and said that Munna Lal might bring a separate suit to try the question of his title. Munna Lal then brought a suit for that purpose and claimed a declaration that the $3\frac{3}{4}$ biswas belonged to him and were not liable to be sold in execution of the decrees obtained by Misri Lal and Murli. The defendants raised *inter alia* the plea that the two decrees aforesaid operated as *res judicata* and that Munna Lal could not now raise the question of his title. Both the lower courts overruled this objection, and finding on the merits in favour of Munna Lal, decreed his suit. Hence this appeal.

A. H. C. Hamilton, (with him Sheo Dihal Sinha), for the appellants:—The question as to whether the mortgagors owned the whole of the $4\frac{3}{4}$ biswas or whether Munna Lal owned $3\frac{3}{4}$ biswas out of it is *res judicata* between the parties. Munna Lal was a party to the suits brought on the two mortgages.

[BANERJI, J.—In the second of those two suits the court did not decide the question of Munna Lal's ownership and expressly left the matter open for a future suit.]

That is so; but in the first suit an issue was framed as to the extent of the mortgagor's share in the property mortgaged, and that issue was decided against Munna Lal. It was immaterial that he was absent and did not defend the suit. The decree in the first suit operates as *res judicata*. I am supported by the ruling in

Shyama Charan v. Mrinmayi Debi, [1902] I. L. R., 31 Cal., 79.

Although in the second suit the question was not gone into and determined, yet it having been determined between the same parties in the first suit, the decree in the first suit constitutes *res judicata*.

Narayan Prasad Asthana, for the respondent:—In the previous suits Munna Lal had been impleaded only as a subsequent mortgagee, and in that capacity he could raise only those pleas which the mortgagors themselves could raise. He, therefore, could not raise any plea which would detract from the validity of the mortgages. No doubt he also filled another character by virtue of his paramount title in respect of $3\frac{3}{4}$ biswas. But this title he could not put in issue in that suit, nor could the court adjudicate upon it. In the first suit the court held that the mortgagors were estopped from disputing the extent of the share, and any pronouncement on the question of Munna Lal's ownership was in the nature of *obiter dictum*, and not conclusive. The question of his title was not a

matter directly and substantially in issue in the mortgage suit, and the decree does not operate as *res judicata*. I rely on the following cases :

Jyoti Prasad v. Asis Khan [1908] I L. R., 31 All., 11,
Jageswar Dutt v. Bhuban Mohan, [1906] I. L. R., 33 Cal., 425,
Girija Kanta v. Mohim Chandra, [1915] 35 I. C., 294 Cal.

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A. H. C. Hamilton, in reply :—There is a passage at p. 439 of the case in I. L. R., 33 Cal., cited by the respondent, which shows that where in a mortgage suit a question of paramount title is gone into and determined, it is an effective decision on the point. There is no reason why such a decision should not have the force of *res judicata*.

The judgment of the Court was delivered by

BANERJI, J.—This appeal arises out of a suit brought under the following circumstances. Soban Lal and Shiam Lal, defendants executed two mortgages in favour of Misri Lal and Murli on the 20th of October, 1906, and the 8th of April, 1908, respectively. In both mortgages the same property, namely $4\frac{3}{4}$ biswas of mauza Behta, mahal Munna Lal was mortgaged. Subsequently to these mortgages, the mortgagors mortgaged a one biswa share out of the aforesaid $4\frac{3}{4}$ biswas in favour of Munna Lal. The mortgagees brought two separate suits on the basis of the two mortgages but impleaded as defendants to each suit not only the mortgagors but Munna Lal also. Munna Lal was made a party to each of these suits as subsequent mortgagee of a one biswa share. The first suit was decreed on the 25th of January, 1913, and the second on the 26th of March, 1914. In the first suit Munna Lal did not appear but the mortgagors raised the plea that they were the owners of a one biswa share only and were not competent to mortgage the remaining $3\frac{3}{4}$ biswas which they alleged belonged to Munna Lal. The court framed an issue as to the extent of the mortgagor's rights and the validity of the mortgage as regard $3\frac{3}{4}$ biswas and decided that the mortgagors were estopped from asserting that the whole of the property which they professed to mortgage, did not belong to them. In the course of the judgment the court made some remarks as to Munna Lal's rights and in the end made a decree for the sale of the whole of the mortgaged property, namely the $4\frac{3}{4}$ biswa share in mauza Behta. In the second suit brought upon the second mortgage Munna Lal did appear and he put forward the contention that the $3\frac{3}{4}$ biswas belonged to him and that the mortgagors had no right to mortgage that share. The court held that as Munna Lal set up a paramount title as regards the $3\frac{3}{4}$ biswa share, the question of his title could not be tried in the suit, and refused to try it, but it made a decree for the sale of the $4\frac{3}{4}$ biswas. In that suit the court distinctly said that Munna

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Lal's remedy was to bring a suit of his own to try the question of his title. The present suit was thereupon instituted by Munna Lal and he asked for a declaration that the mortgagors were the owners of only a one biswa share and that the mortgagees had no right to put to auction sale in execution of the two decrees obtained by them, any portion of the remaining $3\frac{3}{4}$ biswa share which he alleged belonged exclusively to him and not to the mortgagors: Both the court of first instance and the lower appellate court found that the $3\frac{3}{4}$ biswas claimed by the plaintiff belonged to the plaintiff and that the mortgagors Sohan Lal and Shiam Lal were owners of one biswa only. It was contended in the courts below that the previous decrees obtained by the mortgagees operated as *res judicata* and the question of the plaintiff's alleged title could not be re-opened and litigated in a separate suit brought by the plaintiff. This plea was overruled by the courts below. It has been repeated in the appeal before us. Mr. Hamilton who appears for the appellants has conceded that as in the second suit brought on the basis of the second mortgage decided by the Subordinate Judge on the 26th of March, 1914, the court distinctly refused to try the issue as to the title of Munna Lal in respect of $3\frac{3}{4}$ biswas, the decision in that case cannot be held to be *res judicata*; but he contends that the decision in the earlier suit has the effect of *res judicata*. As we have said above, both the courts below have found that the property claimed by the plaintiff Munna Lal belongs to him. We have therefore to consider whether Munna Lal is precluded by any provisions of law from putting forward the title which has been found to exist in him and in respect of which we are bound to accept the finding of the court below. In order to determine whether the question of Munna Lal's title is *res judicata*, we have to see whether in the previous suit this question was directly and substantially in issue. We must take it as settled law that in a suit brought by a mortgagee to enforce his mortgage a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. We may refer to the decision of this Court in *Joti Prasad v. Aziz Khan* (1). That case followed a ruling of the Calcutta High Court in *Jaggaswar Dutt v. Bhuban Mohan Mitra* (2). It is true that in the present instance Munna Lal was made a party to the suit brought by the mortgagees on the basis of the first mortgage, but he was made a party not as a person claiming a paramount title but as subsequent mortgagee of a one biswa share and this representing the mortgagors as regards that share. As such representative he could not raise the question of his paramount title. That apparently was the reason why he did not appear in the suit. He filled two capacities in that litigation;

(1) [1908] I. L. R., 31 All., 11.

(2) [1906] I. L. R., 33 Cal., 426.

viz., first, that of a subsequent mortgagee and as such representing the mortgagor as regards a part of the mortgaged property; and secondly, as a person setting up a paramount title in respect of $3\frac{3}{4}$ biswas. The question of his paramount title could not be litigated in that suit. Therefore no issue could be framed in regard to that question and no such issue could be determined as an issue which arose directly and substantially, as between him and the mortgagee. The mortgagors, it is true, asserted that Munna Lal owned a $3\frac{3}{4}$ biswa share and that they, the mortgagors, were not competent to mortgage that share and to the extent of that share the mortgage was invalid. It is in reference to this plea that an issue was framed as to the right of the mortgagors to mortgage the whole of the $4\frac{3}{4}$ biswas. The court decided that the mortgagors who had made the mortgage were estopped from questioning the validity of the mortgage and asserting that they were not the owners of the property which they mortgaged on the representation that they were the owners thereof. In the course of the judgment the learned Subordinate Judge made some observation in respect to Munna Lal but these observations were nothing more than *obiter dicta* and could not as between the mortgagees and Munna Lal be treated as a decision on the question of the paramount title of Munna Lal. In this view it cannot be said that the question of Munna Lal's title has become *res judicata* by reason of the decision in the previous suit. It may be, as observed in *Jaggewar Dutt v. Bhuban Mohan Mittra*, (1), that if Munna Lal had allowed the question of his paramount title to be determined in the suit, he might not be permitted in appeal to contend that the decree of the court below was vitiated by reason of the determination of that question, but that was not the case here. In the present suit Munna Lal did not appear and he did not put into issue the question of his title in respect of the $3\frac{3}{4}$ biswa share. That question therefore remained an open question as between him and the mortgagee and he is entitled in a subsequent suit to raise the same question. It is true that the decree in the previous suit was a decree for the sale of the whole of the $4\frac{3}{4}$ biswas, but that is the only decree which could be made in the previous suit, and so far as the $3\frac{3}{4}$ biswa share is concerned, Munna Lal must be treated as if he was not a party to the previous suit. The principle of the decision of the Calcutta High Court in *Girija Kanta Chakrabatty v. Mohim Chandra Acharya* (2), is applicable to the present case. There in a suit by a mortgagee the legal representative of one of the mortgagors who had died, was made a party as representing the mortgagor. A decree was obtained against him and the property was sold. The auction purchaser having been resisted in obtaining possession of a portion of the

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(1) [1906] I. L. R., 33 Cal., 425.

(2) [1915] 85 I. C., 294.

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property sold brought a suit for possession. In that suit the representative of the mortgagor, who had been a party to the previous suit, set up an independent title to the property claimed. It was held that he has not precluded from raising the question of his title by reason of the previous decree passed against him." In this case Munna Lal was a party to the suit as representing the mortgagor in respect of a one biswa share. He could not be made a party as claiming paramount title to the remaining $3\frac{3}{4}$ biswas. The fact of a decree having been passed against him as representative of the mortgagors, could not upon the principle of the ruling to which we have referred and on general principles, preclude him from bringing a suit of his own to try the question of his title, and the court from granting a decree to him in respect of the title which it has found to exist. In this view we are of opinion that the appeal must fail. We accordingly dismiss it with costs.

B. K. M.

Appeal dismissed.

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June, 14.

A. RAOOF, J.

BALDEVA (*Defendant*)*versus*PANNA LAL (*Plaintiff*)*

*Provincial Small Cause Courts Act (IX of 1887), Schedule II Article 13—
Suit for realisation of dues—Wajib-ul-arz—Landlord and tenant—Haqq—
Small Cause Court, jurisdiction of.*

A suit instituted by a zemindar in the Court of Small Causes to realise from his tenant, an oilman, the price of the quantity of oil which the latter was bound to render to him under the provisions of the *wajib-ul-arz* is not cognizable by such court under article 13 of the Provincial Small Cause Courts Act.

CIVIL REVISION from an order of BABU RAJ BEHARI LAL, Judge of the Court of Small Causes of Mainpuri.

Baleshwari Prasad, for the applicant.

Girdharilal Agarwala, for the opposite party.

The following judgment was delivered by

A. Raoof, J.

ABDUL RAOOF, J.—Bobra Panna Lal the plaintiff in this case brought this suit against Baldeva Teli upon the following allegations:—In paragraph 1 of the plaint he stated that the plaintiff was a zemindar co-sharer and also a lambardar in mauza Maholi

*Civ. Riv. No. 28 of 1918.

Shamsherganj tahsil Bhogaon district Mainpuri. In paragraph 2 of the plaint he stated that in accordance with the condition and custom entered in the *wajib-ul-arz*, the defendant was liable to give and deliver to the plaintiff two chataks of oil daily, that is to say $3\frac{1}{2}$ seers every month. In paragraph 3 he stated that the defendant had not complied with the condition in the *wajib-ul-arz* for the period therein stated and he therefore claimed Rs. 49-8-0 as the price of the oil which had not been delivered to him by the defendant. The suit was filed on the 6th of August, 1917. In support of his claim the plaintiff filed a copy of an extract from the *wajib-ul-arz* in which the custom relied upon was entered. The *wajib-ul-arz* is dated the 10th of September, 1872, and its Chapter IV, clause 6 is described in these words:—“*Fasil chaharam dafa shaham raqum jo malkan ko sakinaa ghair mazaran se leni jayiz hai*”. Below this the entry is made in these words:—“*Teli yan se tel muafiq jalane rozmarra chaupal aur dewali men ba wazan ek ser*”. The suit was brought on the basis of this entry in the *wajib-ul-arz* and it was decreed *ex-parte*. The present application for revision has been filed against the decree and judgment of the court below. The ground taken before me is that the suit was not cognizable by a Court of Small Causes and reliance is placed upon article 13 of Schedule II attached to the Provincial Small Cause Court Act. The article runs thus:—“A suit to enforce payment of the allowance or fees respectively called *malikana* and *hakk* or of cesses or *other dues* when the cesses or dues are payable to a person by reason of his interest in immoveable property or in an hereditary office or in a shrine or other religious institution.” The present suit is certainly for dues which are claimed by the plaintiff as payable to him by reason of his interest in immoveable property. The plea taken in revision is a valid plea and I think it was clearly contemplated to exclude such a suit from the cognizance of a Court of Small Causes. I hold that the court below had no jurisdiction to entertain this suit. I allow the application, set aside the judgment and decree passed by the court below and under Order 7, rule 10 of the Code of Civil Procedure I direct that the plaint be returned to the plaintiff to be presented to the court in which the suit should have been instituted. The applicant will be entitled to his costs and I order accordingly.

Application allowed.

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May, 8.

PIGGOTT, J.
WALSH, J.LACHHMI KUNWAR (*Defendant*)

versus

DURGA KUNWAR (*Plaintiff*)*

*Family arrangement—agreement executed under a wrong view of facts and law.
Not binding—Hindu law—Adoption by widow after estate has vested in an
heir—Divesting of estate.*

N and *P* were brothers. *N* died leaving a widow *L*. Subsequently *P* died leaving a widow *D*. Upon *P*'s death the two widows apportioned the whole property in equal shares between themselves. In the document which was executed for the purpose it was stated that the two brothers were "joint in food, business and everything," but it was followed by the recital that the two widows were entitled to the property in equal shares. Disputes having broken out between the two widows, two cross suits were filed, one on behalf of *L* and the other on behalf of *D*. *L* alleged that she had been authorised by her husband to adopt a son, and that she intended to adopt one whereupon a dispute arose between her and *D* which was referred to arbitration and that resulted in the former partition. She prayed for separate possession of her share allotted in the partition. *D* in her suit asserted that on *N*'s death her husband *P* succeeded to the whole estate by right of survivorship and on his death she acquired a Hindu widow's estate in the property and that the deed of partition was not binding on her, her signature thereto having been obtained by fraud and in ignorance of the nature of the deed and her legal rights. It was found by the court below that *N* and *P* were members of a joint Hindu family and on the former dying without issue *P* became owner of the whole by right of survivorship, and that the deed of partition was not binding on *D*. Held that the deed of partition, evidently had been executed by *D* under the mistaken belief that she and *L* were equal owners of the property left by her husband and that she would be divested of her rights by an adoption made by *L*, and consequently it was not binding on *D*.

Held also that a widow's power to adopt a son is at an end when the estate has vested in the widow of a co-parceer who had got the estate by survivorship after the death of the adopting widow's husband.

FIRST APPEAL from a decree of MAULVI SHAMS-UD-DIN KHAN, First Additional Subordinate Judge of Aligarh.

The facts of the case are fully set forth in the judgment. Briefly stated, they were as follows:—Nathmal Das and Pem Raj

were two brothers. Nathmal Das died, leaving a widow Musammat Lachhmi Kunwar, and her name was entered in the village papers in respect of the property which had stood in her husband's name. Within a year, Pem Raj died leaving a widow Musammat Durga Kunwar, besides daughters. Musammat Durga Kunwar's name was entered in respect of the property which had stood in Pem Raj's name. A few months later the two widows executed and got registered a partition deed in which it was set out that the two brothers had been joint till death, that after their death the two executants became the owners in equal shares of the property left by the two brothers, and that the property had now been apportioned between themselves in two equal lots which were specified. About a year later disputes arose between them, and they filed two cross suits against each other. Musammat Lachhmi Kunwar set out in her plaint that she had been authorised by her husband to adopt a son, that she wished to do so, that thereupon disputes arose with Musammat Durga Kunwar regarding the property, that the matter was referred to arbitrators who made an award, and that the partition deed was executed in accordance with that award. She prayed for a declaration of her right to separate possession of the property allotted to her by the partition deed. Musammat Durga Kunwar in her plaint stated that on the death of Nathmal Das, Pem Raj became by survivorship the owner of the whole property, that upon the death of the latter she became entitled to the whole property, and that the partition deed was not binding on her in as much as her signature had been obtained by fraud and in ignorance of the nature of the deed and of her legal rights. The court found in favour of the allegations of Musammat Durga Kunwar, and decreed her suit and dismissed the other. Musammat Lachhmi Kunwar appealed.

B. E. O'Connor, (with him *S. Abdullah*), for the appellant, after discussing the evidence submitted that the lower court had considered the case from a wrong point of view. The deed of partition was executed by both the widows, and it was binding on the parties as a family settlement. The question to be considered was not what the actual rights of the parties were at the time when that deed was executed, but whether there was a dispute between, or doubt in the minds of, those parties as to their respective rights, which dispute or doubt was settled by means of the partition deed. Therefore, the question was not whether the two brothers were, as a matter of fact, joint or separate, but whether there was not a dispute on that point. As regards the threat of adoption the question, similarly, was not whether if made it would divest the estate of Musammat Durga Kunwar, but whether she could have been influenced, by the idea of a possible adoption divesting her whole estate, into giving up half the property in order to avoid a dispute. It was well-

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established that a family settlement had to be examined not in the light of what a court of law would decide on the matters in question, but what the members settling the matters might have reasonably thought their rights to be.

Peary Lal Banerji, for the respondent.—It has been found, and in fact it was set out in the partition deed itself, that the two brothers were joint. Assuming that Musammat Durga Kunwar did execute the deed as a free and intelligent agent, she purported to do so on the assumption that the two widows were entitled to equal shares. Consequently if she was made to believe that where two brothers were joint their widows succeeded to equal shares, that would altogether vitiate the settlement.

Further, as a matter of law, if Musammat Lachhmi Kunwar had made an adoption to Nathmal Das after the estate had vested in Musammat Durga Kunwar the adoption would have been invalid and would not have divested Musammat Durga Kunwar.

Chandra bin Bhau v. Gojarabai, [1890] I. L. R., 14 Bom., 465.

Ram Krishna Ram Chandra v. Sham Rao, [1902] I. L. R., 26 Bom., 526. F. B.,

Adiri Suryaprakasa v. Nidamarty, [1908] I. L. R., 33 Mad., 228.

If, therefore, Musammat Durga Kunwar was made to believe that such an adoption would divest her estate, and she entered into the settlement under such belief, it would not be binding on her.

In deciding whether the deed of partition is binding upon Musammat Durga Kunwar, the court has to consider not only whether she knew what she was executing, but also the circumstances which induced her to enter into the transaction.

B. E. O'Connor, was heard in reply.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—The litigation leading to these two first appeals arises out of the following state of facts. One Kundan Lal had two sons, Nathmal Das and Pem Raj. Nathmal Das died in the month of June, 1913, leaving no children surviving him but a widow, Musammat Lachhmi Kunwar, who is the appellant in both the appeals now before us. Pem Raj died in the month of February 1914. He left no son but he left daughters and a widow, Musammat Durga Kunwar, who is the respondent in both these appeals. It is a matter of some significance that there are now living sons of the aforesaid daughters of Pem Raj by the respondent Durga Kunwar. On the 29th of July, 1914, the two widows presented themselves outside the office of the Sub-Registrar at Khurja. Musammat Lachhmi Kunwar there tendered for registration a certain

document which is printed at A 20 and the following pages of our record of first appeal No. 80 of 1916. The Sub-Registrar read over this document to the two ladies, who were sitting concealed from the public gaze behind the curtains of a bullock cart. Each lady was identified by an own brother there present for that purpose. The Sub-Registrar read over the document and both ladies admitted execution. The document was then registered. It commences with a recital to the effect that the two brothers, Nathmal Das and Pem Raj, lived jointly, which is followed up by the emphatic amplification that "they were joint in food, business and everything." It is then admitted that Nathmal Das died first and Pem Raj after him; but upon this admission follows the curious recital that the two executants of the document, the widows of the aforesaid brothers, "became the owners of the property left by our husbands in equal shares." On this basis the two executants proceed to a detailed division and apportionment of the estate which originally belonged to Nathmal Das and Pem Raj between themselves. It is not denied that the apportionment is a fair one on the basis on which it proceeded, namely on the assumption that the two executants were the owners of the property in equal shares. About a year later a dispute broke out upon applications made by both ladies for a succession certificate in respect of the collection of certain debts due to their husbands. The necessary certificate was eventually granted to Musammat Durga Kunwar, for reasons with which we are not concerned; but the dispute over this matter led to the institution of two distinct suits. In each case one of the widows came into court as plaintiff and impleaded the other as defendant. Musammat Lachhmi Kunwar asked for a declaration affirming her right to separate possession and enjoyment of the property allotted to her by the deed of the 29th of July, 1914, already referred to. In her plaint she states that on the death of each of the brothers their respective widows had entered into possession and enjoyment each of the undivided share in the family property belonging to her own husband. She then suggests that a dispute had arisen because she, Musammat Lachhmi Kunwar, had been authorised by her late husband to adopt a son to him and was proposing to exercise that right. Hence there was a reference to arbitration and a division of the property between the two ladies was effected by two arbitrators named in the plaint. The deed of the 29th of July, 1914, was drawn up on the basis of the division made by these arbitrators. It was duly executed by both the parties and Musammat Lachhmi Kunwar claims that it is binding upon the widow of Pem Raj. Musammat Durga Kunwar sues for a declaration that she is in no way bound by this document, that she is in law the owner of the entire property which had formerly belonged to the two brothers, Nathmal Das and Pem Raj, and is entitled to be put and maintained in possession of the same in spite of anything contained in the partition deed already mentioned. Her case

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against that document is set-forth in paragraphs 9 and 10 of her plaint, the essential portions of which it seems worth-while to reproduce in detail.

"The plaintiff has not executed any deed of partition, nor did the plaintiff understand her legal rights, nor was there any opportunity to understand them. If the defendant took unlawful advantage of the plaintiff's position improperly on the strength of her brothers and obtained any document from the plaintiff on false allegations, such proceedings cannot be binding upon the plaintiff, nor can the defendant benefit from such proceedings and documents. The plaintiff is a *pardahnashin* lady and is illiterate and hard of hearing. She has no knowledge of zamindari affairs and legal rights. Moreover she did not get an opportunity to make enquiries owing to grief".

In the evidence which she gave in court Musammat Durga Kunwar went the whole length of setting up a case of fraud pure and simple. She said that the brothers of Musammat Lachhmi Kunwar, having secured the assistance of her own brother, took her to the tahsil at Khurja, telling her that certain arrangements were being made about the lambardarship of the landed property. She was too hard of hearing to be able to understand any document from its merely being read over to her, but she had been told that she must say "yes" in reply to any question that might be asked her and must put her thumb impression to any paper which might be placed before her for that purpose. In this way she accounts for the execution of the deed in question. There has been a good deal of conflicting evidence in the court below, but the learned Subordinate Judge has made up his mind to go the whole way with Musammat Durga Kunwar and has substantially found in favour of her allegations of fraud as made in her evidence. In appeal we have been asked to consider rather what would be the position of Musammat Durga Kunwar in respect of this document, even assuming that she executed it after understanding its contents and its general effect as dividing the family property equally between herself and Lachhmi Kunwar. The first question which comes up for consideration in this connection is that of the jointness or separation of Nathmal Das and Pem Raj. There was a distinct issue upon this point in the court below and a good deal of conflicting evidence was produced; but the learned Subordinate Judge has come to a clear finding that the brothers were members of a joint undivided Hindu family at the moment of the death of Nathmal Das. This finding is not challenged in the memorandum of appeal which Musammat Lachhmi Kunwar has filed in identical terms in each of the two cases. It is unnecessary therefore for us to go into the evidence upon which it rests, beyond remarking that there certainly was evidence to support it, including Musammat Lachhmi Kunwar's own admission in the disputed document of July

the 29th, 1914. We must take it therefore that when Nathmal Das died the whole of what had been the joint family property of himself and his brother passed by survivorship to Pem Raj. Musammat Lachhmi Kunwar retained nothing in law except a right to maintenance. When Pem Raj died the estate vested by inheritance in his widow Musammat Durga Kunwar. The question then is whether this lady is bound by a gratuitous alienation of one-half of this property, effected on the basis of a document which starts with the recital that she and Musammat Lachhmi Kunwar are the owners of the property in question in equal shares. This recital is wrong upon the facts. If Musammat Durga Kunwar was induced to believe it to be true by any body better acquainted with the facts, she is entitled to relief against this document on the ground that she was deceived into executing it and that she executed it without such knowledge of the facts and of her true position as would be necessary in order to bind a *pardahnashin* lady in a transaction of this sort. If on the other hand both the parties to the document were under a mistaken impression as to their ownership, the contract in question is liable to be set aside on the ground of common mistake, if upon no other. From this point of view the position seems clear enough. The best that could be said on behalf of Musammat Lachhmi Kunwar has been to contend that the document in question represents in some way a reasonable settlement of a *bona fide* dispute. That dispute can scarcely have been on the question whether Nathmal Das and Pem Raj were joint or separate, when the document itself recites that they were joint. In Musammat Lachhmi Kunwar's plaint, and also in some of the evidence led by her, an attempt was made to suggest that there was a *bona fide* dispute between the parties of quite a different kind. The suggestion is that Musammat Lachhmi Kunwar was proposing to adopt a son to her deceased husband, that the effect of this adoption would be to deprive Musammat Durga Kunwar of the estate held by her as widow of Pem Raj, or at least of one-half of the estate, and that, in order to avoid a dispute upon this point and to make sure that any adoption which Lachhmi Kunwar might effect would not give the adoptive son more than one-half of the estate, she was induced to enter into the transaction in question. Whether the evidence on the record would bear out this plea, as a matter of fact, assuming that it proceeded upon correct propositions of law, is an arguable question. The plea may be disposed of upon the ground that it does not proceed upon a correct proposition of law. It is sufficient to refer to two cases, *Chandra v. Gojara Bai* (1) and *Adivi Suryaprakasa Rao v. Nidamarty Gangaraju* (2), as authority for the proposition that any adoption which Musammat Lachhmi Kunwar might make, or might purport to make, to her deceased husband, after that husband and his surviving brother

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(1) [1890] I. L. R., 14 Bom., 463. (2) [1908] I. L. R., 33 Mad., 228.

THE BHARATPUR STATE (*Plaintiff*)
versus
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 COUNCIL (*Defendant*)*

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April, 29.

Escheat to the Crown—Right of Zemindar—Residents in houses on the abadi in village Sakitra—Rights of such residents—Death without legal heirs.

PIGGOTT, J.
 WALSH, J.

Two persons, *D* and *M*, Sahukars by profession were owners and occupiers of a house situated within the limits of a village known as mauza Sakitra, and also within the limits of the town of Gobardhan. *D* and *M* died in that house without leaving any heirs. The Collector of Muttra representing the Secretary of State for India took possession of the house and its site as the ultimate heir to the property of a deceased person. The plaintiff, the Bharatpur State, claimed the site as zemindar and asserted that *D* and *M* were owners of only the materials of the house with a right of residence therein, but had no right to transfer the site or the right of residence. The defendant on the other hand contended that the house being situated in a town the owners of it were also owners of the site and consequently the house escheated to him. The plaintiff's case rested on two sets of documents, namely, the Settlement Papers prepared in 1850 A. D., and the *wajib-ul-ars* of 1877 A. D. The *wajib-ul-ars* provided that residents in houses of mauza Sakitra, though their houses might form part of the town of Gobardhan, had no proprietary rights in anything except the materials thereof, and they could not sell the site or the right of residence on the site; and that in the event of the death of the occupier of such a house without legal heirs, the proprietor of mauza Sakitra, would be entitled to possession of the house along with the site. Under the documents of 1850 A. D., the Government conferred on the Bharatpur State Revenue-free proprietary rights over the soil of the 5 biswa mahal of mauza Sakitra:—*Held* upon the facts and the evidence in the case that *D* and *M* were limited owners of the house and that the effect of the settlement of 1850 A. D., was to grant to the Bharatpur State proprietary rights in the *abadi* of mauza Sakitra, and that therefore the Bharatpur State was entitled to the house and the site of the house.

Tulshi Ram v. Gur Dayal, I. L. R., 31 All., 111, applied.

FIRST APPEAL from a decree of B. O. FOREES, ESQ., Subordinate Judge of Muttra.

* F. A. No. 376 of 1915

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Motilal Nehru and Baldeo Ram Dave, for the appellant.

A. E. Ryves, for the respondent.

The following judgments were delivered.

PIGGOTT, J.—This is an appeal by an unsuccessful plaintiff, the Bharatpur State, against the Secretary of State for India in Council, in which the plaintiff's claim was for possession of a certain house. The house in question was admittedly situated within the limits of a village known as mauza Sakitra. Without going further into the arguments which have been addressed to us on the point, I am content to say that I accept the argument of the defendant respondent to the effect that it is also situated within the limits of the town of Gobardhan. The last owners and occupiers of this house mentioned either in the plaint or in the written statement were two persons of the name of Dip Chand and Mansa Ram, who were Sahukars by profession and resided and carried on business in the said house. It is common ground that both these persons are now dead and have left no heirs entitled to inherit their property. The defendant, acting through the Collector of Muttra, has taken possession of this house and its site in assertion of his claims as ultimate heir to the property of a deceased person. The plaintiff's claim is that he is the owner of the site on which the house stood, that Dip Chand and Mansa Ram were no doubt the owners of the materials of the house and had a right of residence therein, which could have descended to their heirs if any. Nevertheless, according to the plaintiff's case, Dip Chand and Mansa Ram had no transferable interest in respect of the site or the right of residence thereon, and were therefore in respect of this house merely the owners of a limited interest. With regard to the question of law on which this claim is based there has been no argument before us. Both parties are agreed that the law on the subject is correctly laid down in the case of *Tulshi Ram Sahu v. Gur Dayal Singh* (1). It is conceded on behalf of the defendant respondent that if Dip Chand and Mansa Ram possessed in respect of the property in suit merely a limited interest, then this interest of theirs could not be the subject of escheat to the Crown and the claim of the plaintiff as owner of the soil cannot be resisted. The case for the defendant, however, is that the house in suit, being situated within the limits of a town, is not subject to the ordinary law governing the relations between occupiers of houses and the ground landlord in the inhabited sites of agricultural villages in these provinces, and that as a matter of fact Dip Chand and Mansa Ram could have sold the house in suit at any time, with the right of occupation and residence, and that the purchaser would thereby have obtained a good title which could not have been contested by the Bharatpur State. The plaintiff has rested his case mainly upon two sets of documents, the Settlement Papers prepared in the year 1850, which

(1) [1910] I. L. R., 33 All, 111, (F. B.)

are printed at pages A 14-A 23 of our record, and secondly a certified copy of the *wajib-ul-arz* or record of rights of mauza Sakitra prepared at the settlement of 1877 A. D. The learned Judge of the court below has found that, on a true interpretation of the terms of that *wajib-ul-arz*, the custom intended to be laid down is that all residents in houses situated within the limits of mauza Sakitra, even though their houses may form part of the town of Gobardhan, have no proprietary right in anything except the materials of the houses, they cannot sell the site, or sell the house along with a right of residence on the said site; and in the event of the occupier of such a house abandoning the same, or dying without legal heirs, the proprietor of mauza Sakitra, that is to say the Bharatpur State, will be entitled to possession of the house along with its site. Nevertheless the learned Subordinate Judge has come to the conclusion that the custom thus stated in the *wajib-ul-arz* of 1877 is not correctly stated and is not a custom binding as between the parties to this litigation. He says that the document in question as it stands is not a record of custom at all but merely a claim preferred on behalf of the proprietor of the Bharatpur State by his Agent. It does not purport to have been signed by any person representing the interests of Dip Chand and Mansa Ram, would not have been binding upon them and would not even have formed a particularly strong piece of evidence against them, in the event of litigation between the Bharatpur State and any transferee of theirs. From this the court below has gone on to hold that the conditions laid down in this document are not binding on the defendant and that, in view of other evidence on the record, it must be taken to be proved that Dip Chand and Mansa Ram, along with all other residents in the town of Gobardhan, possessed an absolute right of transfer in respect of the houses occupied by them. On this ground the court below has affirmed the right of escheat claimed by the Secretary of State as defendant and has dismissed the plaintiff's suit. In the memorandum of appeal before us a point is taken as to the alleged wrongful exclusion of certain documentary evidence by the trial court, but it has been admitted in argument that this plea cannot be pressed. For the rest, the appellant's case is that he is entitled to succeed under the terms of the village record of rights and that, failing this, he would in any event be entitled to succeed on the ground that he is the proprietor of the site and must be presumed to possess in respect of any house standing upon his land the ordinary rights of proprietors of agricultural lands in respect of the inhabited sites appertaining to the mauzas of which they are the owners. A great deal of the argument before us at the hearing of this appeal was devoted to the question whether this mauza Sakitra, or more especially the particular mahal of mauza Sakitra in which the disputed house is situated, was or was not to be regarded as a purely agricultural

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village. The most important documentary evidence on this point is to be found in the Settlement Papers of the year 1850, to which reference has already been made. It appears that in that year the land of mauza Sakitra was settled by Government with the Bharatpur State in a somewhat peculiar manner. The village was divided into two mahals of 15 biswas and of 5 biswas, of which the former alone was assessed to revenue. With regard to the smaller mahal of 5 biswas a revenue-free grant was made in favour of the Bharatpur State, subject only to certain small payments on account of road cesses and *chaukidari* dues, or local police charges. The papers before us contain a complete description of the land appertaining to this revenue-free mahal of 5 biswas. I note more particularly that the cultivated area of this mahal amounted to a little less than 41 per cent. of the whole: that even if the land described as "old fallow" be added to the cultivated area, the total of the two comes to barely over 53 per cent. of the whole. Almost 22 per cent. of the entire area consists of groves and the rest is made up of thoroughfares, inhabited sites, tanks and unculturable land. Taking this description of the land along with the oral evidence, by which it is fully established that the inhabited site of village Sakitra forms, and has long formed, an integral part of the town of Gobardhan, I should be quite prepared, if the case turned upon it, to hold that the house in suit was not situated upon land forming part of the inhabited site of an ordinary agricultural village, so as to make the principles laid down by this Court in respect of the proprietorship of land in such village sites applicable in themselves to the land now in suit. What impresses me however on the other side is that this is a litigation between the owner of mauza Sakitra and the Government, that is to say, the very authority which granted to him revenue-free proprietary rights over the soil of this 5 biswas mahal of mauza Sakitra. I take it from the defendant's own case that in the year 1850, when this grant was made, the only inhabited site appertaining to mauza Sakitra consisted of houses, shops and the like which formed part of the town of Gobardhan. Nevertheless Government took a portion of this town and, treating it as the inhabited site or *abadi* of mauza Sakitra, granted it to the Bharatpur State as forming part of the revenue-free mahal of 5 biswas in the said mauza. Presumably Government meant something by making this grant and by including in the area so granted that portion of the town of Gobardhan in which the house now in dispute is situated. In an agreement which was taken from the Bharatpur State at the settlement of 1850 a number of details are given regarding the inhabited area included in the 5 biswa mahal. It is stated that there is a Katra, or large enclosure, in which there are a number of houses or shops, which have been constructed by the proprietor of the land, that is to say by the Bharatpur State, that all the other houses at that moment standing have

also been constructed by the same and that the Bharatpur State is not merely the owner of the soil but the owner of all the houses and of the aforementioned Katra standing in the *abadi* belonging to the 5 biswas mahal. It is asserted that the proprietor has every right in respect of the same and that, as regards the waste land then in existence, no one will be entitled to build upon it without his permission. The agreement in question appears to have been propounded by a duly authorised agent on behalf of Maharaja Balwant Singh, Raja of Bharatpur, and it is endorsed as having been accepted and ordered to be placed upon the record. At the subsequent settlement of 1877 A. D., an elaborate paragraph was drawn up and inserted in the record of rights of mauza Sakitra regarding the inhabited land appertaining to the village. This shows that there was no other inhabited site appertaining to the said village except that portion of the town of Gobardhan in which the house now in suit is situated. Nevertheless it was provided that if the cultivators, whether possessing occupancy rights or tenants at will, and also the *Riaya*, or tenants generally, have built any houses, cattle-sheds or other enclosures on this *abadi* site, their rights in the same are limited to the materials. They can sell the materials if they like, but not the site; and the meaning of these provisions I take to be that they have no transferable right of residence. There are other provisions in which more general words are used, such as "*bashindgan*" (residents) and in which the word *asami* is used for tenant in place of *Riaya*. In this connection it is expressly provided that, if any "*asami*" dies without an heir, the house occupied by him will pass to the Bharatpur State as proprietor of the site. The question of the interpretation of these provisions has been before the courts on other occasions. A good deal of reliance is placed on behalf of the defendant respondent on the result of a litigation which took place in the year 1906. The judgment is printed at page 6 of the book before us and in this judgment reference is made to the result of a previous litigation of the years 1874-75. Broadly speaking, it is sufficient to say that in this former litigation individual residents in the town of Gobardhan, and in that part of the town which forms the *abadi* of the 5 biswas mahal of mauza Sakitra, succeeded in asserting against the Bharatpur State, the present plaintiff, a right to sell their houses together with a right of residence in the same. The decision in the suit of 1906 proceeds upon a certain interpretation of the provisions of the *wajib-ul-arz* of 1877, according to which those provisions are limited in their application to agricultural tenants. In the present case the learned Subordinate Judge has refused to accept that interpretation. He holds that the words in the *wajib-ul-arz*, as they stand, are wide enough to include all residents (*bashindgan*) in houses situated on the *abadi* in question. The point has been argued again before us, but I feel no hesitation in agreeing with the interpretation put upon

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this document by the court below. I think the word "riaya" in itself is very general and is intended to extend the provisions in question to persons other than the occupancy and non-occupancy cultivating tenants spoken of immediately before. I think also that the word *asami* is wide enough, especially in this particular context, to include all residents of the *abadi*, even though not cultivating tenants or even agriculturists. What has determined the decision of this case in the court below has been the evidence of a number of instances in which residents of houses situated within the area in suit, that is to say, within the *abadi* of the 5 biswa mahal of mauza Sakitra, have exercised a right of transfer in respect of their houses, along with the right of residence in the same. In two of the instances already referred to the rights of the tenants in question were affirmed against the Bharatpur State after litigation. Evidence has also been given of at least four instances in which, on the death of the owner or occupier of a house within the area in question without leaving any heir, the right of escheat was successfully asserted on behalf of the Crown, apparently without any opposition by the Bharatpur State. Moreover, as the learned Subordinate Judge correctly points out, the evidential value of such a document as this *Wajib-ul-arz* of 1877 as against the occupiers of houses within the area in question at the time when this document was drawn up is not great. There is nothing in the document itself to show that any enquiry was made from these persons as to whether the rights recorded in favour of the proprietor of the soil, and to the prejudice of themselves, in this document were admitted by them to exist. The case however seems to be altogether otherwise in a litigation in which the contesting party is the Secretary of State for India in Council, that is to say the Government itself. The Government made the original grant of this 5 biswas revenue-free mahal in the year 1850; and if it did not intend to convey to the grantee, namely, the Bharatpur State, in respect of that portion of the site of the town of Gobardhan which was included in the mahal of 5 biswas of mauza Sakitra, the ordinary rights of a proprietor of an agricultural village in the inhabited site of such a village, it is difficult to see what rights it intended to confer by the grant of the particular area forming this inhabited site. It accepted at the time from the representative of the Bharatpur State a document which expressly admitted full ownership on the part of the said proprietor in respect of all existing houses on the *abadi* in question and recognised the justice of his claim that no one should in future build any house upon the unoccupied land appertaining to the said *abadi* without permission. Then at the settlement of 1877 a record of rights was drawn up under the direction of Government and included in the Settlement Papers, in which as I hold the right now claimed by the plaintiff in respect of the land in question is once more recognised. I do not wish to complicate what seems to me a tolerably straight-

forward case by suggesting that these Settlement Papers of 1850 and 1877 can be used so as to estop the Government, that is to say the defendant in this suit, from asserting that the papers in question were incorrectly prepared and that the rights acknowledged in these papers in favour of the plaintiff never in fact existed. I think however that it is very difficult for the defendant to get round these documents, otherwise than by proving some definite case of adverse possession on the part of the deceased owners through whom the defendant claims. It is not suggested that any case of this sort can be set up. On the evidence as it stands, as between the parties to this present suit, I think it must be held that the plaintiff has successfully discharged the burden of proof which lay upon him, and that Dip Chand and Mansa Ram did not possess an absolute interest, alienable at their will and pleasure, in respect of the property now in suit, but merely a limited interest which cannot be the subject of escheat to the Crown. The Full Bench case of this Court, *Tulshi Ram Sahu v. Gur Dayal Singh* (1), to which reference has already been made, was a case of the devolution of a fixed-rate tenancy; but the arguments there used seem to me to apply with a great deal of cogency to the facts of the present case. I would almost go so far as to say that, unless the defendant can show that the effect of the settlement of 1850 in favour of the Bharatpur State was not to grant to the proprietor of the 5 biswas mahal in village Sakitra any substantial rights of ownership in respect of what was described in the papers of that settlement as the *abadi* appertaining to this mahal, the defendant in the present suit cannot successfully maintain that Dip Chand and Mansa Ram possessed anything more than a limited interest in the house in question and in its site. Practically it seems to me that in taking possession of this house the defendant is derogating from the grant made in 1850 in favour of the Bharatpur State. The fact that there have been 3 or 4 other instances of similar encroachments on the part of the defendant, which have not been contested by the plaintiff, cannot take away from the plaintiff's rights in respect of the land now in suit, if those rights are sufficiently established as I hold them to be by the plaintiff's documents of title, namely the settlement records of 1850 and of 1877. In my opinion therefore we must accept this appeal, set aside the decree of the court below and decree the plaintiff's claim, as brought with costs throughout including in this Court fees on the higher scale.

WALSH, J.—I think this is a clear case. Mr. Motilal Nehru's argument on the document of September 1850 is well founded. That document seems to me consistent only with the existence at some time or another of an old agricultural village, and it is clearly proved that this house was in that village. The indications of an agricultural village, unless I am much mistaken, are over-whelming.

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Village customs, uncultivated land, a former settlement, and field map are referred to from time to time. Fairs are said to take place. There are no village expenses but the Raja's Karinda manages the village. The income from *sewai* items is taken by the weighmen on behalf of the Raja. No taxes are fixed but blankets are taken from the shepherds every year and various contributions in kind are raised from a carpenter, a blacksmith and a barber. The duties of the *chamars* are elaborately defined; and the whole thing seems to me to contain over-whelming internal evidence of the character of the collection of houses, and of the cultivated and uncultivated lands, with which it deals. The corresponding *khasra* speaks of the tenants residing in the village, including the carpenter already referred to, and by a singular coincidence a person of the same name, carrying on business as a *bania*, who bears a suspicious resemblance to the person through whom it is suggested that the Government are now entitled to escheat. This person's house is in a Katra (which I understand to be, whether in village or in town, a non-descript collection of every kind of house) in this village and I am satisfied that the house in question which it is admitted on the part of the Government is 100 years old was situated in that Katra at that date. The map is even more significant. It shows the position of the tank which has been much spoken of, and of the serial No. 1, and it also shows what, I am satisfied, at that date was the south-east boundary of this *abadi* where it abutted upon town of Gobardhan. I think the judgment of the court below, reading between the lines, proceeded upon the assumption that this was really common ground as the case was contested in the court below. It is perfectly clear that the point now relied upon on behalf of Government was not specifically raised by the defence and that paragraph 3 of the defence, which contains the real contention of the Government, dealt with the class of the property or class of occupier, and not with the geographical situation of the building. The *wajib-ul-arz* has been dealt with by my brother. I accept his construction of the words which I do not myself profess to understand, but if this is correctly translated it would clearly bear the meaning which has been put upon it by the learned Judge in the court below. The view I take about these documents is this; not that they are necessarily binding on the Government, not that the Government could not prove by affirmative evidence that the real state of facts was something quite different, or that there is any estoppel, but that as against the Government they contain entries which the Government must be taken to have accepted as an accurate record of the then existing state of facts. They raise a very strong presumption of fact and they get rid of the difficulty which so constantly attends the discussion of the meaning of *wajib-ul-arzes* in this country when no body is left alive to testify to the true facts, and each contending party relies on something or another

tending either to strengthen or to qualify the effect of the *wajib-ul-arz*. The plaintiff therefore starts with what I may call a trump card. The Government Advocate attempted to get rid of the effect of this piece of evidence in two ways, firstly by the description and history of the condition of the town of Gobardhan contained in the Gazetteer; secondly by the evidence of sales and dealings largely coming from the side of the plaintiff and admittedly quite inconsistent with the plaintiff's case. Assuming for the moment that every statement in the Gazetteer is correct and that we are entitled to take judicial notice of its contents as facts established without other proof it seems to me that every one of them is quite consistent with the plaintiff's case. They do not speak in the present tense of the existing conditions from an earlier date than 1884 but I will assume, as appears to be the fact, that there was always in or about this tank which has great historical associations and great attractions for itinerant pilgrims, a town which through the growth of pilgrimage, commerce, fairs and so forth and through local development, generally called progress, has overrun and in substance, so far as identity is concerned, submerged its humbler neighbours. Towns in England, I do not know if it applies to India, frequently owe their development to people who wish to live near them and not in them. Everything points to the remains of this village having been submerged in the superior growth and development of the old town which apparently was originally only a neighbour. However that may be, I agree with the contention made on behalf of the appellant that once it is established that rights of this kind to property have existed they cannot be affected by a change in the character of the neighbourhood only. I think the sales to some extent admitted on the plaintiff's side, and for the rest proved by the defendant's witnesses, are quite intelligible upon the same footing. In fact in a conglomerate neighbourhood of this kind it is not unnatural to find instances entirely inconsistent with one another within a very short distance. The Government Advocate said that there was really no evidence on behalf of the plaintiff of any similar transaction to that which he is setting up in this case. I think in that respect he was wrong. There is no documentary evidence and it is certainly surprising that the plaintiff has failed to produce any. But there is positive and direct evidence of a considerable amount given by the plaintiff's *vakil* or agent, or pleader whoever he may be, of possession by the plaintiff Raja which it is alleged has been recovered under similar circumstances to those relied on by the plaintiff in this case. Nothing would have been easier for the Government than to give direct evidence contradicting these allegations. In the absence of some evidence I think it must be taken to be proved that the Raja as *zemindar* has in previous cases in this *abadi* resumed possession of houses which apparently were not occupied by persons who could be correctly described as agricultural tenants.

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I always speak with hesitation about questions of custom because there are few questions about which misconception so easily arises. It seems to me that this case at any rate is a question of contract between the original zemindar and the former occupiers of this property, and the question of what that contract was is one which we are called upon to presume in the absence of direct evidence about it. But if it does turn upon a question of custom the learned Judge of the court below has found in favour of the plaintiff in spite of everything that has been said in support of the contrary by the Government Advocate. The learned judge of the court below rightly said that the plaintiff was bound to prove the existence of the custom if he relied upon it, and went on to hold that it did exist, and then by an unfortunate misdirection for which I can find no explanation in the judgment instead of giving effect to that finding went on to say that "the general customary law of escheat to the zemindar no longer holds good in Gobardhan." If that means anything it means what Mr. Motilal argued is not the law, namely that owing to the changed condition of the neighbourhood the former rights of the zemindar have been lost. That ground is clearly fallacious and I see no other ground upon which the decision for the defendant can be supported. I agree therefore with my brother that this appeal must be allowed.

BY THE COURT.—We allow this appeal, set aside the decree and order of the court below and decree the plaintiff's suit with costs in both courts.

Appeal allowed.

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Criminal Procedure Code (Act V of 1898), section 4—Indian Penal Code (Act XLV of 1860), sections 193, 210—Perjury—Complaint—Sanction, want of—Trial illegal.

S obtained a decree for Rs. 8-3 against B from the Revenue Court on May 2nd, 1917. He applied for execution of the decree on May 19, 1917, and in the application he stated the date of the decree as June 20, 1917 and the amount due as Rs 16-11-0. Attachment was levied for Rs. 17-5-6 which was paid by B and S granted a receipt in full to B. Subsequently S filed an application in the court which had executed the decree stating that he had made a mistake and that the amount due to him was Rs. 8-3-0 and no more. Three days prior to that B had

* Cr. Rev. No. 110 of 1918.

applied for sanction to prosecute S. No proceedings under section 476 of the Criminal Procedure Code were taken nor was any sanction granted but the Assistant Collector, 2nd class, wrote a letter to the District Magistrate in which he stated all the facts and concluded by saying, "I beg to solicit orders." The Sub-Divisional Officer through whom the letter was intended to be submitted to the District Magistrate instead of doing so, himself ordered the prosecution of S and issued process. The case was tried by him and S was convicted of offences under sections 193 and 210 respectively of the Indian Penal Code. The conviction and sentence were affirmed by the Sessions Judge:—*Held* that the letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate nor intended that the Magistrate should proceed according to law against S, did not come within the meaning of a "complaint" under section 4 of the Criminal Procedure Code, and there being no complaint, the trial was illegal.

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CRIMINAL REVISION from an order of W. R. G. MOIR, Esq., Sessions Judge of Gorakhpur.

The facts of the case are fully set forth in the judgment. For the purposes of this report they may be briefly stated as follows:—Sheo Sampat filed a suit in the court of a Tahsildar to recover arrears of rent and obtained a decree for a smaller sum than that claimed. In his application for execution of the decree the sum which had been claimed by him was put down as the decretal amount, and the date of the decree was also given wrongly. The full amount was realised from the judgment-debtor and paid to the decree-holder, Sheo Sampat. Then the judgment-debtor applied to the court for sanction to prosecute Sheo Sampat for false verification of the application for execution. Sheo Sampat filed an application stating that he had made a *bona fide* mistake. The Tahsildar did not grant sanction, nor did he take action under section 476 Criminal Procedure Code but he addressed a letter to the District Magistrate, through the Sub-Divisional Officer, setting forth the facts and concluding as follows:—"The above facts are borne out by the record herewith submitted. I beg to solicit orders in the case." The Sub-Divisional Officer, without forwarding the letter to the District Magistrate, himself took action and issued process to Sheo Sampat to answer charges under sections 193 and 210 Indian Penal Code. He tried the case himself and convicted and sentenced Sheo Sampat to two year's rigorous imprisonment and a fine. On appeal, the Sessions Judge upheld the conviction and sentence. Sheo Sampat applied in revision to the High Court.

Peary Lal Banerji, (with him *N. P. Upadhyaya*), for the applicant:—The offences with which the accused was charged are

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among those mentioned in section 195 Criminal Procedure Code consequently, no court could take cognizance of them except with the sanction, or on the complaint, of the court concerned. The Tahsildar did not grant sanction; his letter cannot, by any stretch of the imagination, be deemed as granting sanction. The letter is not an order under section 476 Criminal Procedure Code; nor is it a complaint, as defined by section 4 Criminal Procedure Code as it is not an allegation made to a Magistrate with a view to his taking action under the Code. The Tahsildar merely wrote to his official superior and consulted him in the matter. He asked for directions as to how he was to proceed. He did not ask the District Magistrate to take steps under the Code against Sheo Sampat. I am supported by the case of

Ahmad Husain v. Emperor, [1913] 17 O. W. N., 980.

The case of

Emperor v. Sundar Sarup, [1904] I. L. R., 26 All., 514, is distinguishable; there the Assistant Collector submitted the record to the Collector and Magistrate of the district expressly "for starting a case under section 193 Indian Penal Code."

On the merits of the present case it is clear that there was only a negligent mistake, and that no offence under section 193 Indian Penal Code was committed. The case of

Mohammad Ishaq v. King-Emperor, [1914] 12 A. L. J. R., 550, is in my favour.

R. Malcomson, (Assistant Government Advocate) for the Crown:—The letter of the Tahsildar was intended to be a complaint, and was treated by the Sub-Divisional Officer as such. There is no prescribed form for a "complaint," nor is an express prayer to take action essential. The irregularity, if any, would be cured by section 537 Criminal Procedure Code. It has not been shown that a failure of justice has been occasioned by such irregularity.

On the merits, both the courts below have found as a fact that there was no *bona fide* mistake, but a deliberate intention to try and realise more from the judgment-debtor than was legally due.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicant Sheo Sampat, who is an old man of seventy, has been convicted under section 193 and section 210 of the Indian Penal Code under the following circumstances. Sheo Sampat brought a suit in the Revenue Court against one Barbu for arrears of rent. He claimed Rs. 16-11-0 as principal and interest, an *ex parte* decree was passed in his favour on the 29th of September, 1916, for Rs. 9-4-0 and Rs. 2-5-0 costs total Rs. 11-9-0. The judgment-debtor, Barbu, made on application to have the *ex parte* decree set aside. This application was granted. The case was reheard and on the 24th of May, 1917, a decree was made for Rs. 8-3-0 which included costs. On the 19th of May, 1917, Sheo

Sampat filed an application for execution of the decree. In that application the date of the decree was erroneously mentioned as the 20th of June, 1917, and the amount claimed was put down as Rs. 16-11-0. He took out attachment of some property of the judgment-debtor. Meanwhile the judgment-debtor deposited the full amount of the decree. In pursuance of the order of attachment of the property of the judgment-debtor some bullocks were attached by the Amin. The judgment-debtor paid the Amin Rs. 17-5-6 which was the amount mentioned in the warrant of attachment and this amount was received by Sheo Sampat who granted to the judgment-debtor a receipt in full for the aforesaid sum of Rs. 17-5-6. Subsequently he filed an application in the court which was executing the decree stating that he had made a mistake and that the amount due to him was only Rs. 8-3-0 and no more. There days before the date of that application the judgment-debtor had applied to the court to sanction the prosecution of Sheo Sampat. No sanction was granted. The Assistant Collector of the second class, who was the Tahsildar in whose court the execution proceedings were held, did not take action under section 476 of the Code of Criminal Procedure but on the 6th of October, 1917, he addressed to the Magistrate of the district a letter in which he stated all the facts and concluded by soliciting orders in the case. This letter was intended to be submitted to the District Magistrate through the Sub-Divisional Officer, Mr. Gurney. Mr. Gurney instead of sending the application to the District Magistrate himself ordered the prosecution of Sheo Sampat and issued process against him. He himself tried the case and convicted Sheo Sampat and sentenced him to two years rigorous imprisonment and a fine. This conviction was upheld by the lower appellate court.

The first contention in revision is that the trial was without sanction and was therefore illegal. The offences of which the applicant Sheo Sampat has been convicted are offences referred to in section 195 of the Code of Criminal Procedure. Therefore it was absolutely necessary either that sanction for the prosecution was granted or that a complaint was made by the officer before whom the offence was committed, or some officer to whom he was Subordinate. As I have already stated no sanction was granted and as no proceedings were taken under section 476 it cannot be said that a complaint was made under that section. There remains therefore the question whether the letter of the 6th of October, 1917, addressed to the Magistrate of the district amounted to a complaint within the meaning of that expression as defined in the Code of Criminal Procedure. I find it very difficult to hold that it was a complaint. All that the Tahsildar did was to state the facts of the case. He did not ask that any action should be taken by the Magistrate, nor did he intend that the Magistrate should proceed according to law against Sheo Sampat. The only thing stated in the letter after stating the facts was "I beg to solicit

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orders." From this it may be inferred that he asked the Magistrate of the district who also happened to be the Collector to whom the Tahsildar was Subordinate, to instruct him as to what action he should take in the matter. It would be stretching the meaning of the expression "complaint" to hold that the Tahsildar by writing this letter made a complaint and intended the letter to be treated as a complaint against Sheo Sampat with a view to the Magistrate taking action. If that had been the intention he would not have solicited orders which apparently meant orders to him to take some action in the matter. Under these circumstances I am unable to agree with the learned Sessions Judge that there was a complaint by the Tahsildar in this case, and that consequently the Magistrate who tried the case should take cognizance of it. In my opinion, as there was no complaint, the trial was illegal and the conviction must be set aside.

I have also considered the merits of the case. I am unable to hold that the accused Sheo Sampat intentionally made a false statement in his application for execution. The statement contained in that application was no doubt false but I am not satisfied that he knew that the statement was false, or believed that it was untrue, and that he made the untrue statement intentionally. In this view the conviction of Sheo Sampat cannot be maintained.

I allow the application, set aside the conviction and sentence and direct that the fine, if paid, be refunded. The applicant need not surrender to his bail. The bail bond is discharged.

B. K. M.

Order set aside.

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June, 4.

BANERJI, J.
RYVES, J.RATAN MOTI (*Plaintiff*)*versus*TILAK CHAND AND OTHERS (*Defendants*)*

Specific Relief Act (1 of 1877), section 42—Further relief—Person in possession as tenant not denying plaintiff's right—Persons claiming title to property not in possession.

One *C* owned a shop. After his death his daughter-in-law *B* came into possession of it. Her son-in-law *F* managed her affairs. *B* made a gift of the shop to *R* who was one of *F*'s sons. *F* had a son *M* by another wife. *M* *L* occupied the shop as a tenant having executed a rent-agreement in favour of *F* and paying rent to *B* while she was alive. After *B*'s death he paid rent to no one. *R* died leaving a widow *P* who made a gift of the shop to the plaintiff. The plaintiff sued for a declaration that she was the owner of the house and that a sale deed in respect of it executed

*S. A. No. 1066 of 1916.

by *J* was null and void against her. *M* also claimed the ownership of the house. The suit was dismissed on the ground that the plaintiff being out of possession she ought to have asked for further relief in addition to a mere declaration :—*Held* that the only relief that the plaintiff could have claimed was a declaratory decree, inasmuch as the persons against whom she claimed the relief were not in possession and the person in possession had not denied her right.

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SECOND APPEAL from a decree of BABU BANKE BENARI LAL, Additional Judge of Meerut, reversing a decree of Babu Kalka Singh Additional Subordinate Judge.

Tej Bahadur Sapru and *Nihal Chand*, for the appellant.

S. A. Haidar, and *S. M. Sulaiman*, for the respondents.

- The judgment of the Court was delivered by

BANERJI, J.—This and the connected appeal No. 1065 of 1916 arise out of a suit brought by Musammat Ratan Moti for a declaration that a sale deed executed by Jagan Lal, defendant No. 3, in favour of Tilak Chand and Hoshier Singh defendants Nos. 1 and 2 on the 14th of February, 1911, is null and void as against her interest. The sale deed relates to a shop which admittedly belonged originally to one Chunni Lal. Chunni Lal had a son Kunwar Sen whose widow was Musammat Badamo. It is alleged by one party and denied by the other that Kunwar Sen predeceased his father, but the fact is admitted that after Kunwar Sen's death Musammat Badamo was in possession. It is alleged on behalf of the plaintiff that the affairs of Musammat Badamo were managed by her son-in-law Fakir Chand. In 1881 Musammat Badamo made a gift in favour of Roshan Lal, the son of Fakir Chand by Badamo's daughter. Fakir Chand had another wife by whom he had another son, Mahabir defendant No. 5. Roshan Lal died in 1900 leaving his widow Musammat Parsandi defendant No. 4. On the 22nd of June, 1911, Parsandi made a gift in favour of the plaintiff. By virtue of this gift the plaintiff claims to be the owner of the property and she alleges that Jagan Lal had no right to sell it to Tilak Chand and Hoshier Singh. The defendant Mahabir claims the ownership of the property by reason of his being the son of Fakir Chand who, he says, became entitled to it under the gift made in favour of Roshan Lal. Mahabir has therefore been arrayed as a defendant. The court of first instance made a decree in the plaintiff's favour but the lower appellate court has reversed it without trying the suit on the merits but only on the ground that the plaintiff was entitled to further relief, that she ought to have claimed possession of the property and that as she had not done so section 42 of the Specific Relief Act barred the claim. The lower appellate court holds that the shop being in the possession of one Moti Lal who executed a rent agreement in 1906 in favour of Fakir

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Chand, the plaintiff must be deemed to be out of possession, and it must be held that Fakir Chand was in possession and after his death Mahabir Prasad (his son) is in possession. The plaintiff has preferred this appeal and it is contended on her behalf that having regard to the circumstances of the case the only relief that she could have claimed was a declaratory decree. In our opinion this contention is well-founded. It has been found by the lower appellate court that a rent-agreement was executed in favour of Fakir Chand; but it has also found that Moti Lal paid rent to Musammat Badamo so long as she lived and that after Badamo's death Moti Lal refused to pay rent to either party until one party or the other established his or her title to the property. This being the state of things Moti Lal's possession cannot be said to be the possession of the defendant Mahabir. It is true that as between a landlord and his tenant the latter is estopped from denying the title of the former. But there is no question in the present case as between landlord and tenant. Therefore the numerous rulings which have been cited on behalf of the respondents do not seem to us to have any bearing on this case. Moti Lal having refused to pay rent to any one his possession can only be deemed to be possession on behalf of the rightful owner and therefore the court in this case instead of dismissing the suit on a preliminary ground should have tried the question of title and determined whether title was in the plaintiff, or in Mahabir, or in the defendants Nos. 1—3. As no question of title has been tried it cannot be said that the possession of Moti Lal is the possession of Mahabir. The plaintiff could not frame the present suit as a suit for possession inasmuch as the person in possession, namely Moti Lal, has not denied her right and she has consequently no cause of action against him. Under these circumstances we are of opinion that the decree of the court below is incorrect and must be set aside. We accordingly allow the appeal, discharge the decree of the lower appellate court and remand the case to that court with directions to re-admit it under its original number in the register and to try it on the merits bearing in mind the observations made above. Costs here and hitherto will be costs in the cause.

Appeal decreed—Cause remanded

THE SECRETARY OF STATE FOR INDIA AND ANOTHER
(Defendants)

versus

QAMAR ALI (Plaintiff) *

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May, 17.

Land Acquisition Act (I of 1894), section 9—Notice—Effect of non-issue of notice—Validity of proceedings.

TUDBALL, J.
A. RAOOF, J.

The plaintiff purchased certain plots of land from Imdad Husain and Alṭāf Husain. He did not apply for mutation of names and the result was that Imdad Husain sold his share to his wife Ahmadi Begam who applied for mutation of names. After this the plaintiff applied for mutation of names, but the Revenue Court for certain reasons allowed his name to be recorded in respect of a half share only. The result was that there were two *Khata*s in the public records, *vis.*, No. 22 in the name of Ahmadi Begam and No. 23 in that of the plaintiff. The plaintiff, however, seems to have remained in possession and to have planted some trees, the boundary marks also between the plots were obliterated. With the object of acquiring some land for public purposes the Local Government issued a notification in which these lands were also included. In regard to *Khata* No. 22 no notice was issued to the plaintiff and no public notice was issued as required by section 9 (1) of the Land Acquisition Act. An award was made in respect of *Khata* No. 22, the persons who were recorded therein not objecting on the date fixed in the special notices. The plaintiff, however, did appear and made an objection to the special officer and laid claim to the compensation on the ground that he was the owner. He took no steps under section 18 of the Act for a reference to the court. The compensation was placed to his credit in the Treasury. In regard to *Khata* No. 23, public notice and special notice were issued but the full period of 15 days was not allowed. The plaintiff objected and applied for a reference under section 18 in respect of it. Award was made in respect to *Khata* No. 23. At the date of the suit the reference was pending before the District Judge. Formal possession on behalf of Government was taken of both the *Khata*s. The present suit was filed for a declaration that all the proceedings were null and void because of the irregularities of procedure. There was, however, nothing fraudulent or corrupt in the proceedings and it was also found that the plaintiff had knowledge of the proceedings resulting in the award :—*Held* that the land acquisition proceedings were not vitiated by the mere fact that no special notice had been issued to the plaintiff in regard to *Khata* No. 22 inasmuch

* F. A. No. 213 of 1916.

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as he had actual knowledge of all the proceedings. In regard to *Khata* No. 23 the plaintiff had less right to complain, for notice was issued to him, though only ten days before the date fixed, and he would be able to get full compensation for it when the reference which was pending before the District Judge would be disposed of after his objections had been heard.

Held also that the proceedings would not be invalidated by reason of the fact that the two *Khata*s were treated separately, though there were no division marks upon the land itself.

FIRST APPEAL from a decree of BABU BAIJ NATH DAS, Subordinate Judge of Bareilly.

A. E. Ryves, for the appellants.

S. M. Sulaiman, for the respondent.

The judgment of the Court was delivered by

Tudball, J.

TUDBALL, J.—The facts of the present case are hardly in dispute and are as follows:—In Mauza Udaipur khas, pargana and tahsil of Bareilly there were three plots of land recorded as Nos. 42/1, 42/2 and 43 (para 1 of the plaint). These belonged to two persons, Imdad Husain and Altaf Husain.

In 1907 these persons sold these plots to the plaintiff Qamar Ali, a practising lawyer living at Bareilly. It may be as well to point out here that Udaipur khas is on the outskirts of Bareilly City.

Qamar Ali, though a lawyer and presumably well aware of the existence of revenue records and the duty imposed on a transferee of having his name duly recorded as the owner, did not apply for mutation of names at once.

Subsequently Imdad Husain sold his share together with other property, to his wife Ahmadi Begam.

She applied for and obtained mutation of names as against a half share.

After this Qamar Ali applied for mutation of names in respect to the whole, as against his transferors. As their names then stood recorded against part only of the property the Revenue Court directed his name to be recorded in the record of rights as against that half only.

The result was that in the public records two *Khata*s were recorded.

No. 22 against the name of Ahmadi Begam.

No. 23 against the name of Qamar Ali.

Qamar Ali seems to have remained in possession and to have planted some trees. It may also be accepted that the boundary marks between the plots were obliterated.

It also appears that some scheme was proposed for the extension and improvement of Bareilly City, for which purpose it was necessary to take up and acquire a large area of land. The Local

Government for this purpose notified a large area, under the Land Acquisition Act for compulsory acquisition. This was done in 1910 and in this area was included the land mentioned above which is the subject matter of the present suit.

The area was large and the owners numerous and the actual acquisition and making of awards under the Act, was spread over a considerable time and the turn of the plots mentioned above did not come until 1912.

Their acquisition was carried out in two parts. Action was first taken in respect to *Khata* No. 22.

Here it is necessary to state another fact. Many owners of lands were prepared to build houses upon them so as to further the object of the Municipal Board and carry out the scheme. The Land Acquisition Officer who was acting on behalf of Government in the acquisition proceedings consulted the Board and took action in respect to those plots (within the area notified) which the Board settled to be necessary for their scheme and which had therefore to be acquired. In respect to the lands of those owners who agreed to build and help in the scheme, the Board asked the officer not to acquire them and in regard to them apparently no action was taken.

In regard to *Khata* No. 22 action was taken under section 9 by issue of notice to those persons whose names were in the *Khewat*. Special notices were issued to them by order, dated 22nd February, 1912.

Whether the public notice in respect thereto as required by section 9 (1) of the Act, was ever issued it is impossible to say.

Apparently no trace of it can be found.

It is admitted that no notice was issued to Qamar Ali as his name was not in the *Khewat*.

The 9th March, 1912, was the date fixed in the special notices and on that date an award was made by the Special Officer. Here we note that it was very positively alleged on behalf of the plaintiff that no award had been made but it was found after some trouble upon the acquisition record. The notices issued did not give fifteen days clear time to the persons concerned but no objection was raised by any of them and the award was made. It was perhaps incomplete in that it did not apportion the total sum awarded amongst those to whom it was deemed payable.

Another point may be noted here. A copy of the village *Khajra* has been filed showing that certain persons were entered therein as tenants, but no notice was issued to them. In the column of remarks there is a note to the effect that Qamar Ali is in possession.

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The only person who made any objection was Qamar Ali himself. On the 9th March, 1912, he filed a petition before the Special Officer, in which he said that he had heard that compensation was about to be paid to other persons; that this should not be done as he was the owner and therefore the money should not be paid to others but to him.

He took no further steps in spite of the knowledge that he had of the proceedings. He made no application under section 18 for a reference to the court, though as a person interested he had every right to claim one.

No notice under section 12, clause (2), was given to him. He had appeared in person on the date of the award and had filed his petition of objection. The compensation awarded was put in deposit in the Treasury to the credit of Qamar Ali and is still there.

One further point must be noted. The amount awarded did not include anything on account of the value of trees and there appear to be no boundary marks actually in existence marking off the land appertaining to *Khata* No. 22 from that appertaining to *Khata* No. 23.

In respect to this latter *Khata* (23) steps were taken in July, 1912. The public notice and special notice were issued, the latter to Qamar Ali and his recorded tenants for August 2nd, 1912. The notice did not allow the full fifteen days mentioned in section 9 (2), the time being short by five days.

Qamar Ali appeared and filed his objections. An award was made. He did not accept it but applied for a reference under section 18 to the court and the reference was duly made and is pending. His objections were filed on August, 2nd, 1912, and he therein made reference to his petition of the 9th March, 1912. He was informed of the amount of compensation that stood to his credit in the Treasury in respect to *Khata* No. 22 on 26th October, and he filed a petition saying that for the first time he had come to know "*that day*" that compensation had been awarded for a portion of his property (which was clearly untrue).

We note here that in July, 1912, Qamar Ali became a member of the Municipal Board, having been nominated as a member by Government.

The second award (*in re Khata* No. 23) was made on November, 14th.

Formal possession of *Khata* 22 was taken by Government on 16th April, 1912, and of *Khata* 23 on 20th June, 1914.

Five days after the last award Qamar Ali sent a letter to the Chairman of the Municipal Board praying for certain reasons that the Board would not take up his land on condition of his building two bungalows on it.

On January 10th, 1913, the Board by a resolution resolved that it would not take up his land. On 24th February, 1913, the Chairman informed the Special Officer of this resolution. The latter through the Collector informed the Commissioner who addressed the Board pointing out that the land had already been acquired and the Board could not divest itself of property by a mere resolution. The Municipal Board subsequently met and cancelled its resolution of 10th January, 1913. Another fact may be noted. While these proceedings were taking place Qamar Ali sank a well on the land and he did it in the teeth of a protest by the Board (*vide* the evidence of the Chairman).

Qamar Ali brought the suit out of which this appeal has arisen on 1st August, 1914, for a declaration that all the proceedings taken for the acquisition of these plots of land are null and void against him. He withdrew his claim for an injunction. He sued the Secretary of State and the Board.

The case in his plaint was—

- (1) that there was no necessity to acquire his land.
- (2) that as the land was notified in 1910, it was the duty of the Collector to *at once* take it up under the Act.
- (3) that the Collector, the acquisition officer and the Municipal Board gave the plaintiff to understand that his land would be exempt from acquisition as he was a proprietor who could build houses upon it.
- (4) that no steps were taken to acquire the land until July, 1912, and this delay and also the holding out of the hope that the land would not be taken, estopped the Secretary of State from acquiring it under the original notification.
- (5) that the Board was only taking up the land to be able to sell it at a profit to the Rohilkhand and Kumaon Railway.
- (6) that various irregularities set out in para 8 of the plaint had taken place in the acquisition proceedings which rendered them null and void and of no force against him.
- (7) that the compensation officer had induced him by holding out hopes of the non-acquisition of the land, to build a well and collect materials for the building of a house and had then through enmity reported that it should be taken up and therefore the Secretary of State was estopped. It will be observed that in his plaint the plaintiff ignored the proceedings taken in respect to *Khata* No. 22.

The defendants contested the suit. The court below has held :—

- (1) that representations generally were made by both the defendants to owners of sites that their lands would not be acquired

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in cases where the owners could build upon them and that these representations combined with the Board's resolution of 10th January, 1913, operated as an estoppel and barred the defendants from acquiring the land in suit on the notification issued in 1910.

(2) that the delay in the acquisition proceedings did not debar the defendants from acquiring the land.

(3) that in respect to *Khata* No. 22 the irregularities in procedure of the acquisition officer and the fact that the plaintiff was no party to them, resulted in their being void and ineffectual as against him and the plaintiff was still the owner of the land thereof.

(4) that the fact that a reference before the District Judge was pending was no bar to the present suit.

It has therefore granted the declaration that the acquisition proceedings are null and void.

The defendants have appealed.

It is urged before us that though there may have been some errors in procedure in the course of the acquisition proceedings, there has been nothing fraudulent or corrupt, that the plaintiff had full knowledge of them, that in the case of *Khata* No. 22, he could and ought to have applied for a reference to the District Court where all his objections could have been made and he could have had a judicial decision, that all the proceedings up to the making of the awards are purely administrative and not judicial and that errors therein which do not prejudice the plaintiff or prevent him obtaining a judicial determination are not sufficient to enable the court to declare them null and void,——— that in respect to *Khata* No. 22 a judicial proceeding is now pending where all the plaintiff's pleas will be heard and decided; that compensation for all the trees has actually been awarded to him in the acquisition of this *Khata* and the plaintiff has therefore no valid grievance that there has been no withdrawal by Government from the acquisition and that Government alone can so withdraw, that the plaintiff has failed to prove that Government or the Board held out any hopes to him prior to the acquisition that the land would not be acquired.

That it was not until after the awards had been made that the plaintiff approached the Board and the latter passed its resolution of 10th January, 1913, that that resolution was subsequently cancelled and that the Board had no power to withdraw from the acquisition and its resolution had no legal effect.

Reliance is placed upon the decisions in *Ezra v. Secretary of State for India*⁽¹⁾ and *Ganga Ram v. Secretary of State for India*⁽²⁾ and the decision of this Court in F. A. No. 67 of 1915, decided on 10th May, 1916.

(1) [1905] I. L. B., 32 Cal., 605. (2) [1903] I. L. R., 30 Cal., 576,

In regard to the question of estoppel we cannot agree with the court below. We may assume that the acquisition officer did abstain from taking proceedings at the request of the Board, in the cases of some owners who were willing and able to further the extension scheme by building on their lands. It is nowhere shown that in the case of the plaintiff any such hope of non-acquisition was held out as a consequence of which he abstained from protecting his rights in the acquisition proceedings or in consequence of which he spent further sums in sinking his well or improving the property.

We have the evidence of the Chairman of the Board to show that the plaintiff was warned not to build his well and that he persisted in it in spite of warnings. Moreover it was not until the second award had been made that the plaintiff approached the Board on the 19th November, 1912. He was then and had been a member of the Board himself since July, 1912. He may have had hopes in his own mind but he has utterly failed to prove that any such hopes were held out to him individually.

Under the terms of the Act itself, it is Government which was acquiring the land and Government alone under the Act could withdraw from the acquisition. As a lawyer the plaintiff must have been well aware of this.

When the Board's resolution of 10th January, 1913, was passed the acquisition proceedings were ended and there remained only the judicial proceeding before the District Court on the reference made at the plaintiff's own request. The Board had no power to withdraw and the Commissioner of the division at once called the Board's attention to this and the Board rescinded its resolution. It has not been shown that the plaintiff subsequently to 10th January, 1913, so changed his position as to make it inequitable to allow the acquisition of the land without the issue of any fresh notification by Government under the Act. He was not prevented from putting forward his case in full in the District Court. He has not withdrawn from the reference made at his own request to the District Judge in the case of *Khata* No. 23 and it is not shown by any evidence at all that he abstained in the case of *Khata* No. 22 from applying for a reference by reason of any action on the part of the Board or the Secretary of State. The acquisition of that *Khata* took place early in 1912. We fail to see that the appellants have been estopped from acquiring the land in pursuance of the original notification of 1910.

Mere delay in the proceedings based on that notification is no ground for holding that there is an estoppel. The proceedings, no doubt, were spread over a long period of time, but there were many owners of different plots to be dealt with. The plaintiff was in possession and enjoyment of the land. He had planted trees upon it and had leased it to tenants who presumably

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paid him rent for it. He may have incurred the cost of upkeep as he would have had to do in any case. If with knowledge of the notification he invested more capital in it (which is not shown by any evidence) he did so at his own peril. He was warned not to do so and he actually did not approach the Board until after both awards had been made and formal possession taken in the case of the first one. The lower court seems to think that it will be hard on the plaintiff as he had invested money in planting his trees before the notification and that they have so far given him no return but this is a point which the District Judge, no doubt, will consider when he in the judicial proceeding comes to assess the compensation and work out the market value. The question of the compensation for *all* the trees is now before that court, the award of the acquisition officer having included the value of them *all* in the case of *Khata* No. 23. We cannot agree with the court below that there was a substantial withdrawal from the acquisition by both or either of the defendants nor does the fact that the Board at one time considered the advisability of making over this land to the Railway Company for the purposes of a station, act as an estoppel. It may well have been a part of the extension scheme to have a station at this spot for the convenience of the public. It is not for the plaintiff to say to what use the Board should or should not put the land in carrying out their scheme.

The Board was not competent to withdraw from the acquisition and it is not shown that between the 10th January, 1913, and the rescinding of the resolution of that date, the plaintiff materially altered his position. In fact he was warned not to do so. On the question of estoppel we therefore cannot agree with the court below.

The next question is as to the effect of the errors of procedure which took place in the course of the acquisition.

We have detailed those errors above and they need not be repeated.

With the necessity for the acquisition the plaintiff has no concern.

The delay in the acquisition does not invalidate the proceedings.

The survey was made at the very beginning of the proceedings.

The chief complaint and in fact the only one of any substance is that the two *Khata*s are divisions only on paper and that the acquisition was carried out in two parts and that in respect to *Khata* No. 22 no notice was issued to the plaintiff under section 9, and no public notice apparently at all, and that in case of neither of

the two *Khata*s was the full fifteen days' notice given to any body. In the case of *Khata* No. 23, the plaintiff received ten days' notice.

The question is whether these errors so vitiate the proceedings that the court ought to declare them null and void.

The plaintiff himself is not free from blame—when he purchased the property he did not apply at once for mutation of names. This gave the opportunity to Imdad Husain to execute the second sale with the result that when the acquisition proceedings commenced one-half of the property only stood in the plaintiff's name and the other half in the names of other persons. The acquisition officer dealt first with the latter half and acted on the *khawat* entry. He issued notice to the recorded owners whose names were in the *khawat* and they had no objection. But the plaintiff was well aware of the acquisition proceedings. Other lands of his were acquired under the notification in 1911, and he contested that matter also. It was referred to the District Court and he came up on appeal to this Court. Moreover he had actual knowledge himself of the proceedings regarding *Khata* No. 22 for on 9th March, 1912, the date fixed for the making of the award he entered the court and filed his petition to the officer asking that the compensation should be paid to him and not to any body else and the sum awarded was actually credited to him in the Treasury. As a person interested he under section 18 of the Act, could have applied for a reference to the District Court. Though he is a lawyer and had had a similar case of his own in 1911, he took no steps under section 18. In the case of *Khata* No. 23, he received notice though only ten days before the date fixed. He appeared and objected and applied under section 18 and a reference was made to the District Court. As their Lordships of the Privy Council have said in *Ezra v. Secretary of State for India*. "When the sections relating to this matter are read together, it will be found that the proceedings resulting in this award are administrative and not judicial, that the award in which the enquiry results is merely a decision (binding only on the Collector) as to what sum shall be tendered to the owner of the lands and that if a judicial ascertainment of value is desired by the owner he can obtain it by requiring the matter to be referred by the Collector to the court."

The ultimate duty of the officer is not to conclude the owner by his so called award but to fix the sum which in his best judgment is the value that should be offered.

If the proceedings are taken in such a manner that the true owner is barred from obtaining a judicial pronouncement on the matter, then there may perchance be good ground for complaint. But as pointed out in *Ganga Ram v. Secretary of State for*

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India the very provisions of section 9 show that persons interested, who are not known or believed to be interested may not have notice and yet the proceedings may go on validly.

If the Collector wilfully and perversely abstains from giving notice, then his proceedings cannot be considered *bona fide* and should be held inoperative in vesting the land in Government, but where through mere inadvertence or mistake a person interested has not had notice served upon him, the reason of the non-service is rather allied to ignorance of the fact of his being interested than to wilful perversity. In the present case there is nothing to show that the proceedings were fraudulent or corrupt.

Now in the case of *Khata* No 22 the plaintiff was not recorded as an owner. In the *Khasra* no doubt there was a note by the Patwari of his possession but the acquisition officer worked on the *Khewat*. There no doubt was a mistake. The plaintiff has alleged malice and enmity but his allegation is not supported by any evidence and in the end he did receive actual information though not legal notice and he did enter the officer's court-room and actually filed his petition on the date fixed for the award. He had every right to apply for a reference and could have done so. He preferred to abstain from seeking the judicial pronouncement to which he was entitled and to bring the present suit and to take his stand on the fact that no notice had issued to him. He was not prevented from obtaining the remedy which the law gave him. There is therefore no sufficient reason for holding that the vesting of the land in Government did not take place. There can be no sympathy with a litigious person who has acted as the plaintiff has done. The ruling in *Ganga Ram's case* has received the approval of this Court in F. A. No. 67 of 1915, which we have mentioned and we fully approve of it also. If the plaintiff had been debarred from seeking and obtaining a reference to the District Court we might perhaps have held otherwise, for every person interested has the right given to him by section 18 which in certain circumstances allows a period of six months from the date of the award. In the present case the proceedings in regard to *Khata* No. 23, were taken within six months of the award of 9th March, 1912, of which the plaintiff had actual knowledge though legal notice had not been served upon him. He was well aware of the award and deliberately abstained from exercising his right under section 18 of the Act.

In the case of *Khata* No. 23 he has still less right to complain, for notice was issued to him though only ten days before the date fixed and the reference to the District Court is actually pending and all his grievances can be aired there and full compensation awarded. Nor do we think that the fact that the two *Khata*s were treated separately, (though there are no division marks upon the

land itself) is sufficient cause for invalidating the proceedings. That is a matter of really very little concern when full compensation can be granted under a reference to the District Court.

We, therefore, hold on the above findings that the plaintiff is not entitled in the circumstances of this case to the declaration granted by the court below.

We, therefore, allow the appeal, set aside the decree of the lower court and dismiss the plaintiff's suit with costs of both courts.

Appeal allowed.

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SUKH LAL (*Defendant*)

versus

NANNOON PRASAD (*Plaintiff*)*

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June, 26.

RYVES, J.

Provincial Small Cause Courts Act (IX of 1887), article 31—Rent of house paid to one person—Suit by another to recover his share—Money had and received—Jurisdiction of Small Cause Court—Question of jurisdiction not raised in court below—Revision—High Court not to interfere.

A nephew sued his uncle in the Court of Small Causes for his half share of the rent of a house which the latter had realised from the tenant of the house. It appeared that the entire rent used to be paid to the uncle. No question of jurisdiction was raised. The court tried the suit and gave the plaintiff a decree for the amount claimed:—*Held* that the suit was one for money had and received, and the Court of Small Causes had jurisdiction to try it. *Held* also that the question as to the court's jurisdiction not having been raised by either party and the court having tried the case and it being doubtful whether the suit was not one for money had and received, the High Court refused to interfere in the exercise of its discretion as justice had been done.

CIVIL REVISION from an order of BABU GOPAL DAS MUKERJI, Judge of the Court of Small Causes at Agra.

Narain Prasad Asthana, for the applicant.

Shiam Krishna Dar, for the opposite party.

*Civ. Rev. No. 77 of 1918.

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The following judgment was delivered by

RYVES, J.—This application arises out of a suit brought by a nephew against his uncle and a tenant. It appears that a house which jointly belonged to the nephew and uncle had, for many years, been rented by defendant No. 2 and the whole rent used to be collected by the uncle. No doubt the nephew was entitled to a half share. This suit was brought to recover Rs. 130, being half of Rs. 360 which the uncle had been paid by the tenant. The suit was filed in a Court of Small Causes. Not only was no objection taken to the jurisdiction of that court, but in paragraph 8 of the written statement the uncle specifically stated that he raised no objection to the court trying the suit. Of course it is not open to parties to waive a question of jurisdiction, but for reasons to be stated later, I think this matter is of some importance. The court, from the judgment which it has recorded, tried the case apparently very fully, and came to what seems to me a very just decision. Having lost the suit in that court, the uncle applies to this Court for revision and for the first time raises the objection that the court below had no jurisdiction to try the suit, and he relies on article 31 of the schedule to the Act (Act No. IX of 1887). It is only the second part of that article which could apply, that is to say, "a suit for the profits of immoveable property belonging to the plaintiff which has been wrongfully received by the defendant" is barred from the cognizance of a Court of Small Causes. Reliance has been placed on *Rameswar Singh v. Durga Das* (1), *Sheikh Uzir v. Hari Charan Pal* (2), and *Srimati Nand Rani v. Swashwaneshwar Mukerji* (3). It seems to me that it is by no means clear that this case comes within the scope of those rulings. It appears in this particular case that the rent had been paid for many years by the tenant to the uncle. I therefore do not see how it can be said that the uncle had wrongfully received the rent, the subject-matter of this suit. It seems to me to be an ordinary suit for money had and received. In any case, I feel that substantial justice has been done and the only result of this application would be further litigation, and that between an uncle and a nephew, and should hesitate to re-open the matter unless I am forced to. There is the authority of this Court in *Ram Lal v. Rabul Singh* (4) (and I would refer also to the cases referred in 37 Indian Cases, page 991 and 29 Indian Cases, 566) which gives me a discretion. As I have already stated I doubt as to whether article 31 strictly applies, and having also, I think, a discretion in the matter, I decline to interfere. The result is that the application is rejected with costs.

Application dismissed.

(1) [1901] I. L. R., 23 All. 487. (2) 37 I. C., 671.

(3) 8 I. C., 270 (4) [1908] I. L. R., 25 All., 135.

KEDAR NATH

versus

EMPEROR.²

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June, 18.

TUDBALL, J.

Act No. VI of 1912, Local, sections 4, 6—Commission Agent exposing article of food for sale—Adulteration of article—Whether agent punishable.

K, a commission agent, exposed for sale canisters containing *ghee* as good and genuine. On analysis the *ghee* was found to be adulterated:—
Held that he was liable to punishment, under Act VI of 1912 and that he, being a commission agent who exposed the same for sale, could not come within section 6 of the Act.

CRIMINAL REVISION from an order of D. R. LYLE, Esq., Sessions Judge of Agra.

Shiam Krishna Dar, for the applicant.

R. Malcommon, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

TUDBALL, J.—The appellant has been convicted under section 4 of Act VI of 1912, which is a Local Act of the United Provinces Legislative Council. He has been sentenced to a fine of Rs. 80. The facts of the case are not in dispute. The applicant is a Commission Agent and as such he exposed for sale what purported to be *ghee*. The *ghee* no doubt belonged to those persons who had sent it to him for sale. But it was he who exposed it for sale, and he exposed it as being good and genuine *ghee*. The Chief Sanitary Inspector of the Agra Municipal Board went to his warehouse where he saw certain canisters of *ghee* open and exposed for sale. There were a large number of other canisters unopened. With the consent of Kedar Nath he took several samples of *ghee*, gave one to Kedar Nath, kept one himself and sent one to the public analyst. The certificates of the latter person show clearly that the *ghee* had been adulterated. The complaint in the present prosecution was signed by the Executive Officer of the Municipal Board on the 8th of October, 1917. This officer on the 20th of September, 1917, was authorised by the Municipal Board to institute prosecutions under the Act. The samples obtained from the applicant were obtained on the 12th of September. Three points have been taken

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before me, one is that the prosecution is illegal in the present instance as it has not been made with the order or consent in writing of the proper person and also that on the 12th of September the Executive Officer had no power to institute the prosecution. The second point is that section 6 applies to the case and exonerates the applicant. The third point is that the applicant has acted in good faith. He sold what he had received from others and a smaller fine would be sufficient to meet the ends of justice. As regards the first point there is no force in it. On the date on which the complaint was made the Executive Officer had full power and the court was therefore fully justified in acting upon the complaint. As regards section 6 it clearly does not apply to the present applicant. Admittedly clause (a) of that section could not possibly apply to him as he is only a Commission Agent and had never purchased the *ghee* in question. Moreover in the present case he has made no sale at all but had only exposed for sale. The act may be defective but that is not the fault of any body else but the legislative body. Section 6 clearly does not apply to the present case. So far as the sentence is concerned there can be very little doubt that the applicant as well as every body else concerned knew that the *ghee* was adulterated. The Act was passed for the public welfare and it is only by a thorough working of it that the public will benefit from it. These persons who sell *ghee* are generally well aware of the facts that it is adulterated. I therefore see no reason to interfere with the sentence. The application is accordingly dismissed.

Application dismissed.

SHAMSHER SINGH AND OTHERS (*Defendants*)*versus*PEARE DATT (*Plaintiff*) SUBEDAR AND OTHERS (*Defendants*)**Pre-emption—Refusal to purchase, what is—Custom—Wajib-ul-arz—Property to be sold to co-sharer first—Sale to stranger.*

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July, 9.

RICHARDS,

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Where the custom of pre-emption as evidenced by the *wajib-ul-arz* is to the effect that a co-sharer wishing to sell his property must *first* offer it to a co-sharer, and if the co-sharer refuses then he may sell to a stranger, in such a case the fact that the co-sharer-vendor offered the property to another co-sharer and the latter declined to purchase on the ground that he had no money or for any other reason was unwilling to purchase would entitle the owner to go to a stranger and to sell it to him and that the owner would not be obliged after he has made a definite agreement with the stranger to return and offer the property a second time to the co-sharer on the other hand the going to a stranger and making a bargain with him before offering the property to a co-sharer would be acting contrary to the custom.

FIRST APPEAL from a decree of PANDIT PIERE LAL KATARA, Subordinate Judge of Mainpuri.

A. H. C. Hamilton (Tej Bahadur Sapru and Peary Lal Banerji with him), for the appellants.

T. N. Chadha (with him Girdhari Lal Agarwala), for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption and was before us on a previous occasion. We held that the plaintiff, under the circumstances of the case, was entitled to get the property by pre-emption provided that he had not refused to purchase it. The court below has decided that the plaintiff did not refuse to purchase. The court disbelieves the evidence adduced by the vendees upon this point and it is to be remembered that although the plea was raised when the case came on originally for trial it was not until after the order for remand that evidence of refusal to purchase was given. We see no reason to differ from the court below upon the issue of the refusal to purchase. The learned Subordinate Judge in the course of his judgment held that even if the plaintiff had refused to purchase that would not

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be sufficient to debar him from his right of pre-emption and has cited two cases namely *Munawar Husain v. Khadim Ali* ⁽¹⁾ and *Kanhai Lal v. Kalka Prasad* ⁽²⁾. In the last mentioned case there is the following passage in the judgment. "As we pointed out in our judgment in *Sohan Lal v. Shahab-ud-din Khan* ⁽³⁾ in order to debar a party entitled to pre-empt a sale from exercising his right an opportunity to purchase must be given when a definite agreement to purchase at a fixed price has been entered into with a stranger. It is not enough to offer property to a person entitled to pre-empt before an agreement to purchase has been entered into with a third party as was the case here." This Bench has had occasion to deal with this *dictum* in several cases (see *Naunihal Singh v. Ram Ratan* ⁽⁴⁾ and *Nathi Lal v. Dhani Ram* ⁽⁵⁾). As a general rule the custom, as evidenced by the record in the *wajib-ul-arz*, is that where a co-sharer wishes to sell, he must *first* offer it to his co-sharer and if the co-sharer refuses to purchase, he is entitled to go to a stranger. Where the custom proved is of this nature we have no hesitation in saying that if the co-sharer offers the property to the another co-sharer and he refuses to purchase upon the ground that he has no money or is unwilling for any other reason to purchase, the owner of the property is quite entitled to go and sell it to a stranger and that he is not obliged after he has made a definite agreement with the stranger to return and offer the property to the co-sharer a second time. It seems to us that (where the custom is as stated) the going to a stranger and making a bargain with him before offering it to the co-sharer would be acting contrary to the custom. We dismiss the appeal with costs

Appeal dismissed.

(1) [1908] 5 A. L. J. R., 331.

(2) [1905] I. L. R., 27 All., 670.

(3) S. A. No. 909 of 1901 unreported. (4) [1916] 14 A. L. J. R., 1138.

(5) [1917] 15 A. L. J. R., 315

MOTI RAM (Plaintiff)
versus
 BANKE LAL (Defendant)*

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May, 18.

TUDBALL, J.
 A. RAOOF, J.

Mortgage, suit on—Person in possession holding up as shield payments made towards prior mortgages—Suit decreed subject to his lien—Final decree made without mention of the lien—Property sold and purchased by mortgagee—Dispossession of the person in possession—Suit by such person to recover money paid for prior mortgages—Suit not maintainable—Code of Civil Procedure (Act V of 1908), sections 11, 47.

One B held two mortgages, dated respectively February 20, 1895 and June 27, 1895, over certain property belonging to K. There was a prior usufructuary mortgage over the same property for a sum of Rs 290. In execution of a decree one M bought the equity of redemption. B brought a suit on his first mortgage for sale of the property and he impleaded M. B mentioned the prior usufructuary mortgage and offered to pay the amount due thereon. He obtained a decree and paid in the amount of the prior mortgage which money was withdrawn by that mortgagee. The property, however, was not sold. M having come to terms with B. Between 1901 and 1904 M paid in sums of money till the whole amount which was Rs. 737 odd was paid off. B then sued on foot of his second mortgage and asked for sale of the property. M who was a defendant held up as a shield his rights by virtue of the payment of the two prior mortgages. The court held that he could hold this up as a shield and made a decree for sale *subject to his lien*. At the time of drawing up the final decree, however, no mention was made of the lien in favour of M. The property was sold and bought by B. B did not deposit any sum for payment to M and B obtained possession of the property. M objected that he could not be dispossessed till he was paid off but the court refused to go into this question in execution proceedings and directed M to bring a separate suit. M thereupon brought the present suit claiming Rs. 737 with interest from B by sale of the property :—*Held* that the suit was not maintainable, being barred by the principle of *res judicata* and the provisions of section 47 of the Code of Civil Procedure.

SECOND APPEAL from a decree of D. R. LYLE, Esq., District Judge of Agra, reversing a decree of B. C. Forbes, Esq., Subordinate Judge of Muttra.

Shiam Krishna Dar, for the appellant.

M. L. Agarwala, for the respondent.

The judgment of the Court was delivered by

TUDBALL, J.—The facts of this case are as follows :—The property in dispute was owned by one Kallan. There was an

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*S. A. No. 822 of 1916.

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usufructuary mortgage upon it for the sum of Rs. 290. It was subsequently mortgaged to Banke Lal, the defendant under two deeds, dated the 20th of February, 1895, for Rs. 150 and 27th of June, 1895, for Rs. 150. The property *i.e.*, the equity of redemption was subsequently sold in execution of a decree on the 28th of March, 1900, and was purchased by the plaintiff, Moti Ram. In that year 1900, Banke Lal brought a suit on his first deed of the 20th of February, 1895, for sale of the property and he joined Moti Ram as a defendant. In this suit Banke Lal mentioned the prior usufructuary mortgage and the fact that Rs. 290 thereon was due to Mathura Prasad, the mortgagee. He offered to pay this sum. He prayed for a decree for sale. He paid off the Rs. 290. His decree was dated the 16th of July, 1900, and he got a final decree for sale on the 23rd of February, 1901. In neither of these decrees was there any specific mention of the sum of Rs. 290 but it was actually paid into court by Banke Lal and was withdrawn by the prior mortgagee in July, 1901. The property was not sold as Moti Ram came to terms with Banke Lal. A certain sum of money was paid down in 1901 and other sums were paid on subsequent dates up to the year 1904, when the full claim of Rs. 737 odd was paid off by Moti Ram. This included the sum of Rs. 290 mentioned above. In 1909 Banke Lal brought a suit on the basis of his second mortgage, dated the 27th of June, 1895, and he asked for sale of this property. Moti Ram was impleaded as a defendant. He proceeded to hold up as a shield his rights which had accrued to him by payment of the sum due on the two prior mortgages mentioned above, *i.e.*, the sum of Rs. 737 odd. In his defence he made a mistake in figures, but it was finally admitted that the sum which he had paid was Rs. 737 odd. His case was that the plaintiff Banke Lal had no right to sell this property without first paying off to him the above mentioned sum. The court in its judgment held that he was legally entitled to hold up this shield; and it held further that the property could only be sold "*subject to his lien*," (whatever the Judge may have meant thereby). A preliminary decree for sale was drawn up and mention of the lien was entered therein. The decree-holder Banke Lal applied for his final decree in accordance with the preliminary decree. Notice was issued to Moti Ram. He did not appear. A final decree was drawn up which was simply an order for the sale of the property without mentioning Moti Ram's lien in any way. The property was then put to sale in execution of the decree and was purchased by Banke Lal himself. Banke Lal did not deposit any sum for payment to Moti Ram. He applied for possession as auction-purchaser and in May, 1912, was put into possession by the court. Thereupon Moti Ram made an application to the court pointing out that the money had not been paid to him and asking that he might be re-placed in possession of the property until the money had been paid. The court held that it could not go into this matter in the course of the execution of the

decree and that if Moti Ram had any remedy he must seek it by a separate suit, hence the suit out of which this appeal has arisen. Moti Ram has claimed to recover the sum of Rs. 737 *plus* interest from Banke Lal by sale of the property in question. The court of first instance decreed the claim. The lower appellate court dismissed it as being barred by limitation. It held that Moti Ram was driven to sue upon the two original mortgages and as they dated back to 1895 in the one case and prior to that in the other, the suit was barred by limitation. The pleas taken before us are, first of all that the present suit is a suit to enforce a liability created by the judgment which was passed between the parties in Banke Lal's second suit; that article 122 applies, and that the suit is within time. In the alternative it is urged that it is a suit to enforce a charge under article 132; that no charge arose in favour of the plaintiff until the decision of the suit or at least until the years 1901 to 1904 when he paid the money; since which time there have been certain acknowledgments of liabilities made by Banke Lal which under section 19 of the Limitation Act would operate to extend limitation. There has been a great deal of discussion over the meaning of sections 74 and 101 of the Transfer of Property Act but we do not think that they are at all relevant to the point that we have to decide. Section 101 of the Transfer of Property Act does not apply to the case in question. Moti Ram was not the owner of a charge or encumbrance who had become absolutely entitled to the property. He was a person who had become entitled to the property by auction purchase; who subsequently paid off two prior mortgages and when he was sued by Banke Lal, he, by the application of equitable principles was entitled to hold up the payments that he had made as a shield and to demand that Banke Lal should re-pay to him that sum before he could oust him from the property. The judgment in the suit between him and Banke Lal did not create a liability. It merely declared the right of Moti Ram and did not create it. We do not think that article 122 has any application to the facts of the present suit. In both the courts below the defendant raised the plea that this suit was barred by the provisions of section 47 of the Code of Civil Procedure. The first court dismissed this plea in two lines. The lower appellate court did not touch it. It has been raised and discussed before us. We have summoned the Collector's record of the sale proceedings in order to satisfy ourselves as to what took place therein between the parties; but it has been of no assistance as the proclamation of sale is not to be found in it. If this suit were treated as one upon the original mortgages, it would be barred by limitation. It clearly cannot be treated as a suit based upon the previous judgment and to enforce a liability created thereby and article 122 of the Limitation Act does not apply. Nor does article 132 apply. Even if it did the bar of limitation would still be there as we have not been able to find the alleged acknowledgments.

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The plaintiff's present position is due to his own negligence. He was duly impleaded in Banke Lal's last suit and he rightly raised the plea that the property could not be sold until the sum of Rs. 737 had been paid to him. The court passed a wrong decree directing the property to be sold subject to his lien. It ought to have directed Banke Lal to pay the money before he put the property to sale. The plaintiff remained satisfied with that decree.

If we assume that the court meant by the words "*subject to the lien of Moti Ram*" that the money was to be paid before the property was sold, then Moti Ram has been most negligent. Even when the final decree was prepared he did not appear to see that the decree was properly drawn up and as a matter of actual fact it omitted all mention of his rights.

When the decree was put into execution and notice issued to him, he did not appear and the property was sold and possession awarded. He then came into court and asked to be re-placed into possession. The court refused his plea and he did not appeal.

It is clear that no separate suit will now lie. The matter was one that ought to have been raised and actually was raised between the parties in the previous litigation and Moti Ram asked for the relief to which he was entitled *viz.*, that the property should not be sold until he had been paid off. The court's decree did not in terms grant him that relief. If its decree be taken as a refusal to grant the relief he cannot now sue for it again.

If it be taken as having granted him that relief, he ought to have enforced it in the execution department and no separate suit will lie. If the present suit be treated as an application in the execution proceedings he is met with the fact that the final decree is silent on the point and no attempt has been made to make it agree with the preliminary decree. If that error be now amended, he will then be met with the fact that when notice was issued to him he took no objection and when after the property had been sold, he came into court and the court refused to give him his relief in those proceedings, he remained satisfied with that order. The principle of the rule of *res judicata* must be applied. He ought to have appealed and obtained his relief then and there. He cannot re-open the point again by a fresh application in the execution proceedings. We can see no way of giving him relief now, and he has merely himself and his own negligence to thank for his present difficulty.

The appeal must fail and we dismiss it. In the circumstances of the case however we order the parties to bear their own costs of this appeal.

Appeal dismissed.

NANDLAL SINGH (*Plaintiff*)*versus*BENI MADHO SINGH AND OTHERS (*Defendants*)*

*Costs—Joint decree for costs against defendants claiming under separate titles—
Defendants wrong-doers—Suit for contribution—Suit not maintainable.*

N got a half share in certain property under a deed of gift executed by *J*. *B* got a half share in the same property under a separate deed of gift also executed by *J*. *B* and *Z* alleging themselves to be owners brought a suit against *N* and *R* to recover their shares in the property. *R* did not defend the suit, and *N* contended that the suit had been brought in collusion with *R*. The suit was decreed (it being found that *N* and *R* each had separately in his possession a share to which *B* and *Z* were entitled) and costs were jointly awarded against them. The whole of the costs was realised from *N* alone. In a suit for contribution by *N* against *R*, held that the suit would not lie, *N* and *R* being independent wrong-doers whose interests were in conflict.

SECOND APPEAL from a decree of BABU MURARI LAL, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore, reversing a decree of Maulvi Muhammad Junaid, Munsif of Fatehpur.

Tej Bahadur Sapru (with him *Shamnath Mushran* and *Kailas Nath Katju*), for the appellant.

Baldev Ram Dave (with him *Braj Nath Vyas* and *Nawal Kishore*), for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—The plaintiff-appellant in this suit was a person who under a deed of gift executed by one Jagat Singh obtained a half share in certain property. The respondent Ram Lal Singh is a person who received a half share in the same property by an entirely separate deed of gift from the same Jagat Singh. Beni Madho Singh and Zalim are certain persons claiming to be the lawful owners of a certain share in that property. They brought a suit to recover their shares and they impleaded both Ram Lal Singh and Nand Lal Singh in the suit. Ram Lal Singh did not defend the suit but Nand Lal Singh did and in the course of his pleadings he stated that Ram Lal Singh was at the bottom of the suit and that he had instigated the plaintiffs to sue. Part of the claim was decreed and part of the claim was dismissed. The plaintiffs appealed in respect to

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A. RAOOF, J.

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so much of their claim as was disallowed. Nand Lal Singh appealed in respect to so much of the claim as had been decreed against him. The plaintiff's appeal was allowed, and Nand Lal Singh's appeal was dismissed. Ram Lal Singh was a respondent to both the appeals. He contested neither. In the execution department, Ram Lal Singh pleaded that no portion of the share decreed to the plaintiffs should be taken from him but that it should all be taken from Nand Lal Singh. Nand Lal Singh opposed him. The court held that each of them had in his hands half of the share decreed. The appellate decree which is the decree of this Court in the plaintiff's appeal, shows clearly that this Court held that each defendant was separately liable in respect of the property which was in his hands. The order for costs was a joint one. The plaintiffs in the former suit have recovered the whole of their costs from Nand Lal Singh. He has now brought the present suit for contribution, claiming half from the defendant Ram Lal Singh. This is clearly not a case of joint *tort feorsors*. Ram Lal Singh derived his title to the property which was in his hands by an entirely separate deed from Jagat Singh, and Nand Lal Singh derived his title, such as it was by a separate deed of gift. The two defendants were not at one in defending the suit. They were as a matter of fact opposed to each other. Paragraph 15 of the written statement of Nand Lal Singh shows this clearly. Ram Lal Singh in no way contested the suit whereas Nand Lal Singh did and it is quite clear that the extra costs that were incurred in that suit were due to the action of the present plaintiff Nand Lal Singh alone. The case is very much like that of *Fakire v. Tasaddug Husain* (1). In this case there was no contract between the present parties. Each was in separate possession of property and there was nothing joint. Each was separately liable for the trespass that he had committed. Each trespass was committed separately, and each defendant's liability for mesne profits was entirely separate. The only thing common between them was that they were arrayed as defendants to the suit. We cannot find any equity in the present case that will enable us to hold that the respondent Ram Lal Singh is in any way liable to the plaintiff for a share of the costs that was recovered from him. The appeal is dismissed with costs to Ram Lal Singh.

It is to be noted that the action of the plaintiff is directed solely against Ram Lal Singh and not against the other respondents. This is clearly admitted before us in open court.

Appeal dismissed.

(1) [1897] I. L. R., 19 All., 462.

LALA RAM (*Plaintiff*)
versus
 THAKUR PRASAD (*Defendant*)*

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BANERJI, J.
RYVES, J.

Civil Procedure Code (Act V of 1908), section 60 (c), Order 21, rule 92—Execution of decree—Sale in execution—House of an agriculturist—Exemption from liability to sale—Issue raised in a separate suit by the judgment-debtor that house not saleable—Estoppel.

In execution of a money decree passed against the defendant a house was sold and it was purchased by the plaintiff. The defendant raised no objection to the sale which was duly confirmed. The plaintiff having obtained formal possession brought a suit against the defendant for recovery of actual possession. The suit was resisted on the ground that the defendant was an agriculturist and consequently the house was exempted from liability to sale under section 60 (c) of the Code of Civil Procedure:—*Held* that defendant having allowed the auction sale to take place without objection and that sale having been confirmed it became conclusive as between the parties, and the purchaser acquired a vested interest in the property sold and the defendant was precluded from questioning the validity of the sale and the title of the purchaser.

SECOND APPEAL from a decree of PANDIT PIARE LAL KATARA, Subordinate Judge of Mainpuri, confirming a decree of Babu Prem Behari, Munsif.

Baleshwari Prasad, for the appellant.

Girdhari Lal Agarwala, for the respondent.

The judgment of the Court was delivered by

BANERJI, J.—This appeal arises out of a suit brought by the plaintiff-appellant for possession of a house which originally belonged to the defendant-respondent. In execution of a decree obtained against the said defendant the house was sold by auction so far back as the 23rd of November, 1910, and it was purchased by the plaintiff. He obtained formal delivery of possession, but as he did not get actual possession he brought the present suit. The claim was contested on the ground that the house claimed was the house of an agriculturist and was therefore not liable to sale in execution of a decree in view of the provisions of section 60 (c) of the Code of Civil Procedure. This objection prevailed in the courts below and the suit was dismissed. The plaintiff has preferred this appeal and he raises two questions. The first is that the lower appellate court ought to have determined whether the house was the house of an agriculturist or was appurtenant to the house of an agriculturist within the meaning of clause (c) of section 60; and, secondly, even if the house was of the description mentioned in that clause whether after that sale and confirmation of sale it was open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired

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under it. As regards the first point the lower appellate court says that it was a fact not disputed that the defendant was a tenant and that the house in dispute was an appurtenance to his tenancy. We must accept this statement of fact as correct and assume that the house in dispute is an appurtenance to the tenancy of an agriculturist as such. If an objection had been taken before the auction sale it ought not to have been sold but the question which arises is whether after the sale and the confirmation of the sale its validity can now be questioned by the defendant as against whom the sale has become conclusive by reason of its confirmation. Under Order 21, rule 92, after a sale has taken place and has been confirmed the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place or at any time. It is not suggested in the pleadings that the defendant judgment-debtor was not aware of the execution proceedings; so that as between him and the auction-purchaser the sale has become conclusive and the auction-purchaser has acquired a vested interest in the property sold. If objection had been raised on behalf of the defendant before the auction sale the court would have had jurisdiction to consider and decide whether the property was of the description mentioned in section 60(c), and if it had decided that the property was liable to sale and no appeal had been preferred against such decision, the sale of the property could never be questioned. In the present case no objection having been taken and the sale having become conclusive as between the parties, it is not open in our opinion to the defendant after the lapse of so many years from the date of the sale to contend that the sale ought never to have taken place and conveyed no title to the purchaser. This view is supported by the decision of this Court in *Umed v. Jasram* (1), and also by the decision referred to in the judgment in that case. The rulings of the Bombay High Court in *Pandurang Balaji Bagave v. Krishnaji Govind Parab* (2) and of the Calcutta High Court in *Dwarka Nath Pal v. Tarini Sankar Ray* (3), are to the same effect. The only case in which a contrary view appears to have been held is the unreported judgment of a single Judge of this Court in second appeal No. 327 of 1910, decided on the 16th of January, 1911. In that case the learned Judge held that an objection as to attachment and sale could not be made before the auction sale. We are unable to agree with this view and we do not feel ourselves justified in following that ruling in the face of the other rulings to which we have already referred. The result is that we allow the appeal, set aside the decrees of the courts below and decree the plaintiff's suit with costs in all courts.

Appeal allowed.

(1) [1907] I. L. R., 29 All., 612. (2) [1903] I. L. R., 28 Bom., 125.

(3) [1907] I. L. R., 34 Cal., 199.

PRIVY COUNCIL.

KALYAN DAS AND OTHERS (*Plaintiffs*)*versus*SHEIKH MAQBUL AHMAD AND OTHERS (*Defendants.*)

Privy Council practice—Point not taken before High Court—Point taken in grounds of appeal to High Court but not pressed—Cannot be raised before Privy Council.

*Feb. 28 and
March, 1.*

It is a well settled rule of practice of the Judicial Committee that an appellant will not be allowed to question the decree of a High Court on the ground that it has wrongly accepted a decision of the Subordinate Court, if he himself has never brought that decision before the High Court for its consideration.

VISCOUNT
HALDANE,
LORD DUN-
EDIN, LORD
SUMNER,
SIR JOHN
EDGE,
MR AMEEB
ALI.

And the same rule applies when the appellant though he has mentioned a point in his memorandum of appeal to the High Court, elects not to advance it for the High Court's determination.

CONSOLIDATED APPEALS from two decrees of the Allahabad High Court, dated November 6th, 1912, modifying a decree of the Subordinate Judge of Aligarh.

The facts of the case are sufficiently stated in their Lordships' judgment. One Debi Das, to whom certain immoveable property was mortgaged, subsequently purchased the equity of redemption and became full owner. As such he mortgaged the property to Sagar Mal, who brought a suit on the mortgage, and obtained a decree for sale in execution of which the property was put up for sale and purchased by respondents who obtained possession. By mistake or accident the sale proclamation and certificate of sale specified that what was sold was the "mortgagee rights" of Debi Das in the property. Many years after the present suit was brought by the appellants as heirs of Debi Das, (a) for a declaration that the court sale was a nullity; (b) alternatively for redemption of the mortgagee rights sold. The Subordinate Judge dismissed the plaintiff's first claim, but granted the second, and directed accounts to be taken and finally made a decree. Plaintiffs appealed on questions of account only. The High Court after remitting the case to have the accounts re-taken passed a decree for redemption of the mortgagee rights on a certain footing.

Plaintiffs then preferred the present appeal, in which they not only raised various questions of account, but revived their contention that the court-sale was a mere nullity.

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Sir W. Garth, for the appellants.—What was sold at the auction must be determined by the terms of the sale proclamation and sale certificate.

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Thakur Barnha v. Jiban Ram Marwari, [1913] 41 I. A., 38.

These show that what was sold were the mortgagee rights of Debi Das. But these rights ceased to exist when Debi Das acquired the equity of redemption. No doubt in certain cases a mortgagee purchasing the equity of redemption can keep alive his rights as mortgagee: but in the present case the intention to do so has been expressly negatived, and this being so the charge was extinguished under section 101 of the Transfer of Property Act. The purchase was before that Act, but section 101 is merely declaratory of the existing law. The result is that respondents got nothing by the sale.

[*De Gruyther, K. C.*—This point is not open: it was not appealed to the High Court.]

The Subordinate Judge's first decree was interlocutory only. The trial was before the Civil Procedure Code of 1908: under the old Code we need not appeal, even if we could appeal till the final decree:

Forbes v. Ameeroonissa Begum, [1865] 10 M. I. A., 340 at p. 359;

Shah Mukhun Lal v. Babu Sree Kishen Singh, [1858] 12 M. I. A., 167 at p. 184;

Khadim Hossain v. Imdad Hossain, [1901] I. L. R., 29 Calc., 758 (F. B.)

No doubt the present law is different:

Ahmad Musaji Saleji v. Hashim Ebrahim Saleji, [1915] 42 I. A., 91.

Secondly.—The respondents were not entitled to enhanced revenue prior to 1897. For the 16 years 1881-1897 the mortgage was admittedly dead.

Thirdly.—The appellants should have been allowed interest on the sum of Rs. 6,988 which Debi Das took out of court in 1878.

Fourthly.—We are entitled to *Malikana* in terms of the mortgage.

De Gruyther, K. C., for the respondents.—The first point, *viz.*, that nothing passed under the auction, is not open; the Subordinate Judge decided it against appellants, and no appeal on the point, was ever preferred to the High Court.

The second point is similarly not open. It is true it was taken in the appeal to the High Court, but that court has recorded that plaintiff's *vakil* stated that he "did not desire to press it." It must be taken to have been abandoned.

[Their Lordships intimated that this point was not open to appellants.]

The High Court were right in refusing to allow appellant's interest on the Rs. 6,988: there was no good reason for allowing it.

We are willing to allow Rs. 1,000 for *Malikana* provided that this is not made a ground for depriving us of costs.

Sir W. Garth, replied.

Their Lordships' judgment was delivered by

LORD SUMNER.—In 1863 Debi Das lent 7,700 rupees to Ram Bux on a usufructuary mortgage of his half share in a mouzah, called Lodha Mai, in the district of Etah. Debi Das died a good many years ago, and the present appellants, the plaintiffs in the suit, are his representatives in interest. A suit was begun in 1877 for redemption of this mortgage, and a decree was made on payment of 6,988 rupees, which sum was brought into court. Debi Das appealed on the ground that this sum was not enough, and it was increased by a further sum of 8,956 rupees. While the appeal was pending he had managed to take the money out of court, and the mortgagors had then got possession. They paid, however, no more, and accordingly in 1879 their redemption suit stood dismissed. Debi Das then applied to be, and was replaced in possession and, having sued for mesne profits during the time he was out of possession, he got a decree in 1881, in execution of which the court sold the mortgagors' equity of redemption at auction. Debi Das, being the buyer, was put into possession as full owner in 1883.

It might have been supposed that this was the end of the mortgage of 1863, but, strange as it may seem, this appeal is now brought to determine upon what terms the appellants, the representatives of Debi Das, are to be allowed to redeem it, as mortgagors, some thirty years after he bought in the mortgagor's equity of redemption, as mortgagee. This paradoxical result has come about as follows.

Debi Das continued in possession of the property as owner till 1897, and as owner he mortgaged it in 1886 to Sagar Mal. There is no copy of this mortgage forthcoming. Debi Das got behind with his payments, and in 1897, on the application of Sagar Mal, the property was put up for sale. The respondents, the defendants in the suit, or their predecessors in interest, bought it and duly obtained possession.

The proclamation of sale was dated the 27th February, 1895. Though Debi Das had bought the equity of redemption of the 1863 mortgage in 1881 and had had possession of the property since 1883, his name, from indifference or neglect, continued to be recorded in the revenue papers as mortgagee. This may account for the wording of the proclamation of sale. The entry in the

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column for the description of the property was "zamindari property in mouzah Lodha Mai, out of which the shares entered as holding Nos. 1, 2, and 3 are mortgaged with possession to Debi Das, under a mortgage-deed dated the 5th February, 1863." The column headed "extent of interest of judgment-debtors in the property as far as it has been ascertained by the court" was filled up thus: "(b) mortgagee right in a 7 biswa share, entered as holding No. 1 in the 10 biswa mahal patti, Debi Das; (c) mortgagee right in a 1 biswa, 9 biswansi, 15 kachwansi share entered as holding No. 2; (d) ditto, ditto, entered as holding No. 3" These fractions, with another not included in the present proceedings, make up the half share originally mortgaged by Ram Bux. The application for execution of the decree for sale had contained a "specification of the property sought to be sold by auction" in similar terms and the list of bids and the sale certificate, dated the 2nd August, 1897, followed the same formula. It certified that the respondents' predecessor was declared to be the purchaser of property, specified as "mortgagee rights in holdings 1, 2, and 3 in the 10 biswa mahal patti, Debi Das." The documents were all in regular form. There is nothing to show that there was anything in the mortgage to Sagar Mal to account for this mode of describing the subject-matter of the sale and in the proceedings below Sagar Mal's mortgage is stated to have been secured on the 10 biswa share, of which Debi Das had become proprietor in 1881. Most probably it was the result of slavishly following the entry in the revenue papers, which had ceased for many years past to represent the true position of Debi Das towards the property.

The present suit was begun in 1906 and the plaintiffs prayed, first, a declaration that the court's sale in 1897 was a nullity, as it was inoperative to pass the proprietary rights of Debi Das and he had no mortgagee's rights to be passed, and, secondly, in the alternative, for redemption of the mortgagee rights sold, *videlicet*, the rights of Debi Das as mortgagee under the mortgage of 1863, being the only mortgage he ever held. This was the beginning of perplexity.

The assumption was that Sagar Mal, in enforcing a simple mortgage of his own, had prevailed on the court to sell his mortgagor's rights, as mortgagee under a usufructuary mortgage, to which he was a stranger. The plaintiffs asked the court to allow them to redeem a mortgage, which had ceased to exist nearly a quarter of a century before, and to redeem it as against persons who had never been parties to it, and in the process of redemption their interest would be to contest what their predecessor, Debi Das himself had done, and, as his representatives, to require the defendants to account, as if they were the parties who really represented him. In a word, Debi Das prayed to be allowed to redeem Debi Das and to have him decreed to account as mortgagee for the benefit of himself as mortgagor.

This suit has been thrice before the Subordinate Judge, and has twice been appealed to the High Court. On the first occasion the Subordinate Judge dismissed the plaintiffs' first claim for a declaration of the nullity of the sale and granted the second, the claim for redemption. He subsequently heard evidence, took the accounts, and made a decree for a final sum. From this the plaintiffs appealed, but on questions of account only. The dismissal of their claim to have the sale of 1897 declared a nullity they did not contest. The High Court, on the first occasion, remitted the case to have the accounts re-taken, subject to certain directions, which they gave. Again the account was taken, and again it was appealed. The present appeal to their Lordships' Board is against both judgments of the High Court, both the first and the second.

Their Lordships are not surprised to find in the judgments of the High Court plain evidence of the embarrassment, which the learned Judges felt, in affirming a decree for redemption of an extinct mortgage by the mortgagee's representatives against persons, who had only this much to do with it that they had managed to procure the court to sell something for their benefit, which was nothing but a memory of the past. The choice which the parties laid before the High Court was a limited one. The present respondents asked that the transaction of 1897 should be construed as a sale of the whole proprietary interest of Debi Das. The present appellants did not ask to have it declared a nullity, as being a sale of non-existent interests. They accepted the judgment of the Subordinate Judge that they should be allowed to redeem these interests, whatever that might mean. The High Court not unnaturally thought that they could not hold the sale to have really been a sale of the entire proprietary interest in the half share, when every document connected with it described the subject-matter as being the specific rights of a mortgagee in that half share, but they were careful to go no further. Had they been free to deal with the argument of the present appellants, had they heard it contended that in effect nothing was sold at all, their decision might have been otherwise.

Before their Lordships the appellants' points have been five. First, on the whole matter, they say that the respondents' predecessor took nothing by his purchase in 1897. The rest of the argument is on the accounts. The second point is that certain patwari's accounts were improperly accepted and relied on; the third that an insufficient sum was allowed to the appellants for *Malikana* under a condition in the mortgage that the mortgagee should make a certain *Malikana* allowance; the fourth that credit should be given to the appellants in respect of payments of enhanced revenue cesses upon the property, and the fifth that interest ought to be allowed them on the 6,988 rupees, which Debi Das took out of court in 1878.

It is a well-settled rule of practice of their Lordships' Board that an appellant, when bringing up the actual decree of the High

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Court for review, shall not be allowed to ask to have it set aside on the ground that it has wrongly accepted a decision of the Subordinate Court, if he himself has never brought that decision before the High Court for its consideration. Such a request would be fair neither to the court appealed from nor to the Board appealed to. The High Court ought not to be liable to have its determinations over-ruled upon matters never submitted to it. Their Lordships ought not to be called on to adjudicate finally upon matters where they have not the advantage of knowing and weighing the view taken by the learned Judges of the High Court. This has nothing to do with waiting to question an interlocutory decision until an appeal is taken from a subsequent final decree. The appellants' first point therefore cannot now be raised.

The second point fails *in limine*, because by the terms of the mortgage of 1863 the appellants were bound to accept the patwaris' accounts, whether they were merely made upon materials furnished to him, as was the case, or were the fruits of his own independent inquiry, which probably never happens. The third was disposed of by an agreement between counsel that an additional sum of 1,000 rupees should be credited to the appellants in the account over and above what had been allowed by the decree under appeal, the question of costs not to be affected by this concession. From the fourth point the appellants are barred on much the same grounds as apply to the first. It appears that on the second appeal to the High Court this point was mentioned in the notice of appeal, and the judgments say of it that the appellants' advocate "stated that he did not desire to press it," and so no more is said about it. Their Lordships think that they must accept this statement. It is true that the same learned gentleman included this point again in the present appellants' petition for leave to appeal to His Majesty in Council, which is dated on the very day on which the judgment of the High Court was given, but in the absence of any evidence that the judgment was erroneous on this point the appellants must accept it, and cannot raise here, by way of exception to the High Court's decree, a point which they elected not to advance for the High Court's determination.

The fifth point remains. If any regard is had to the true facts this argument is not easy to state. In effect it is this. Debi Das now claims to receive from the respondent's interest on a sum of money, which he himself had and enjoyed ever since 1878 and which they never had, or owed, or had anything to do with at all. Only by forgetting the facts and fixing the mind on the notional mortgage, which by a fiction is being redeemed in the present proceedings, is the point intelligible at all. It seems to amount to what follows. In 1878 the mortgagees under the mortgage of 1863 got 6,988 rupees on account of a redemption, which is only now taking place; therefore they received it over thirty years too

soon; therefore they should not only allow it in account, which they have done, but should allow over thirty years' interest on it too. Alternatively, since 1878 the principal mortgage moneys under the mortgage of 1863 must be deemed to have been paid off in the proportion of 6,988 to 15,944, and as the enjoyment of the usufruct by the mortgagees was conceded only in consideration of the continuance of the mortgage loan, the enjoyment should be reduced *pro tanto* from that date; in strictness, on redemption a part of the rents and profits collected should be returned or credited in account to the mortgagors in the above proportion, but for simplicity's sake interest at a sufficient rate will do as well. One cannot, however, help remembering here that the persons, who are asked to re-pay these profits are the respondents, whose predecessors never collected them or had anything to do with them, and that the persons to whom they are to be re-paid are the successors of Debi Das, who collected and enjoyed them and probably bequeathed them to the appellants, but this inconvenient reminiscence is for present purposes outside the hypothesis.

To the first way of putting the matter their Lordships reply, as the High Court replied, that interest depends on contract, express or implied, or on some rule of law allowing it. Here there is no express contract for interest and none can be implied, and no circumstances less capable of justifying the allowance of interest as matter of law can be imagined. The mortgage of 1863 is the answer to the second view. It treats the usufruct as a whole as a remuneration for the loan or any part of it, so long as it remains outstanding. The words are—

"Interest on the mortgage money has been agreed to be considered equal to the amount of profits, i. e., the mortgagee shall not claim interest on the mortgage money, nor shall I the mortgagor claim profits of the village. . . . The mortgagee shall be the owner of profits and liable for loss after payment of the Government revenue, patwari rate, chaukidar cess, and village expenses and, with the exception of the 'Malikana' allowance mentioned above, I shall not at all claim anything else. When I pay the whole of the mortgage money in a lump sum . . . the property shall be redeemed. During the period (of the mortgage) I shall in no way raise any dispute or offer any obstruction to the mortgagee in making collections from the tenants of the village."

Their Lordships will humbly advise His Majesty that, by consent of the parties, the decree of the High Court, dated the 6th November, 1912, should be varied by allowing credit to the appellants for an additional sum of 1,000 rupees, but that otherwise the decrees under appeal should be affirmed, and that these appeals should be dismissed with costs.

A. P. P.

Appeal dismissed.

Douglas Grant.—Solicitor for the appellants.

Barrow Rogers and Nevill.—Solicitors for the respondents.

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BANERJI, J.
RYVES, J.GOSWAMI GORDHANLALJI AND OTHERS (*Judgment-debtors*)

versus

GOSWAMI MAKSUDAN BALLABH (*Decree-holder*)*

Code of Civil Procedure (Act V of 1908), Order XXI, rule 32—Injunction, decree for—Execution of decree—Decree passed in regard to a hereditary office—Right claimed as legal representative—Decree passed against defendants as legal representatives.

A decree for a perpetual injunction was passed in favour of the plaintiff and certain other persons called defendants of the third party against persons who were called defendants of the second party. The right claimed in the suit was the right to perform "Arti" in a certain temple, the parties asserting their right thereto as descendants of the original founders. The defendants of the second party were restrained from interfering with the performance of the "Arti" by the plaintiff and defendants of the third party. The defendants of the second party having obstructed the performance of the "Arti," one of the defendants of the third party applied that the decree might be enforced through the Superintendent of Police. The application was granted:—*Held* that Order XXI, rule 32 of the Code of Civil Procedure prescribed the mode of executing a decree for an injunction and the court was not justified in ordering the police to interfere in the matter nor was it justified in appointing a Commissioner to see that the decree holder performed without obstruction the duties appertaining to his office. Clause (5) of rule 32 of Order XXI does not authorize the passing of such orders and provides for a different state of things.

Held also that the decree related to a hereditary office which the plaintiff claimed and which the defendants resisted and was not passed against the defendants as individuals but as descendants of the original founder.

EXECUTION FIRST APPEAL from a decree of H. J. COLLISTER Esq., Subordinate Judge of Muttra.

Shiam Krishna Dar, for the appellants.

Narain Prasad Asthana, for the respondent.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This appeal arises out of an application for the execution of a decree passed on the 17th of December, 1906, in a suit brought by one Goswami Manohar Lal against a number

* E. F. A. No. 112 of 1918.

of defendants of whom the appellant Pearey Lal is one. Certain persons who were alleged to have the same rights as the plaintiffs were made defendants of the third party, one of these defendants being the present applicant for execution Goswami Maksudan Ballabh. A decree was made by the court against all the defendants of the first and second party with the exception of one Kishori Lal declaring that the plaintiff and the defendants of the third party were entitled to perform the "Singar Arti" ceremony in a certain temple both on ordinary and festive occasions. The decree also ordered a perpetual injunction to issue restraining, the defendants of the first and second parties from obstructing the plaintiff and the defendants third party from performing the duties of the office claimed by them. The present application was made by Goswami Maksudan Ballabh who is one of the defendants of the third party against Goswami Gobardhan Lalji, the grandson of Prem Lal, who was defendant No. 1 and Goshain Girdhar Lalji and Goshain Gourdhan Lalji, the sons of Goshain Munna Lal, who was one of the defendants of the second party, and Piare Lalji who as we have said above was also a defendant of the second party. It is stated on behalf of the decree-holder that these defendants are now interfering with the performance of the duties appertaining to the office which was claimed in the suit and which was decreed to the plaintiff and the defendants of the third party. Their prayer as contained in the application is that the decree may be enforced through the Superintendent of Police of Muttra in this way that on the dates mentioned in the application he (the Superintendent of Police) may have the "Arti" performed by the decree-holders, applicants, and that the defendants may be directed not to interfere with the performance of those duties. The application is opposed on several grounds but the objections were disallowed and the application as made was granted by the court below. In this appeal which has been preferred by the judgment-debtors the first contention raised is that Goswami Maksudan Ballabh is not entitled to apply for execution as he was not one of the plaintiffs to the suit. This objection was raised in the court below and was, we think, rightly disallowed. The decree was made in favour not only of Manohar Lal but also of the defendants of the third party declaring their right to perform the duties of the office claimed by them at certain hours every day and also on festive occasions. The decree thus declared the right of amongst others the present applicant Maksudan Ballabh and the injunction decreed was also an injunction in his favour. He is, therefore, entitled to maintain the present application.

The next contention put forward on behalf of the appellants is that the decree was personal to the persons in whose favour it was made and could only be enforced against the individuals who were defendants to the suit and not against persons who are their legal

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representatives. This contention also is in our opinion without force. It appears that the suit was brought on the basis of a right which the plaintiffs claimed as descendants of one of the founders of the temple and that the defendants were also made parties as such descendants. The plaintiffs claimed to have the right to perform certain offices which the defendants contended they themselves had a right to perform. So that the decree related to a hereditary office which the plaintiffs claimed and in regard to which their claim was resisted by the defendants. The injunction was also granted against them not as individuals but as persons who claimed a right as descendants of the original founder of the temple. The appellants, who after the death of some of the defendants in the former suit, have taken their place—or claim to have taken their place—are thus persons against whom the decree may properly be executed so far as the injunction goes. We may mention that this plea was not put forward in the court below and it therefore did not become necessary for that court to consider it.

The third contention is that the application is time-barred. As the decree was one for a perpetual injunction limitation would run from the date of breach of the injunction, that is from the date on which the defendants disobeyed the injunction—that date was within three years of the present application. Consequently no question of limitation arises in the present case, as held by the court below.

It is lastly urged that the court below was wrong in ordering the Superintendent of Police of Muttra to see that the “Arti” was performed by Goswami Maksudan Ballabh and that the defendants offered no obstruction. So far as this part of the prayer in the application for execution is concerned we do not think that the court below ought to have granted it. It had no power under the Code of Civil Procedure to order the police to interfere in the matter. There being a decree for a perpetual injunction against the defendants or those whom they represented, it was the duty of the defendants to carry out the injunction, that is to say to refrain from offering any obstruction to the performance of the office which was decreed to the decree-holder. If they disobeyed the order of the court they were liable to the penalties mentioned in Order 21, rule 32 of the Code, but the court could not order the police to see that the decree-holders performed the duties of their office without interference on the part of the defendants. If a breach of the peace was apprehended, that was a matter for the Magistrate and the police and not for the Civil Court. We accordingly set aside that portion of the lower court’s order which directs the Superintendent of Police to order the Sub-Inspector of Bindra-ban to have the applicant Maksudan Ballabh perform “Singar Arti” in the temple.

We are also of opinion that the court had no power to appoint a Commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. This portion of the lower court's order which was passed on a subsequent date should also be set aside. In our opinion clause (5) of rule 32 does not authorize the court to make these orders and provides for a different state of things.

We accordingly vary the order of the court below by directing that an order do issue to the defendants appellants forbidding them to interfere with the performance of the duties of the decree-holder, namely "Singar Arti" every day and on festive days in the temple of Radha Ballabhji. If the defendants appellants fail to obey the injunction it will be time for the decree-holder to make a proper application in the terms of Order 21, rule 32. We direct the parties to bear their own costs of this appeal.

Decree varied.

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LACHMI NARAIN DUBE (*Applicant*)

versus

KISHUN LAL AND ANOTHER (*Opposite parties*)*

Provincial Insolvency Act (III of 1907), sections 6, 15, 16—Petition for insolvency—Petitioner examined and evidence taken—Case adjourned—Petitioner absent on adjourned date—Petition dismissed for want of prosecution—Order illegal.

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June, 20.

BANERJI, J.
PIGGOTT, J.

On a debtor's petition of insolvency presented under section 6 (3) of the Provincial Insolvency Act, the duty laid upon the court after completing the necessary enquiries, is to come to a decision on the various matters spoken of in section 15 and either to dismiss the petition or to make an order of adjudication. There is no warrant in the Act for dismissing such a petition for want of prosecution if the debtor does not appear on a subsequent date when the court on a previous date had examined the petitioner and taken some evidence.

FIRST APPEAL from an order of I. B. MUNDLE Esq., Subordinate Judge of Mirzapur.

Harnandan Prasad, for the appellant.

The respondents were not represented.

*F. A. F. O. No. 13 of 1918,

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Piggott, J.

The judgment of the Court was delivered by

PIGGOTT, J.—This is an appeal by one Lachmi Narain Dube, who had applied to the court of the Subordinate Judge exercising jurisdiction in the district of Mirzapur to be adjudicated an insolvent. The application was opposed by a creditor; the court had examined the applicant and had taken certain evidence offered by the objecting creditor. The hearing was then adjourned for reasons which need not be discussed, and it continued to be adjourned over a number of successive dates fixed for the hearing. Finally on the 31st October, 1917, the case being called on, it was found that the applicant did not appear. The court, thereupon, passed the following order:—

“Applicant is absent. The application is dismissed for want of prosecution.”

It seems to us that this order is not justified either by the circumstances of the case or by the provisions of the Provincial Insolvency Act, No. III of 1907. The debtor's petition had alleged facts sufficient, if established, to entitle him to present his petition under section 6 (clause 3) of the said Act. After completing the necessary enquiries the duty laid upon the court was to come to a decision in respect of the various matters spoken of in section 15 of the said Act and then either to dismiss the petition under the provisions of that section, or else to make an order of adjudication. On this point the words of section 16 (i) of the Act are clear and mandatory. We, therefore, allow this appeal and set aside the order of the court below. We return the record to that court with orders to re-admit it on to its file of pending applications and to dispose of it according to law. The appeal is not opposed and there is no necessity for us to make any order as to costs.

Appeal allowed.

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June, 26.

TUDBALL, J.
A. RAOOF, J.

TAMIZ-UN-NISSA BIBI AND ANOTHER (*Judgment-debtors*)

versus

NAJJU AND ANOTHER (*Decree-holders*)*

Limitation Act (IX of 1908), Schedule I, article 182 (5)—Execution of decree—Step-in-aid of execution.

An application to the court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in-aid of execution and saves the bar of limitation.

EXECUTION SECOND APPEAL from a decree of W. T. M. WRIGHT, Esq., District Judge of Budaun, confirming a decree of Babu Kshirod Gopal Banerji, Subordinate Judge.

Application for execution of a decree.

E. S. A. No. 459 of 1917.

A decree absolute was passed in favour of Najju Khan and others on February 17, 1910. The first application for execution of the decree was made on November 29, 1911, and thereupon the court transferred the sale to the Collector on March 23, 1912, inasmuch as the property sought to be sold was ancestral. One Sadiq Ali brought a suit against the decree-holders claiming 6 biswansis out of 16 biswansis of the property sought to be sold, and on July 9, 1913, Sadiq Ali's suit was decreed. Thereupon Sadiq Ali prayed that his 6 biswansis be exempted from sale. On July 18, 1913, the decree-holders applied that the sale of the entire 16 biswansis be allowed to proceed as an appeal against the decree obtained by Sadiq Ali was pending. But Sadiq Ali's prayer was sustained and his 6 biswansis were exempted. The present application for execution of the decree was made on June 27, 1916.

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• Both the courts below held that the application was within time inasmuch as the previous application of July 18, 1913, was a step-in-aid of execution. The lower appellate court relied upon the ruling of

Shagun Chand v. Ramjas, 5 I. O., 292.

The judgment-debtors appealed.

Iqbal Ahmad, for the appellants.

Ibn Ahmad, for the respondents.

The judgment of the Court was delivered by

TUDBALL, J.—This is a judgment-debtors' appeal and the sole question is whether the decree-holders' application of the 18th of July, 1913, is an application made to a proper court to take a step-in-aid of execution. That application was an application to the court to reject certain objections which had been filed against the execution of the decree so as to enable the execution to proceed. It was in our opinion an application made to the proper court, and it was an application asking that court to take a step which was very necessary for the execution of the decree. The appeal fails and is dismissed with costs.

Tudball, J.

Appeal dismissed.

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April, 15.

PIGGOTT, J.
WALSH, J.RAM DULARI (*Defendant*)*versus*HARDWARI LAL AND OTHERS (*Plaintiffs*) *

Limitation Act (No. IX of 1908), Sch 1, art. 116—Sale of property—Covenant to make good loss in case of vendee being compelled to pay off money in excess of sale consideration—Breach of covenant—Covenant of title—Limitation.

A sale-deed was executed in favour of the plaintiffs on July 4th, 1901, purporting to convey the property free from encumbrances and containing the covenant that should any excess sum be charged against them the other properties of the vendor would be liable for the same together with damages and costs. At the date of the sale there was a prior simple mortgage existing on the property. That mortgagee brought a suit for sale on August 1st, 1902, and it was decreed. May 20th, 1915, was fixed for sale of the property and on May 19th, 1915, the plaintiffs paid off the decree. On July 10th, 1915, the plaintiffs brought the present suit for recovery of the amount which they paid on account of the prior mortgage, together with interest, from the estate of the vendor:—*Held* that the suit was not barred by limitation inasmuch as the plaintiffs were not suing upon a mere covenant of title, but upon a covenant of indemnity as set forth in the sale-deed, and the cause of action arose on the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge.

FIRST APPEAL from a decree of BABU HARIHAR LAL BHARGAVA, Subordinate Judge of Shahjahanpur.

The predecessor in interest of the appellant executed on 23rd April, 1889, a simple mortgage of certain property in favour of one Chattri Lal. Subsequently, on 4th July, 1901, he sold the same property to the plaintiffs. In the sale-deed there was no mention of the mortgage; on the other hand there was a covenant to the effect that the property had been sold to the vendees free from all liabilities and debts, and that if any portion of the property passed out of the possession of the vendees or *if any excess amount were charged against them*, then the other properties of the vendor would be liable for the same, together with damages and costs. On an alternative reading of the words in vernacular the italicised words would be replaced by "if they were made liable for any prior encumbrance" On 1st August, 1902, Chattri Lal

sued on his mortgage and obtained a decree for sale of the property. Eventually the 20th of May, 1915, was fixed for the sale, and on 19th May, 1915, the plaintiffs paid the amount of Chatri Lal's decree into court and saved the property from sale. On 10th July, 1915, the plaintiffs brought a suit against the appellant for recovery of the amount together with interest from the estate of the vendor. Paragraph 4 of the plaint set out the covenant mentioned above; and the cause of action was said to have arisen on 19th May, 1915. One of the pleas in defence was that of limitation. The court of first instance held that the cause of action for the suit did not accrue till the plaintiffs had to pay the money on 19th May, 1915, and that the suit was therefore within time. The court decreed the suit. Hence this appeal.

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Tej Bahadur Sapru, (with him *Sarat Chandra Chaudhri*), for the appellant.—The suit is essentially one for damages for breach of the covenant of title contained in the sale-deed. That covenant was in the following terms, “the property has been sold to the vendees free from all liabilities and debts.” The title was guaranteed to be free; but it was not free, owing to the existence of the mortgage of 1889. The stipulation amounted to this, that the vendor was undertaking that there were no encumbrances or that if there were any, they had been cleared by him or would be cleared by him before the transaction of sale was completed. At the time when the sale was completed there existed contrary to the stipulation conveying an absolutely free title, an outstanding encumbrance on the property sold. Consequently, the breach of the stipulation occurred as soon as the sale was effected; and the cause of action for a suit for damages for breach of the covenant arose on the date of the sale. I rely on

Halsbury: Laws of England, Vol. 25, pp. 462, 464, 465,

where it is pointed out that such a covenant is not a continuing covenant but is broken once and for all at the time of the conveyance if there is then a defect in title; and, consequently, time begins to run forthwith.

This principle has been followed in India; *e.g.*, in the case of

Tulsiram v. Murlidhar, [1902] I. L. R. 26 Bom., 750; at p. 754; and was discussed with approval in the case of

Ardesir v. Vajesing, [1901] I. L. R. 25 Bom., 593; at p. 603.

The same rule is laid down in

Dart: Vendors and Purchasers, 7th Edition, pp. 788, *et seq.*;

and a distinction is drawn there, as well as in the passage from *Halsbury's Laws of England* cited above, between a covenant of title and a covenant for quiet enjoyment, as to the point of

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time from which limitation for an action for breach begins to run in either case.

In the case of

Hari Tiwari v. Raghunath Tiwari, [1888] I. L. R. 11 All., 27 at p. 80, F. B.,

EDGE, C. J., remarked that if the suit had been for the breach of a covenant of title, no doubt the period of limitation would begin to run from the time when the deed was executed. As, however, there was no covenant of title in that case but only a covenant for quiet enjoyment, it was held that the cause of action did not arise until the happening of an event disturbing that enjoyment.

I am further supported by the cases of

Turner v. Moon, [1901] 2 Ch., 825 ;

The Secretary of State v. Pemmarraju, [1916] 30 M. L. J., 575 ; S. C., 35 I. C., 254.

The cause of action having arisen on the date of the sale, the suit should have been brought within six years of that date, under Art. 116 of the Limitation Act. As has been laid down in many of the authorities already cited time begins to run, in such cases, from the date of the conveyance, although the vendee may not have knowledge of the defect in the title. It is, therefore, immaterial when the plaintiffs came to know of the existence of the mortgage. At any rate, they had knowledge of it when they were made parties to Chatri Lal's suit in 1902. Even if it be regarded that the cause of action arose on the date of the decree in that suit, the present suit is still barred by time.

Baldev Ram Dave, for the respondents, was not called upon.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—This is an appeal by the defendant in a suit which, as brought, was a suit for damages on account of the breach of a covenant of indemnity contained in a sale-deed of the 4th of July, 1901. That deed in itself arose out of and formed the completion of a transaction embodied in a previous deed of 9th of January, 1899. The plaintiffs in this case represent the transferees of the vendees under these two deeds and the defendant the vendor in each of these deeds. The vendor purports to convey certain property free of all encumbrances, and in each of them there is a covenant setting forth what is to happen in the event of its being found that the property is in fact encumbered, and in the event of the vendees being disturbed in possession or having to make any payment on account of some previously existing encumbrance. The matter is clearer in the earlier of the two deeds, but no doubt the point has to be decided with reference

to the agreement as embodied at the end of the deed of July the 4th, 1901, on page 8 R. of the book before us. We have only referred to the previous document in order to explain the nature of the transaction as throwing light on the intention of the parties and the footing on which they were dealing with one another. Unfortunately in the deed of July the 4th, 1901, there has been a clerical error on the part of the scribe in that very portion of the document which is most material for our purpose. We are not sure that this error is really vital to the decision of the question argued before us, but the error is there and it is as well that attention should be called to it. A certain word in the deed may have been intended to be written as "Maqabal" or as "Fazil". As the document stands it is actually written "Faqabal," which is nonsense, but it must be intended to be read as one or other of these two words. Now, on the one reading the expression is correctly translated in our paper book by the words "or if any excess amount is charged against them," on the other reading, we may translate "or if they are held chargeable with any prior encumbrance." The latter of these two readings would be less favourable to the appellant's case and for the purposes of argument we may adopt the former. The covenant then is that, in the event of the vendees having to pay some excess amount, that is to say, some further charge over and above the sale consideration set forth in the deed, the estate of the vendor will be liable to make it good, together with damages and costs. Immediately before the words above set forth there is a recital that the property is conveyed to the vendees free from all debts and liabilities or claims. Then follows the agreement that if any portion of the property passes out of the possession of the vendees, or they fail to obtain possession or finally, in the alternative, if any excess amount is charged against them, the other property of the vendor will be liable for damages. It subsequently transpired that there was a prior encumbrance on the property conveyed in the shape of a mortgage in favour of one Chatri Lal. A suit was brought on this mortgage in which the present plaintiffs, the vendees, were impleaded along with the original mortgagor. The claim was contested, but resulted finally in a decree in favour of Chatri Lal, and in order to save the property from sale under that decree the present plaintiffs, the vendees under the deed of July the 4th, 1901, had to pay up the sum now claimed by them, consisting of the mortgage money due to Chatri Lal along with interest and costs. In the court below this claim was resisted upon a variety of pleas, some of which are repeated in the memorandum of appeal now before us, but the appeal has been argued upon one ground only, namely on the plea of limitation.

There was an issue on this point in the court below (issue No. 5), and the learned Subordinate Judge disposed of it very briefly, by pointing out that in his opinion the cause of action accrued to the plaintiffs in the month of May, 1915, when they had to pay the

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money to Chatri Lal, and that this plaint had been filed with great promptitude in the month of July, 1915. He held therefore that it was clearly within time. Curiously enough, in the memorandum of appeal before us this finding on the question of limitation is not in express terms challenged. We have been told however that there has been some error or oversight about the drafting of the memorandum of appeal and that the plea taken in the first paragraph was intended to read, "that the plaintiffs had no subsisting cause of action," and so raised the question of limitation. At any rate we have heard the appellant on this point and it was within our discretion to do so. The plea is based upon the contention that the agreement embodied in the last paragraph of the deed of July the 4th, 1901, was simply a covenant of title, that there was a breach of this covenant the moment the deed itself was executed, that a cause of action accrued to the plaintiffs on that very date and that consequently the present suit is barred under the six years rule of limitation. As subsidiary arguments on this point our attention has been drawn to the fact that the mortgage in favour of Chatri Lal was a registered document, of which it might be said that the plaintiffs had constructive notice, and that in any event they had actual notice of it when Chatri Lal instituted his suit, which was as long ago as the year 1902. The argument before us has proceeded upon lines which evidently were not followed in the court below. Our attention has been drawn to a number of rulings, of which the decision most in point is that in *Hari Tewari v. Raghunath Tewari* (1). What that case seems to us to lay down is that, if the plaintiffs in a suit like the present were bound to rely solely upon a covenant of title, whether express or implied, it might be held that limitation ran against them from the date of the execution of the deed; but in that suit itself a distinction was drawn, and the plaintiffs were held to be within time, because they were not suing upon a mere covenant of title, and it was held that their cause of action arose long subsequently when they were dispossessed of a portion of land then in question.

Similarly in the present case, it seems to us that the plaintiffs are entitled to rely upon the words already set forth as a covenant of indemnity and to bring a suit upon them from the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge. The decision of the court below on the issue of limitation therefore appears to be substantially correct on the ground on which it proceeds, although the point was not fully argued. The appeal, therefore, fails and we dismiss it with costs.

B. K. M.

Appeal dismissed.

(1) [1888] 1. L. R. 11 All., 27, F. B.

ANANDGIR (*Defendant*)*versus*SRI NIWAS (*Plaintiff*)*

*Agra Tenancy Act (11 of 1901), section 193—Order of remand—Appeal—
Preliminary and final decree.*

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June, 5.

KNOX,

A. C. J.

BANERJI, J

Plaintiff brought a suit to be declared the proprietor of a *muafi*. The court of first instance dismissed the suit. The lower appellate court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that 'the suit be remanded to the lower court for determination of the revenue payable by the plaintiff-appellant.'—*Held* that the order being one of remand no second appeal lay to the High Court; and as there was no provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree.

SECOND APPEAL from a decision of B. C. FORBES, Esq., District Judge of Cawnpore, modifying a decree of Pandit Gursewak Upadhyaya, Assistant Collector, First Class of Fatehpur.

The plaintiff brought a suit in the court of an Assistant Collector first class to be declared proprietor of certain *muafi* land under section 158 of the Tenancy Act. The main plea in defence was that the *muafi* had been resumed long ago, and that the plaintiff was only an occupancy tenant of the land. The Assistant Collector found against the plaintiff and dismissed his suit. On appeal the District Judge found that the plaintiff had become proprietor; the decree of the Assistant Collector was, accordingly, set aside, the plaintiff was declared proprietor, and the suit was remanded to the first court for determination of the revenue payable by the plaintiff. Against this decision the defendant filed a second appeal to the High Court. The appeal was heard by a single Judge, and then put up before a Bench of two Judges.

N. C. Vaish, for the respondent, took a preliminary objection that the appeal did not lie.

The District Judge has remanded the suit, and under the Tenancy Act no appeal is given from an order of remand. Section 182 which is the section which provides for a second appeal to the High Court does so only from decrees, section 193 excludes the application to suits under the Tenancy Act of the provisions of

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chapter XLIII of the Code of Civil Procedure of 1882, corresponding to Order 43 of the present Code. Order 43, rule 1 (u) of the Code, which provides an appeal from an order of remand, has therefore no application to Rent Court suits. Hence, no appeal lies from the order of remand. I rely on the following cases.

Vilayat Husen v. Maharaja Mahendra Chandra Nandy, [1905] I. L. R., 28 All., 88 ;

Zahur Ali v. Sher Ali, [1905] I. L. R., 28 All., 283 ;

Gulzari Lal v. Latif Husain, [1916] 14 A. L. J. R., 84.

Unless an appeal is expressly provided for by the Tenancy Act it will not lie ; nor will it be sustained upon any analogy furnished by the provisions of the Code of Civil Procedure. I am further supported by the cases of

Karanpal Singh v. Bhimma Mal, [1910] 7 A. L. J. R., 246 ;

Kirpa Devi v. Ram Chandar, [1918] 16 A. L. J. R., 231.

Haribans Sahai, (for *Nawal Kishore*), for the appellant (in reply to the preliminary objection).—The appeal is in form and substance an appeal from a decree and not an appeal from a mere order of remand. It is submitted that the decision of the District Judge amounts to a decree. It is to be remembered that the definitions of “decree” and “order” given in the Code of Civil Procedure have not been adopted by the Tenancy Act and do not apply to all cases under that Act.

Zohra v. Mangu Lal, [1906] I. L. R., 28 All., 753. F. B.

So, the notion derived from the Code of Civil Procedure that where an appellate court reverses the decision of the first court and remands the case the decision of the appellate court amounts merely to an “order” and not a “decree” has to be discarded in considering cases arising under the Tenancy Act. The Act itself furnishes no definition of what is and what is not a “decree” within the meaning of the Tenancy Act.

The District Judge had decided all the material issues in the case ; and the remand order related only to the assessment of revenue, as regards which there was no issue in the court of the first instance ; nor was it a substantial issue between the parties.

[Knox, A. C. J., referred to section 158 of the Tenancy Act.]

The order of remand related only to a matter which did not affect the real merits of the claim but was purely a matter of arithmetical calculation. The decision was a “decree” in substance. It amounted to a preliminary decree if not a final decree ; and the remand order was for the purpose of determining the proportionate revenue and preparing the final decree. The Board

of Revenue of the United Provinces has taken this view in the case of

Tikaram Singh v. Kunwar Sen, [1916] Unreported Decision of the Board of Revenue in Petition No. 23 of 1915-16, decided on 2nd August, 1916.

The matters decided in this preliminary decree could not be questioned in appeal from the final decree; and if the present appeal be held incompetent then the appellant will have absolutely no remedy. Such a decision will lead to great hardship and failure of justice.

N. C. Vaish, in reply.—The appellant contends that in a case like the present the order of remand amounts to a decree so as to be appealable under section 182. If it had been the intention of the Legislature to give certain orders passed under the Act the force of decrees so as to be appealable as such, it could have given a definition of "order" or of "decree" in the interpretation clause of the Act in furtherance of that intention. The Legislature has not done that; there is nothing to indicate that it ever intended to make any distinction between one class of orders and another, in this respect.

There is no such thing as a preliminary decree under the Tenancy Act. The Act recognizes only one decree, namely, a final decree.

A comparison of the language of section 177 of the Tenancy Act and sections 96, 97 and 100 of the Code of Civil Procedure clearly shows the distinction between the meanings attached to the term "decree" in the two Acts. The words used are "the decree" in section 177 of the Tenancy Act, which connote only one class of decree; while the words in sections 96, 97 and 100 of the Code are "every decree," which connote several classes of decrees. And further, there is a specific mention of the term "preliminary decree" in section 97, Civil Procedure Code.

It is from the decrees passed in the suits included in the fourth schedule of the Tenancy Act that appeals are provided for and the only decree, mentioned in the fourth schedule, under section 158 is a decree "for the assessment to revenue of a rent-free grant." That is the only decree, therefore, from which an appeal can lie in a suit under section 158. Any order passed prior to such a decree cannot possibly amount to that decree and be appealable as such decree.

To regard the decision of the District Judge as a preliminary decree and to hold it to be appealable would be inconsistent with the provisions of the Tenancy Act. As was held in the case in *I. L. R.*, 28 All., 753, a provision of the Code of Civil Procedure which would be inconsistent with the provisions of the Tenancy Act cannot be applied.

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ANANDGIR

SRI NIWAS.

Knox, A. C. J.

The judgment of the Court was delivered by

KNOX, A. C. J.—The plaintiff in the court of first instance is the respondent here. He brought a suit in the Revenue Court in which he prayed that he might be declared proprietor of a disputed *muafi* and that costs *etc.*, might be granted to him. The court of first instance dismissed his claim altogether. He then went in appeal to the District Judge of Cawnpore who ordered that the decree of the lower court, that is to say, the court of first instance dated the 13th of March, 1916, be set aside and the appeal be allowed to the extent that the plaintiff was entitled to be declared rent-free grantee of so much of the land in suit as he was then entered in the revenue papers as occupancy tenant of the same. The order however did not stop here. It went on as follows:—"That the suit be remanded to the lower court for determination of the revenue payable by the plaintiff-appellant." The defendant has now come to this Court and asks that the decree of the lower appellate court be set aside and the decree of the Assistant Collector be restored or any other order that may be deemed fit, may be passed. Various pleas were then set out attacking the judgment of the District Judge. Upon the appeal being called on in this Court for hearing a preliminary objection was at once raised on behalf of the plaintiff respondent, namely that no second appeal lies from the order of the District Judge. In support of the contention stand was taken upon section 193 of the Agra Tenancy Act of 1901 and it was contended on the ground set out in clause (a) of section 193 that the provisions of the Code of Civil Procedure did not apply to the procedure in suits and other proceedings under the Rent Act. Our attention was called to the case of *Vilayat Husain v. Maharaja Mahendra Chandra Nandy* (1), and *Gulzari Lal v. Latif Husain* (2). The learned Vakil for the appellant meets this objection by maintaining that he is not appealing from any order but from a decree and so seeks to bring the case away from clause (a) of section 193. He dwelt a great deal upon the hardship that, if it was held otherwise, he would have no remedy. Be that as it may, we are here not to make law but to expound it as it stands and it appears to us that the only meaning we can put upon clause (a) of section 193 of the Rent Act is that no appeal lies from an order of this kind. He contended that the decision of the District Judge of Cawnpore was in reality a preliminary decree. We have considered this but we are unable to agree with it. The Tenancy Act says nothing from first to last about preliminary or final decrees. The result is that the objection prevails and the appeal is dismissed with costs. There is a cross-objection but we have heard nothing about it from the beginning of the case up to this moment. It stands dismissed.

B K. M.

Appeal dismissed.

(1) [1905] I. L. R. 28 All., 88.

(2) [1916] 14 A. L. J. R., 84.

AZIZ-UR-RAHMAN

versus

HANSA*

Statute, interpretation of—Act XIII of 1859 (Workmen's Breach of Contract Act)—Breach of contract—Refusal to work—Provisions of Act to be strictly enforced.

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1918

June, 27.

KNOX,
A C J

The provisions of Act No XIII of 1859 are not confined only to fraudulent breaches of contract as stated in the preamble.

Hence, where a workman made a contract under the Act and subsequently refused to complete the contract agreeing to refund the money advanced to him and the Magistrate refused to enforce the provisions of the Act at the instance of the employer as being inapplicable, *held* that the Magistrate was bound to act according to the Act. *Bakhtawar v. Emperor*, [1918] 16 A. L. J. R., 164, followed.

CRIMINAL REVISION from an order of W. H. WEBB, Esq., District Magistrate of Agra.

Narain Prasad Asthana, for the applicant.

The opposite party was not represented.

The following judgment was delivered by

KNOX, A. C. J.—This is an application for revision of an order passed by the Magistrate of Agra whereby an order of a first class Magistrate of Agra was confirmed. The first class Magistrate of Agra had before him an application asking him to enforce the provisions of sections 1 and 2 of Act No. XIII of 1859. All that appears before me on the record is an order in which the learned Magistrate arrives at the conclusion that the suit does not lie under Act No XIII of 1859. No evidence appears to have been taken, and all that is on the record is the contract. Act No. XIII of 1859 is an Act which has been extended to the station of Agra. The contract is upon a stamp paper and it recites that it is a contract under Act No XIII of 1859. The first class Magistrate sets out what he believes to be the obvious object of Act No. XIII of 1859. He says that "it was designed to prevent coolies or labour contractors fraudulently bolting with the advances necessary for obtaining work from them and it was not designed to secure the employers enforcement of elaborate contracts with skilled artizans." I do not know from what source the learned Joint Magistrate obtains this. There is nothing in the Act to this effect. The learned Joint Magistrate

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will do well to consider the ruling by which he is bound, namely *Queen-Empress v. Indarjit* (1). Having placed this interpretation upon the object of the Act the learned Joint Magistrate went on to pass an order for which there is no warrant that I know of. That order runs as follows :—"The accused till to-morrow should produce balance of money due to the complainant. If he does so and the complainant takes it, accused will be acquitted. If he does so and complainant refuses the money, the case will be dismissed. If he does not produce it, it will be a clear case of bad faith and I shall proceed against him under Act No. XIII of 1859." The morrow came and the accused produced the money required of him. The complainant refused to take it saying that he wished to have the work done by the accused. The learned Joint Magistrate professed to act upon a ruling of the Bombay High Court (2), to which he is not subordinate and which he should not follow when he has before him rulings of this Court. I cannot moreover sanction the unwarrantable language used by the Joint Magistrate regarding an Act in the statute book. He says "it is altogether preposterous that this Act designed to protect people who make cash advances in order to import or secure manual labour from people not worth powder and shot in the Civil Court should be prostituted in this way by employers of skilled artizans." The learned Joint Magistrate had no right to use language of this kind regarding a statute which is in force and which he is bound to respect. The Act is in full force in the station of Cawnpore for instance and for ought I know may be in full force in the station of Agra. I call the attention of the court below to the case of *C. J. Lucas v Ramai Singh* and *Bakhtawar v. Emperor* (3), both to be found in 16 A. L. J. R., 164. The learned Joint Magistrate says that he cannot compel Hansa to continue the work which he contracted to perform because it requires him to sit very near the fire. He is said to have been working in the same situation in another factory. This may or may not be true. But the matter should have been enquired into and evidence fully taken. This was not a case for summary disposal. I set aside the orders of both the courts below and I return the case in order that it may be dealt with strictly in accordance with the provisions of Act No. XIII of 1859.

(1) [1889] I. L. R., 11 All., 262.

(2) See *Queen-Empress v. Rajab*, [1892] I. L. R., 16 Bom., 368.

(3) [1918] 16 A. L. J. R., 164.

BEHARI LAL (*Judgment-debtor*)

versus

BALDEO NARAIN AND OTHERS (*Decree-holders*)*

Code of Civil Procedure (Act V of 1908), section 115—Revision—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of court—High Court may interfere when such question wrongly decided.

CIVIL

1918

June, 29.

RYVES, J.

In execution of a decree a house belonging to a minor was advertised for sale. An application was put in for the adjournment of the sale.

• The *vakalatnama* under which the application was filed had been executed by one Gaya Prasad; it did not appear on the face of the *vakalatnama* that he was executing it as guardian of the minor. An affidavit was also filed in support of the application, and the two together made it clear that he was acting as the guardian of the minor. The adjournment was granted for six days, and after the expiry of the period the sale was held and the property was sold for very much less than its proper value. An application was made under Order 21, rule 89, of the Code of Civil Procedure by the Vakil who had applied for the adjournment. It purported to be tendered on behalf of the minor. The court of first instance rejected the application on the ground that the minor had not been represented by a next friend. This order was affirmed by the lower appellate court:—*Held*, in revision, that when a question of jurisdiction was involved the High Court was competent to revise a finding of law or fact bearing on a question of jurisdiction: *Balakrishna v. Vasudeva Ayyar*, I. L. R., 40 Mad., 793, explained.

CIVIL REVISION from an order of F. D. SIMPSON, Esq., District Judge of Allahabad.

Motilal Nehru and Radha Kant Malaviya, for the applicant.

W. Wallach, S. M. Sulaiman, Ibn Ahmad, Tej Bahadur Sapru and Sital Prasad Ghosh, for the opposite party.

The following judgment was delivered by

RYVES, J.—The facts out of which this application arises are admitted. A suit was filed against a minor, Behari Lal, under the guardianship of his brother, Gaya Prasad, and a simple money-decree was passed against him for a sum of Rs. 238-15-0. In execution of that decree, house property belonging to the minor was attached and advertised for sale. The sale was fixed for the

Ryves, J.

* Civ. Rev. No. 50 of 1918.

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Ryves, J.

14th April, 1917. On the 13th of April, 1917, an application was made by Gaya Prasad, as guardian of the minor, asking for the adjournment of the sale. The application was put in by a Vakil of the court under a *vakalatnama* executed by Gaya Prasad. In the body of the *vakalatnama* which is a printed document, and which is usually filled in by the Vakil himself or his clerk, the name of Gaya Prasad was not entered. The document reads "I..... appoint,"—so and so. It was executed by Gaya Prasad. Of this there is no question, but he did not add that he was executing it as the guardian of the minor. Along with this application there was filed an affidavit by Gaya Prasad. Taking the two together it was quite obvious that the application for adjournment was being made by him as guardian of the minor, through the vakil whom he had appointed to act for him. The court accepted the application to this extent that it granted an adjournment of the sale for six days and the 20th of April, 1917, was fixed. On that date the sale was held and the property was knocked down to an outsider *i.e.*, to a person who was no party to the suit, for a sum of Rs. 180, the opposite party here. It is admitted that the property was worth a very great deal more than what it was knocked down for. On the 4th May, 1917, an application was made under Order 21, rule 89 by the same Vakil. It purported to be tendered on behalf of the minor. The proper amount had been paid into court within the time allowed and the application must have been accepted by the court and the sale set aside unless the application was not in order. The court of first instance rejected the application in these terms:—"This application under Rule 89, Order 21 of the Code of Civil Procedure has been presented by the applicant who is a minor and it is not presented by a next friend. The minor's application was filed through a pleader who does not appear to have been retained by him, *vide*, the *vakalatnama*. The application is against the provisions of Rule 5 (1), Order 32 of the Code of Civil Procedure and is also vague. No order can legally be passed on it without the minor being represented by a next friend. I therefore reject this application with costs." That is the order really in question here. The lower court found, and rightly found, that the application in itself was not vague and that it entirely complied with Order 21, rule 89, but it held substantially for the same reason as the first court that the application had not been properly presented on behalf of the minor, and rejected the application. From this order no appeal lies to this Court; hence an application in revision.

Two arguments are raised against my interfering. First of all it is said, on the authority of *Balakrishna Udayar v. Vasudeva Ayyar* (1), and three recent rulings of this Court, reported in 16 A. L. J. R., pages 433, 495 and 535, that this Court has no power to interfere.

(1) [1917] I. L. R., 40 Mad., 793.

It is said that the lower court had jurisdiction to go wrong and, assuming it did go wrong, that decision is final. Secondly it is argued on the merits that the decision on the point of law is correct. It seems to me that, put in plain language, the court declined to hear the applicant. It declined to hear the minor himself because of his minority, and declined to hear the pleader because of a supposed defect in his *vakalatnama*. It seems to me that if the court was wrong in its reasons for not hearing the pleader and therefore not accepting the application, it declined to exercise a jurisdiction vested in it, or at least acted with material irregularity in the exercise of its jurisdiction. There is one passage in the judgment of the Privy Council report (I. L. R., 40 Mad.) which, read by itself, and separated from the context and read without consideration of the facts of that case, does support the objection of the opposite party. It is the sentence which is reported at page 799, and runs as follows:—"It will be observed that the section (115) applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it." But the judgment does not end there, it goes on to say:—"The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved, and if the appellants' contention be correct, then, if the Civil Court should absolutely and whimsically decline to exercise its jurisdiction and refuse to make any orders as to the filling up of vacancies, no matter how many existed, there would not, in a case such as the present, be any remedy available under this section and no appeal would lie." In that case the District Judge purporting to act under a particular section of a particular Act construing the section as he did, held that he had jurisdiction to pass a particular order, and passed it. Objection was taken to this order before the successor of the District Judge on the ground that the former District Judge had no jurisdiction to pass it. The court held that he had. An application was then made to the High Court of Madras in revision, and it was argued that the High Court had no power to interfere, one argument being that the decision of the court below was at the most a wrong decision on a point of law. The High Court repelled this objection and did interfere in revision, and the Privy Council upheld its decision. It seems to me what the Privy Council case decided was that the section (115 of the Code of Civil Procedure) is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. (I think the words which I have italicised are most important). It seems to me to follow from this that where a question of jurisdiction is involved this Court is competent to revise a conclusion of law or fact which bears on a question of jurisdiction. In the case before me it seems to me that on the point of law decided, a question of jurisdiction is involved, therefore I think I have jurisdiction to consider that point on the merits.

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Three recent cases of this Court, however, are quoted in support of the objection. The first case is that of *Fazal Rab v. Manzur Ahmad* (1). On the face of it, that case looks very like the present case, but there the only point decided was that payment of money into the Treasury was not a payment into court within the meaning of Rule 89, Order 21 and this Court held that, if that decision was a wrong one it could not be set aside in revision. There no question of jurisdiction was involved. In the next case at page 499 of the same Volume, also no question of jurisdiction was involved. In the last case, to which I was a party, a question of jurisdiction was involved. The case was decided only a very short time ago and I remember perfectly well that we did go into the merits and were satisfied that the order of the courts below in returning the plaint, was a proper order and one which the courts had jurisdiction to pass and should have passed. That case, therefore, in my opinion is not a helping guide. In that case no authorities were cited. I must confess that I had not then studied the Privy Council case in 40 Madras as carefully as I have since done, and I am inclined to think that perhaps the judgment was expressed unnecessarily broadly. It seems to me on full consideration that the Privy Council case gives me jurisdiction to go into the merits of the decision in this case on the point of law involved.

There is one other aspect of the case which I think should not be lost sight of. The defects, if any, in the application or the power of attorney, were purely technical, and seeing that the property of a minor was at stake, I think, that if the court had doubts, it would have been well advised to have called evidence and ascertained whether the guardian had in fact authorized the Vakil to make the application. I do not however base my judgment on this consideration though in my opinion it has weight.

On the merits;—the application of the 4th of May, 1917, purported, as I have said to be made by the Vakil on behalf of the minor. There was no fresh *vakalatnama*, it is admitted, executed by the guardian of the minor authorizing the Vakil specifically to file this application. It seems to me that no new *vakalatnama* was required for this particular application. The Vakil had been appointed by Gaya Prasad to appear for the minor in a former stage of the litigation and also to put in the application of the 13th of April, asking for an adjournment of the sale in these very execution proceedings. If that appointment was a good appointment, then it seems to me that it was still in force under Order 3, rule 4 of the Code of Civil Procedure. But it is argued that the *vakalatnama* executed by Gaya Prasad was not valid for two reasons. One that the clerk of the Vakil or some body should have recorded in the body of the application, for a second time, the

(1) [1918] 16 A. L. J. R., 423.

statement that it was Gaya Prasad who was making the appointment, and as guardian of the minor. As the *vakalatnama* runs Gaya Prasad and no one else was making the appointment. It says so. "I appoint" and although that *vakalatnama* was executed by Gaya Prasad, it is said to be invalid, as there was no statement in it to the effect that Gaya Prasad executed it as "guardian of the minor" or some such words. This seems to me a very technical objection. Except as guardian of the minor he had nothing whatever to do with the suit or the proceedings in execution. I have already said he himself came into court and made the application for the stay of the sale on the 13th April, and put in an affidavit. The application showed that he had appointed the Vakil to act for the minor of whom, he, Gaya Prasad was the guardian. It seems to me therefore that the application of the 4th of May was in order, and that the court has failed to exercise its jurisdiction in not accepting it because it came to a wrong decision on a point of law. Undoubtedly if it had decided as I think it should have decided, it should have accepted the application. I therefore, setting aside the order of the court below, pass the order which I think it should have passed, i. e., I direct that the money paid into court be made over to the purchaser and the sale be set aside. The applicant will have his costs throughout.

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Ryves, J.

BABU RAM

versus

EMPEROR.*

CRIMINAL

1918

July, 15.

PIGGOTT, J.

Indian Arms Act (XI of 1878), sections 19 (f), 30—Possession of unlicensed arms—Search made by Sub-Inspector without warrant from Magistrate—Officer in charge of reporting station—Legality of search.

Under section 30 of the Indian Arms Act, the power of search in respect of an offence punishable under clause (f) of section 19 of the Act is to be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf, and the provisions of Chapter VII of the Act did not render illegal a search made by an officer-in-charge of a reporting station without a warrant from a Magistrate.

A Sub-Inspector of police who was in-charge of a reporting station searched the house of the accused reported as being in possession of arms without a license. The said officer had not a license from a Magistrate, but he was specially empowered by the Local Government in virtue of his office to make such a search :—*Held* that the search was not illegal.

*Cr. A. No. 303 of 1918,

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BABU RAM

v.

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CRIMINAL APPEAL from an order of A. G. P. PULLAN, ESQ.,
Sessions Judge of Mainpuri.

C. R. Alston and *A. P. Dube*, for the appellant.

Lalit Mohan Banerji, (Government Pleader) for the Crown.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—Babu Ram appeals against his conviction on a charge under section 19 (f) of the Indian Arms Act (No. XI of 1878.) The case against him is that he had in his possession and under his control two swords, one gun, one pistol and certain ammunition in contravention of the provisions of the Arms Act, that is to say without having any license for the same. The evidence has been fully set forth and discussed in the admirably lucid and convincing judgment of the Sessions Court and I do not propose to go into it at length. The essential facts are that a certain house was searched upon information given by one Khiali Ram, who has been produced as a witness for the prosecution, and that the arms which are the subject-matter of the charge were found in a receptacle formed by hollowing out a log of wood, the receptacle itself being buried under-ground in a small room in a corner of the building. The case for the defence is that the discovery of the arms in that place does not prove that they were in the possession or under the control of Babu Ram. The suggestion further is that it is a matter of fair inference from the evidence that they had been concealed in that place by enemies of Babu Ram in order to get him, or his father Hulas Rai, into trouble. The decision of the questions thus raised must depend upon the proper appreciation of certain evidence given by Sub-Inspector Mafiz Ali Khan and the witnesses Angan Lal and Sikhar Chand, on the one side, and the witnesses Maharaj Singh, Chunni Lal and Gokal on the other. Maharaj Singh and Chunni Lal were official witnesses to the search, that is to say the witnesses from the neighbourhood of the appellant's house whose attendance had been procured by the Sub-Inspector in accordance with section 103 of the Code of Criminal Procedure. The Sub-Inspector had complied with the law by calling in these two persons; but the fact that he had done so does not bind the court to accept as true their evidence if it can be shown to be false. In the present case the Sub-Inspector for reasons sufficiently apparent had taken the trouble to secure the attendance of two other witnesses; the evidence given by himself and by these men, Angan Lal and Sikhar Chand, receives strong corroboration from the unimpeachable testimony of Rai Bahadur Man Singh, Superintendent of police, and Mr. Sheorakhan Singh, Deputy Magistrate. I have not the slightest doubt, after an examination of the record, that the learned Sessions Judge, who had the concurrence of the assessors, was perfectly right in rejecting the evidence of Maharaj Singh, Chunni Lal and Gokal. Anything less convincing

on the face of it I have rarely read. Their assertion that the house in question had been lying vacant for years is conclusively disproved by the observations made on a subsequent date by the Superintendent of police and the Deputy Magistrate. The most crucial point in their evidence, namely the assertion that the Sub-Inspector on entering the house went straight to the remote and somewhat isolated chamber in which the discovery was made, is introduced in a singularly unconvincing manner in the evidence of Maharaj Singh, and is in my opinion quite sufficiently contradicted by the ordinary probabilities of the case. The conduct ascribed to the Sub-Inspector by the defence evidence is that of a man at once unscrupulous and singularly guileless and open in betraying himself by his actions. I am satisfied that the inner room in which these arms were found was under the control and in the exclusive possession of the appellant Babu Ram. He had the key of the outer door of the house in his own possession. He was the only inhabitant of the house (along with his family) at the time of the search; and he produced from his own possession the key of the inner room, from which alone the small closet in which the unlicensed arms were found could be approached. I have not been asked by the prosecution to re-consider the question whether the learned Sessions Judge was right in refusing to record the conviction in this case under the first clause of section 20 of Act No. XI of 1878. Personally I find it difficult to understand with what purpose the offences mentioned in clause (f) of section 19 of the said Act are included in the list of offences specified in the first portion of section 20, if that section was not intended to apply to such a case as the present. The question must not be confused by reference to the wholly distinct question of the scope of the second clause of section 20 of Act No. XI of 1878, in respect of which I in no way dissent from the opinion pronounced by a learned Judge of this Court in the case of *Ram Sarup v. Emperor* (1). The sentence passed however was within the power of the court below under section 19 of Act No. XI of 1878, and I see no adequate reason for making a formal alteration in the conviction.

A strong point has been made on behalf of the appellant of the alleged illegality of the search of this house by the Sub-Inspector Mafuz Ali Khan without a warrant from a Magistrate. I find nothing in the provisions of Chapter VII of the Indian Arms Act to make such a search illegal. Section 25 deals with the special case of a Magistrate who receives information that a person who has arms, ammunition or military stores in his possession, is keeping them for some unlawful purpose, or that for any other reason such person cannot be allowed to remain in possession of the same without danger to the public peace. In cases falling under section 25 it is wholly irrelevant whether the arms, ammunition or military stores in question are or are not covered by license.

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Piggott, J.

Unlicensed possession of arms punishable under section 19, clause (f) of Act No. XI of 1878 is a cognisable offence, and is therefore an offence which under the Code of Criminal Procedure, a great many Police Officers are entitled to investigate. In the conduct of such an investigation a search for the purpose of discovering the arms in respect of which it is believed that an offence has been committed would be legal under section 165 of the Code of Criminal Procedure. The Legislature however has seen fit to restrict the powers of Police Officers in the matter of offences punishable under section 19, clause (f) of the Indian Arms Act by the special provisions of section 30 of the said Act. The power of search in respect of an offence punishable under that particular clause of the Act is required to be made in the presence of some officer specially appointed by name or in virtue of his office by the Local Government in this behalf. The Local Government has seen fit to empower, amongst other persons, Police Officer in-charge of reporting stations, by virtue of their office, to conduct such searches. Sub-Inspector Mafuz Ali Khan was on the date in question an officer in-charge of a reporting station and there is nothing illegal in the action taken by him. I am quite satisfied that the appellant has been rightly convicted and I am not prepared to interfere with the severity of the sentence passed by the court below. I think the learned Sessions Judge has given adequate reasons for the same. I dismiss the appeal. The appellant must surrender to his bail to undergo the unexpired portion of his sentence.

Appeal dismissed.

(1) [1905] I. L. R., 28 All., 302; S. C., 3 A. L. J. R., 833.

PRIVY COUNCIL.

MADANA MOHANA DEO KESARI (*Plaintiff*)*versus*PURUSHOTTAMA ANANGA BHEEMA DEO (*Defendant*).

CIVIL

1918

Hindu Law—Adoption—Divesting of estate by adoption—Limitations of widow's power to adopt—Impartible raj—Whether the rule that adoption must be to last male-holder applies to it.

March, 12,
13 and 14.

VISCOUNT
HALDANE,
LORD
DUNEDIN,
LORD
SUMNER,
SIR JOHN
EDGE,
MR. AMEER
ALI.

Hindu Law recognises the validity of an authority given to a widow by her deceased husband to make a second, or even a third or fourth adoption, on failure of the previous adoption to attain the object for which the power is given, *vis*, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. Such a power comes to an end as soon as any such adopted son attains full legal capacity to continue the line: nor does it subsequently revive on his death, whether or not he leaves a son of his own or a widow capable of adopting to him.

The rule that adoption must be made to the last full owner applies just as much to an impartible raj (which is joint family property subject to an exception) as it does to separate property.

Ramkrishna v. Shamrao, [1902] I. L. R., 26 Bom., 526 (F.B.), approved.

APPEAL from a decree of the Madras High Court, dated April 22nd, 1914, affirming a decree of the District Judge of Ganjam.

Raja Adikonda Deo, owner of the impartible zamindari of Chinnakimidy in the Ganjam district, died sonless in 1868, having given his widow a written authority to adopt. His brother Raghunada succeeded to the zamindari. In 1870 the widow adopted Braja Kishore Deo and the latter instituted a suit to recover the zamindari, which the Board decided in his favour in 1876 (*vide* 3 I. A., 154). He held possession till his death in 1906: he left a widow, Ratnamala, but no son: and Raghunada's son Varshuava Deo took possession, but dying a few days later was succeeded by his son Purushottama, the present respondent.

In 1907 Adikonda's widow purported to adopt the present appellant as son to Adikonda and he then brought the present suit to recover the zamindari. The District Judge of Ganjam held that the widow had no power under the authority left by Adikonda to make a second adoption, but that even if she had such adoption would be invalid *first*, because of the existence of the widow Ratna-

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TAMA
ANANGA
BHREMA DEO.

mala, and second, because the adoption was not to the last male holder, and therefore could not divest the respondent, whether the zamindari was regarded as separate estate or as co-parcenary property. Plaintiff appealed to the High Court. The Judges (SIR ARNOLD WHITE, C. J., and SESHAGIRI AIYAR, J.) agreed that the second adoption was within the authority conferred by Adikonda, but concurred in dismissing the appeal on the ground that Ratnamala was alive when the adoption was made. On the question whether an adoption not made to the last male-holder could divest the estate vested in respondent they differed, the Chief Justice remained of the opinion, expressed by him in

Sivaguanam v. Ramasamy, [1912] 22 M. L. J., 85,

that it could not, while SESHAGIRI AIYAR J., came to the conclusion that "the Estate taken by survivorship by a member of the joint Hindu family is a conditional Estate subject to defeasance on the coming into existence by adoption or otherwise of a new member into the co-parcenary, that the rule of law that in order that an estate once vested may be divested the adoption should be made to the last male-holder is not applicable to co-parcenary property, and that an impartible zamindari is joint family property subject to an exception." The proceedings before the High Court are reported at 38 Mad., 1105.

Plaintiff appealed to the Privy Council.

De Gruyther, K. C., (*Dube* with him) for the appellant.—There are two questions at issue: (a) the construction of the power—whether under it the widow had the power to adopt. On this I submit the High Court were right in holding that she had; (b) if so, whether the power was exhausted and incapable of being exercised in consequence of Braja Kishore's death leaving a widow. It is not alleged this widow has adopted or has any power to adopt; but it is contended and had been held by the District Judge and the Chief Justice that anyhow the adoption is invalid as not being made to the last male owner. If the zamindari had been separate estate I concede the adoption would have been bad: but it is not so: it is joint family property. Both Vaishnava and Purushottama took not by inheritance, but by survivorship: this is alleged in the plaint and not denied: for the purposes of this case, and as between the parties to the litigation, this must be treated as a joint family: even apart from the failure to deny this in the pleadings, respondent is estopped by the decision in the earlier case (3 I. A., 154). The rule that adoption must be made to the last male holder does not apply to joint families living in co-parcenary.

Bachoo Hurkiondas v. Mankorebai, [1907] 34 I. A., 107;

Mt. Bhobun Moys Dibia v. Ram Kishore, [1865] 10 M. I. A., 279.

When a Hindu has given his widow a power to adopt and had placed no specific limitation to such power, the authority to adopt

is not exhausted by a first adoption, and can be again exercised if the son first adopted dies.

Kannepalli Suryanarayana v. Pucha Venkata Ramana, [1906] 33 I. A., 145.

The power to make such second adoption is not extinguished by the existence of Ratnamala.

Bachoo Hurkiondas v. Mankorebai, (S. C.).

In this last case the case in 3 I. A., 154, is treated by the Board as concluding the point.

B. Dube, followed:—Impartible property passes not by inheritance, but by survivorship:

Kachi Kaliyanna v. Kachi Yuva, [1905] 32 I. A., 261.

Such property is not subject to co-parcenary.

Thakurani Tara Kumari v. Chaturbhuj Narain Singh, [1915] 42 I. A., 192 (201);

Rajah Rup Singh v. Rani Baisni, [1884] 11 I. A., 149 (154).

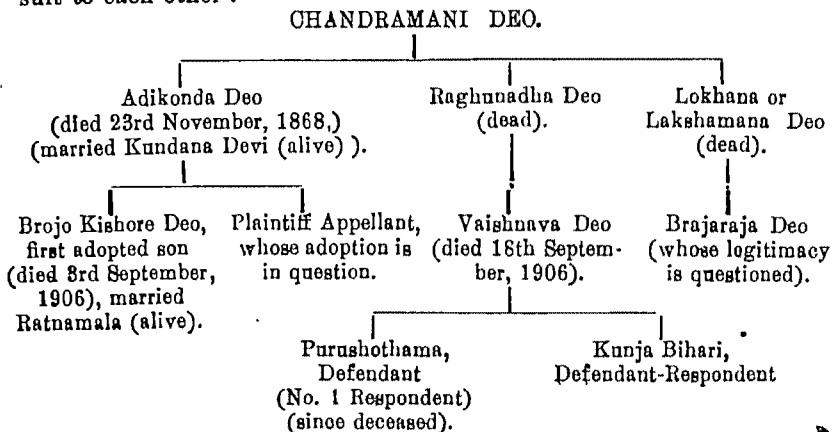
It is joint property in this sense only, that if the holder dies, the next person to take will be decided by the right of survivorship under the *Mitakshara*. But the rule that adoption must be made to the last male-holder has never yet been applied to an impartible raj, and SESHAGIRI IYER, J., has correctly held that it is inapplicable.

Sir Erle Richards K. C., and *J. M. Parikh*, for the respondent, were not called on.

Their Lordships' judgment was delivered by

VISCOUNT HALDANE.—This is an appeal from a decree of the High Court of Judicature at Madras which affirmed a decree of the District Judge of Ganjam. The main question to be decided relates to the validity of the appellant's adoption.

The suit is concerned with an impartible zemindari in the district of Ganjam called Chinnakimidi or Pratapgiri. In 1868 the holder of the zemindari was Raja Adikonda Deo, who was a member of a joint Hindu family subject to the *Mitakshara* law. The following pedigree shows the relationship of the parties to the suit to each other:—



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Before his death in 1868 Adikonda Deo, the then Raja, gave to his widow, who was at that time *enciente*, a written authority to adopt in the following terms:—

“As I know that my end, consequent upon the expiration of the terms fixed by fate is approaching, I do hereby declare that in case you, who are at present pregnant, be delivered of a male issue, the said child alone shall inherit my *talook* as well as all my property, both movable and immoveable. Becoming the owner of movable and immovable properties, till he arrives at the proper age you will look after him; or if a daughter be the result of your present pregnancy, you, adopting a son, who may be in your opinion worthy of the throne and making him owner of the *talook*, &c, shall, pending the attainment of the said boy's majority, take care of him. This agreement is executed with my free will.”

On the death of Adikonda, his brother, Raghunadha Deo, took possession of the zemindari. The widow gave birth to a daughter, and, acting on the authority, adopted to her husband a boy, Brojo Kishore Deo, in 1870. The adopted son instituted a suit to recover the zemindari from Raghunadha Deo, and this suit was decided in his favour by this Board in 1876. Having recovered possession of the zemindari, Brojo Kishore Deo held it until his death in 1906. He left a widow Ratnamala, but no son. Possession of the zemindari was then taken by Vaishnava Deo, who died later in the same year, and was succeeded in the possession by the deceased respondent, Purushothama Deo.

In 1907 the widow of Adikonda Deo purported to make a second adoption to her husband, under the terms of the authority already set out, by adopting the present appellant. The latter, as plaintiff, subsequently instituted the present suit to recover the zemindari.

Several issues were framed, but that on which the result of the appeal must in any view turn is whether the adoption was legal. For if this question be answered in the negative other issues which were raised before the courts below do not arise, and the root is cut from the appellant's case.

It is not in dispute that the zemindari was impatible and descended by the rule of primogeniture to a single heir. When Brojo Kishore was adopted, he succeeded as though he had been the actual son of Adikonda, and, as this Board decided in 1876 with reference to this very succession in a case reported in 3 Indian Appeals, 154, he became entitled to oust Raghunadha, whose right to enter was only temporary, operating merely to prevent the ownership from being in abeyance pending any such succession to his elder brother as the adoption brought about. But when Brojo Kishore succeeded he became himself the full owner, from whom heirship must be traced instead of as earlier from Adikonda. The widow of the latter was therefore in a different position when she endeavoured to effect

the second adoption from that which she occupied on the former occasion. She could on that occasion, by exercising the power conferred on her, establish a direct succession to the estate of her husband Adikonda, which related back to his death. On the second occasion the ownership which had become vested in Brojo Kishore had intervened, and it was only to his estate that she could possibly establish a succession. The learned Judges in the courts below have all agreed in holding that any authority she could originally be taken to have received to make a second adoption had become inoperative by reason of the changed circumstances, and their Lordships are of opinion that the conclusion so come to was right.

The Hindu Law no doubt recognises the validity of an authority given to a Hindu widow by her deceased husband to make a second, or even a third or fourth adoption on failure of the previous adoption to attain the object for which the power is given, viz, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. When the authority to make successive adoptions is alleged, two questions arise: (1) whether it was in fact given; and (2), if so given, did it still exist in the widow when the subsequent adoption is made.

In the present case their Lordships do not consider it necessary to decide whether the document before them can be construed as by its terms enabling a second adoption to be made. For the vital question here is whether after the adoption of Brojo Kishore Deo the power still survived in the widow of Adikonda Deo.

When and under what circumstances the authority ceases to be exercisable has been considered in a number of cases both by this Board and the courts in India. The High Court at Bombay took the view that the power must be looked on as extinguished under analogous circumstances in the case of *Ramkrishna v. Shamrao* (1), where CHANDAVARKAR, J., delivering the judgment of the Full Bench, examines the authorities closely. He interprets earlier decisions of the Judicial Committee as having established conclusively that, quite apart from any question of construction, there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and that when that limit is reached the power is at end. That limit may arise from circumstances such as those already referred to. The authorities on which he founds are the judgment of this Board as delivered by LORD KINGSDOWN in *Musammatt Bhoobhun Moye Dibia v. Ram Kishore* (2), and the subsequent judgments in *Pudma Koomari v. The Court of Wards* (3), and *Thayammal v. Venkata Rama* (4).

(1) [1902] I. L. R., 26 Bom., 526

(2) [1865] 10 Moore, I. A., 279.

(3) [1863] 8 I. A., 229.

(4) [1869] 14 I. A., 67.

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Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinion that on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adikonda's widow to an end when Brojo Kishore, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural-born son or by the adoption to him of a son by his own widow. That widow was not a party to the suit, and, whether or not she had power to adopt to Brojo Kishore, it has not been established against her that she had no such power. Their Lordships think it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of Brojo Kishore and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of Adikonda's widow, who was not the widow of the last owner, and could not adopt a son to him. This conclusion is in their opinion in no way in conflict with the previous decision of this Board as to the succession to this zemindari. There the title of Adikonda's widow to displace Raghunadha's succession was recognised. But Raghunadha's succession was of a character only provisional, and subject to defeasance by the emergence of a male heir to Adikonda.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

A. P. P.

*Appeal dismissed.**Douglas Grant.*—Solicitor for the appellant*Chapman, Walker and Shepherd.*—Solicitors for the respondent.

HIGH COURT.

EMPEROR

versus

GULAB AND OTHERS *

CRIMINAL

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July, 4.

TUDBALL, J.
A. RAOOF, J.

Penal Code (Act XLV of 1860), sections 37, 300 (4), 304—Murder—Culpable homicide not amounting to murder—Fatal assault committed by three persons acting in concert.

- Three men attacked two others with *lathis*. A free fight took place
- with the result that considerable injuries were inflicted on both sides. One of the persons attacked received several severe injuries which culminated in his death—the evidence for the prosecution was that some of the injuries were inflicted after the deceased had been felled to the ground. It did not appear, however, which of the injuries had been caused by which of the assailants, but the weapons used were *lathis* (lethal weapon)—and the three persons were acting in concert:—*Held* that the accused were guilty of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, inasmuch as the matter was sudden and the injuries had been inflicted in the heat of passion.

Chandan Singh v. Emperor, 16 A. L. J. R., 11, dissented from ;

Emperor v. Hanuman, I. L. R., 35 All., 560, and *Emperor v. Ram Nexas*, I. L. R., 35 All., 506, referred to.

CRIMINAL REVISION from an order of BABU JAGAT NARAIN, First Additional Sessions Judge of Aligarh.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The opposite parties were not represented.

The judgment of the Court was delivered by

TUDBALL, J.—Notice was issued by a learned Judge of this Court to the three persons Gulab, Majid and Ghafur to show cause why they should not be convicted of an offence punishable under section 304 of the Indian Penal Code why the sentences passed on them should not be enhanced, or why they should not be ordered to be re-tried on a charge under section 302 of the Indian Penal Code. The facts of the case as found by the court

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below and which appear to us to have been correctly found, are as follows:—There was a sugarcane crop standing in three fields. It had been sown by the deceased Hardial and his partners Jahangir, Bhagwan Sahai and others. These fields had been given to Hardial by the accused to enable him to recoup himself for certain monies which he had advanced to them and which were due to him from them. The mortgage of an occupancy holding is of course contrary to law. No bond was executed in this case but the fields were actually made over to Hardial and he cultivated them. One of his duties was to pay the rent. The evidence shows that he had failed to pay two instalments. On the date in question he and his friends and his nephew Ganga Prasad were cutting the sugarcane crop when the three accused appeared upon the scene and Gulab objected to his cutting the crop as he had not paid the rent. Hardial replied that he had intentionally not paid the rent because the accused owed him other money and that he had set it off against the debt. Abuse followed between the parties and thereupon, according to the evidence for the prosecution, *the three men attacked Hardial with their lathis*. Ganga Prasad was also armed with a *lathi* and a regular fight took place between two men on one side and three on the other. The result was considerable injuries on both sides. Hardial received three blows on the head, one on the cheek, one across the ear and some on his body. The injuries on the head were all on the right side. According to the evidence for the prosecution, some of the injuries were inflicted after he had been knocked down and the fact that the injuries on the face, ear and head are all on the right side, is some indication of the fact that this really occurred. Ganga Prasad also received considerable injuries. Upon other persons arriving at the scene, the accused fled. The court below has convicted the accused under section 325 of the Indian Penal Code of having voluntarily caused grievous hurt, relying upon the ruling in the case of *Chandan Singh v. Emperor* (1). It is obvious that the offence of culpable homicide either amounting to murder or not amounting to murder, was committed. A man's life has been taken. It is obviously impossible in cases of this description to be able to prove that the fracture of the skull which resulted in death was caused by a blow from the *lathi* of any special one of the assailants. In the present instance Hardial had three fractures of the skull and had received three *lathi* blows upon the head. The three accused were all armed with the same class of weapon. They all attacked Hardial. A *lathi* is a lethal weapon as has been repeatedly held in this Court for very many years. The person who uses a *lathi* must know on an occasion like this, that he is *very likely to cause death*. The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they

(1) [1918] 16 A. L. J. R., 11.

all used deadly weapons and they must be deemed to have known that they were likely to cause death. We cannot agree that the accused can only be convicted of voluntarily causing grievous hurt. It is impossible to say whose *lathi* fractured the skull. The other blows inflicted on the body of Hardial caused only simple hurt. It appears to us that the present case falls within exception 4 of section 300 of the Indian Penal Code wherein it is stated "that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner." If five or more persons had banded together in this matter on behalf of the accused, no one would have hesitated to have held all five guilty of the offence of culpable homicide not amounting to murder (section 149 of the Indian Penal Code). Why, because the number is reduced to three, these three should not be equally guilty under section 304 of the Indian Penal Code, we fail to understand. If one man alone had committed the offence, he also would have been convicted under section 304 of the Code. It is illogical to say because two others joined with him with similar weapons that therefore the offence committed by the three is reduced to the lesser offence of voluntarily causing grievous hurt. With all due respect to the learned Judge who decided it we find it impossible to agree with the opinion expressed in the case of *Chandan Singh v. King-Emperor* (1). If the facts were as they are reported, then the offence in our opinion was not even one under section 304 of the Indian Penal Code. It was a cruel and a brutal assault, premeditated and committed for the purpose of revenge upon an unfortunate man. The offence committed appears to us nothing more or less than murder and all three accused were equally guilty as they were clearly moved by the same intent and had the same object and all three used lethal weapons. We do not agree with the view of the law taken in that case and in that respect we would point out that it was quite inconsistent with the remarks to be found in the case of *Emperor v. Hanuman* (2). The remarks at page 563 are worthy of note. They run as follows:—"It is impossible to prove by direct evidence the intention of a particular individual. The intention can only be inferred from the reasonable and probable result of his act or conduct. The learned Judge seems to confuse the meaning of the term intention with desire. It is quite possible that these persons had no wish either collectively or individually to kill Sheoratan (as is indicated by the fact that no wound was discovered on his head), but nevertheless, if they beat him in the way it is proved that they did they must be taken to have had knowledge that their act must in all probability cause death or such bodily injury as was likely to cause death, and if so, they are guilty of murder. Under circumstances such

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(1) [1918] 16 A. L. J. R., 11. (2) [1913] I. L. R., 35 All., 560.

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as these, it is quite immaterial to ascertain whose blow was the immediately fatal one." The learned Judges who decided that case distinctly dissented from the rule of law laid down in the case of *Dhian Singh v. King-Emperor*, which was a judgment of a single Judge of this Court. They distinctly say "we cannot agree with the rule of law laid down in *Dhian Singh v. King Emperor*." We would also call attention to the decision of this Court in the case of *King-Emperor v. Newaz* (1). This was similarly a case of three men who with the same intent and object attacked one other. They were armed with *lathis*. They inflicted serious injuries which resulted in death. All three of them were found guilty of the offence of murder. These cases no doubt are distinguishable from the case before us for here the matter was a sudden one, it sprang up suddenly and the injuries were inflicted in the heat of passion. We think that the case falls within exception 4 of section 300 of the Indian Penal Code. We, therefore, alter the conviction in the present case from one under section 325 of the Indian Penal Code to one under section 304 of the Indian Penal Code and in view of the circumstances of the case, we do not think it necessary to enhance the sentences that have been passed.

(1) [1913] I. L. R., 85 All., 506.

CRIMINAL

1918

June, 8.

BANERJI, J.

CHAITAN LAL

versus

EMPEROR *

Code of Criminal Procedure (Act V of 1898), section 435—High Court, revisional powers of—Quashing of proceedings not resulting in any advantage.

The High Court in the exercise of powers vested in it under section 435 of the Code of Criminal Procedure, quashed the proceedings initiated in this case under section 182 of the Indian Penal Code inasmuch as no advantage would be gained by continuing them.

CRIMINAL REVISION from an order of W. RAW, Esq., District Magistrate of Muzaffarnagar.

Chaitan Lal made a report at the Police Station charging his brother with theft; he also filed a complaint in court to the same effect. The court issued notice to the accused. After that, a joint petition was filed by the parties to the effect that the matter had

^uCr Rev. No. 249 of 1918.

been settled between them, and praying that the complaint might be dismissed. The court being of opinion that the matter in dispute between the brothers was really of a civil nature, granted the petition and discharged the accused. After this order the Superintendent of police sanctioned the prosecution of Chaitan Lal under section 182, Indian Penal Code, for bringing a false charge, and the Magistrate taking cognizance of the case issued summons to Chaitan Lal. Chaitan Lal applied in revision against the order taking cognizance of the case.

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Peary Lal Banerji, for the applicant, contended that if the charge made by Chaitan Lal to the police was false, it was a 'false charge' within the meaning of section 211, Indian Penal Code; the offence, therefore, was not one under section 182, Indian Penal Code, particularly as the report to the police was followed up by a complaint in court. Without the sanction of the court before which the complaint was filed no court could take cognizance of the offence under section 211. It could hardly have been intended that the police could start proceedings under section 182 after the matter had gone into court. He cited the following cases:—

Empress v. Pitam Rai, [1882] I. L. R., 5 All., 215;

Empress v. Parahu, [1883] I. L. R., 5 All., 598;

Emperor v. Hardwar Pal, [1912] I. L. R., 34 All., 522.

Although the making of a false report to the police may constitute an offence under section 182, yet when a man follows up the report with a complaint in court he commits an offence under section 211; and the report having been made in relation to proceedings in court, sanction of the court is necessary under section 195, Criminal Procedure Code.

Even if the report to the police be deemed as having constituted a distinct offence under section 182, still the sanction under section 182 was very injudicious; and this Court even if it could not set aside the sanction could quash the proceedings started on such sanction. He referred to the following cases:—

T. N. Chadha v. Emperor, [1916] 14 A. L. J. R., 851;

Jai Narain v. Emperor, [1918] 16 A. L. J. R., 458.

R. Malcomson, (Assistant Government Advocate), for the Crown, contended that the false report to the police was a distinct offence, and the mere fact that a graver offence under section 211 was committed afterwards would not cause a merger of the one in the other.

Even if, in one view, the report to the police were regarded as constituting an offence under section 211, it nevertheless was clearly an offence under section 182 also, and the police had, therefore, power to grant sanction and this Court could not interfere with the order.

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In any case, the proceedings that have been started should continue and this Court could not at this stage stop those proceedings. If a complaint is filed by a private individual he is entitled to have it tried and disposed of finally by the Magistrate. There was no reason why a responsible police officer should have any less rights and be not entitled to a complete hearing of his complaint.

He commented on the cases cited by the applicant.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—Two brothers, Kishen Murari and Chaitan Lal, lived in the same house but occupied different quarters. During the absence of Chaitan Lal, Kishen Murari is said to have broken open the door of the room occupied by Chaitan Lal. Chaitan Lal made a report to the police charging his brother with theft. He also filed a complaint before a Magistrate. The matter was subsequently compromised and the case brought in the Criminal Court was dismissed. After all this on the application of the police the Superintendent of police sanctioned the prosecution of Chaitan Lal for bringing a false charge under section 182 of the Indian Penal Code and he is being prosecuted under that section. Arguments have been addressed to me on the question whether the case comes within the purview of section 182 or section 211. I do not deem it necessary to decide the question of law just raised because in my opinion this is not a case in which any action ought to have been taken and any proceedings instituted. The dispute was one between two brothers. The offence with which Kishen Murari was charged might or might not be theft but no advantage would be gained by continuing the proceedings which have been instituted under section 182. I accordingly quash those proceedings and direct that they be discontinued. I make this order in exercise of the powers vested in this Court under section 435 of the Code of Criminal Procedure as held in *Jai Narain Lal v. Emperor* (1).

B. K. M.

(1) [1918] 16 A. L. J. R., 458.

NASIR-UD-DIN HUSAIN (*Plaintiff*)*versus*ASHFAQ HUSAIN (*Defendant*)*

CIVIL

1918

June, 26.

Code of Civil Procedure (Act V of 1908), Order 32, rules 1, 2, 12—Suit filed by minor without next friend—Minor attaining majority during pendency of suit—Application by minor to be allowed to proceed with suit as major—Plaint ordered to be struck off—Order illegal—Revision.

BANERJI, J.
PIGGOTT, J

A minor filed a suit without a next friend. It was reported that the minor would come of age two days after the date when the suit was filed. On the date fixed for deciding this question an application signed by the plaintiff and his pleader was filed in which it was denied that the plaintiff was a minor and it was also stated that if he was so on the date of the suit he had in the interval come of age and he prayed for permission to go on with the suit. The plaint was registered and notice was issued to the defendant. Upon the defendant objecting the court ordered the plaint to be taken off the file :—

Held, in revision, that the order was bad inasmuch as the court had refused to exercise jurisdiction which was vested in it by law and the High Court could interfere in revision.

CIVIL REVISION from an order of BABU MANMOHAN SANYAL, Subordinate Judge of Meerut.

Suit for rendition of account.

The facts of the case are shortly as follows :—The parties are brothers. According to the will of their father the defendant was appointed guardian of the property of the plaintiff who was a minor. The defendant managed the property and realized profits and other dues from the debtors and submitted accounts to the plaintiff's mother. The plaintiff alleges that the defendant submitted a bogus account. Hence the present suit for rendition of account against their defendant. He brought the suit in his own name without a next friend. A few days after the filing of the suit the plaintiff attained the age of majority and asked the court to be allowed to proceed with the case in his own name as a major. The court then registered the suit and sent notice to the defendant to file objections. On his objections the Subordinate Judge held that the suit having been filed by the plaintiff when he was a minor the only course open to the court was to strike off the plaint, and he ordered accordingly.

The plaintiff filed the present application for revision against that order.

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Baldev Ram Dave, (with him *Nihal Chand* and *Iqbal Ahmad*),
for the applicant.

Having regard to the fact that the plaintiff attained majority three days after the institution of the suit and he having asked the court to be allowed to go on with the case, the plaint ought not to have been struck off but the plaintiff should have been ordered to amend it. The procedure that is followed in the case of a minor suing through a next friend, and attaining majority during the pendency of the suit should have been followed.

The procedure is laid down in Order 32, rule 12 of the Code of Civil Procedure.

There is no reported case exactly in point but the cases reported in

Abdul Karim v. Muhammad Ahmad, [1908] 11 O. C., 159 ;

Beni Ram Bhutt v. Ram Lal Dhukri, [1886] I. L. R., 13 Cal., 189 ;

Flight v. Bolland, [1828] 4 Russ., 298 ; S. C., 28, R. R., page 101,

explain the principle which should be applicable in the present case.

No question of limitation arises in the case and the plaint may be considered to be filed on the date on which the plaintiff made the application to proceed with the case in his own name.

S. M. Sulaiman, (with him *Surendra Nath Sen*), for the opposite party.

The provisions of Order 32, rule 1 are imperative. It lays down that every suit by a minor *shall* be instituted through a next friend.

Rule 2 lays down that the defendant may ask the court to take the plaint off the file. It is absolutely in the discretion of the court to do or not to do so and in the exercise of its discretion it ordered that the plaint be struck off. In matters of discretion the High Court does not generally interfere in revision. Moreover unless the other side shows that the lower court had no jurisdiction to pass that order or that it shirked jurisdiction they cannot complain of the order in revision. The court had jurisdiction to decide the matter and, rightly or wrongly, it decided it. The High Court cannot interfere in revision now.

Jwala Prasad v. E. I. Railway Co., [1918] 16 A. L. J. R., 535.

The frame of the application mentioned in Rule 12, of Order 32, Civil Procedure Code shows that it is only in those cases in which the suit is instituted by a minor through a next friend that the minor can make an application to proceed with the case.

Moreover, the suit is not barred and the plaintiff can file a fresh suit properly framed. It has been held in numerous cases that where any other remedy is open to the applicant the High Court will not interfere in revision.

The judgment of the Court was delivered by

BANERJI, J.—The facts of the case out of which this application arises are these :—On the 3rd of March, 1917, a plaint was filed in the court of the Subordinate Judge of Meerut. The office reported that the plaintiff would attain majority on the 5th of March, 1917, and that the suit had been instituted by a minor without a next friend. The court ordered the plaint to be brought forward in the presence of the pleader for the plaintiff and fixed a date for that purpose. On the 15th of March, 1917, an application was filed signed both by the pleader for the plaintiff and the plaintiff himself in which the plaintiff stated that he was not a minor on the date of the filing of the plaint, that in any case he had completed his age of twenty years and that he wished to proceed with the plaint. Thereupon the court ordered the plaint to be registered and issued notice of the suit to the other side. An application was made on behalf of the defendants to have the plaint taken off the file on the ground that the suit had been instituted by a minor without a next friend. This application was granted and the court ordered the plaint to be taken off the file. Against this order the present application for revision has been brought. In our opinion there was an irregular presentation of the plaint on the 3rd of March, 1917, and that the plaint was lying in the court without its being registered from that date to the 15th of March. On the 15th of March, the plaintiff elected to proceed with the plaint and we must take it that there was a proper presentation of the plaint on that date. It was upon that application that the court ordered it to be registered. This being so we must hold that the plaint was properly presented on the 15th of March, when the plaintiff was of full age, and therefore there was no justification for the order directing the plaint to be taken off the file. The court in making that order refused to exercise the jurisdiction which was vested in it. We allow the application, set aside the order of the court below and direct it to take back the plaint as instituted on the 15th of March, 1917, and proceed to hear the suit according to law. Under the circumstances we direct that the parties do abide their own costs of this application.

B. M. V.

Application allowed—Cause remanded.

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July, 2.

BANERJI, J.
RYVES, J.WAZIR ALI AND ANOTHER (*Defendants*)*versus*ALI ISLAM (*Plaintiff*) **Usufructuary mortgage—Redemption—Purchaser of equity of redemption in part of mortgaged property, suit by—Limitation Act IX of 1908, Sch. I, Art. 148.*

A purchaser of the equity of redemption in a part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by Article 148 of Schedule I to the Limitation Act. All persons who have stepped into the shoes of a mortgagor are "co-mortgagors" for all purposes and the rule of limitation provided by article 148 is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property.

SECOND APPEAL from a decree of J. B. MUNDLE, Esq., District Judge of Azamgarh, confirming a decree of Pandit Suraj Narain Majju, Subordinate Judge.

M. L. Agarwala, S. M. Sulaiman, Tej Bahadur Sapru and Surendro Nath Sen, for the appellants.

Gokul Prasad, for the respondent.

The judgment of the Court was delivered by

Banerji, J.

BANERJI, J.—This appeal arises out of a suit for redemption brought under the circumstances mentioned in detail in the judgment of the court below. It is unnecessary to repeat all the facts and it is sufficient to say that on the 21st of December, 1864, one Iradat Ullah made a usufructuary mortgage of certain shares in four villages one of which was the village Gangapur. The present suit is for the redemption of that village. The equity of redemption in one of the mortgaged villages, namely, Pul Ratni, was sold by auction and purchased by one Mazhar Ali in 1874. He sold it in 1882 and the share which he purchased ultimately came to one Sarju Singh. In 1887, Sarju Singh brought a suit for redemption and got a decree for redemption of all the four mortgaged villages and obtained possession in 1891. The present appellant Wazir Ali is the purchaser of the rights of Sarju in Gangapur and he is in possession by virtue of his purchase.

* S. A. No. 1395 of 1916.

In 1873 the share in Gangapur was purchased at auction by Kali Charan, defendant No. 15 who sold it to the plaintiff on the 11th of October, 1913. By virtue of this purchase the plaintiff brought the present suit on the 18th of May, 1915, for redemption of Gangapur as against Wazir Ali, who is in possession of that village. He has made other persons parties to the suit and one of these is Musammat Saidan Bibi, the second appellant, the widow of Iradat-ul-lah, the mortgagor. The court of first instance decreed the claim and the decree of that court was confirmed by the lower appellate court.

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Banerji, J.

The first contention raised before us on behalf of the appellants is that the claim is time-barred this point is concluded by the authority of the Full Bench decision in *Ashfaq Ahmad v. Wazir Ali* (1). This case has been followed in subsequent cases by this Court and we as a Divisional Bench are bound by it. Following that ruling we must hold that the limitation applicable to a suit of this description is that provided by article 148, namely, sixty years from the date on which the mortgage became capable of redemption. It is contended that the word "co-mortgagor" should not be extended to purchasers of the equity of redemption. We are unable to agree with this contention, all persons who have stepped into the shoes of the original mortgagor are "co-mortgagors" for all purposes and therefore the rule laid down in the Full Bench case is applicable to the present case which is that of a purchaser of the equity of redemption in a part of the mortgaged property.

The learned counsel, for the appellant, referred to the case of *Jai Kishen Joshi v. Budhanand Joshi* (2). That case so far from helping him seems to us to be against his contention. That case was decided mainly on the ground that the representative of the mortgagor who had redeemed the mortgage had asserted a proprietary title and claimed adversely to the true owner. It was held that in a case of that description article 144 would apply but one of the learned Judges who decided the case, observed as follow at page 47 of the report.

"If Jaidat had not dealt further with the property but had merely taken possession and held it, the plaintiff would (under the ruling of this Court in *Ashfaq Ali v. Wazir Ali* (1), have had a period of sixty years from the date of the mortgage of 1860 within which to recover his share from Jaidat on payment of his share of the debt."

We are accordingly of opinion that the court below was right in holding that the limitation applicable to the case was that provided by article 148 and that the suit was not barred by limitation.

(1) [1889] 1 L. R., 14 All., 1, (F. B.) (2) [1916] 14 A. L. J. R., 41.

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It was next contended that the suit should be deemed to be one for a declaratory decree as regards the title of the plaintiff or his vendor, Kali Charan. This contention is, in our opinion, untenable as the suit is not for a declaratory decree but for consequential relief, namely, redemption of the mortgage and possession of the property. For the purpose of maintaining the suit it was necessary for the plaintiffs to ask the court to declare his title.

The last contention put forward was that as Kali Charan did not bring a suit to assert his title within twelve years of the date of his purchase that title must be deemed to have become extinct. This contention has no force inasmuch as Kali Charan had no occasion to bring a suit to establish his title. The mortgagee was in possession and the possession of the mortgagee must be deemed to be that of the person entitled to the equity of redemption.

For these reasons the appeal must, in our opinion, fail. We dismiss it with costs.

Appeal dismissed.

CIVIL

1918

July, 4.

TUDBALL, J.
A. RAOOF, J.MOHUNT DARSHAN DAS (*Opposite-party*)*versus*THE COLLECTOR OF MEERUT AND ANOTHER (*Petitioners*)*

Code of Civil Procedure (Act V of 1908), section 92—Public endowment—Breach of condition by Mohunt—District Judge ordering suspension of Mohunt on mere report—No suit filed—Jurisdiction—Interference by High Court in revision.

The Code of Civil Procedure gives no powers to the District Judge to take any action in order to protect property forming the subject-matter of a public endowment unless and until a regular suit is filed in his court under section 92, and when the District Judge exercises any of the powers vested in him under that section he acts without jurisdiction. The High Court therefore interfered in this case in its revisional jurisdiction and set aside the order of the District Judge suspending a *Mohunt* when there was no suit before him under section 92.

CIVIL REVISION from an order of E. R. NEAVE, Esq., District Judge of Meerut.

Under a decree passed by the District Judge of Meerut on the 7th of May, 1909, the respondent, Puran Atal, was removed from the *Mohuntship* of a *Sanghat* (a public endowment) in Meerut

* Civ. Rev. No. 122 of 1918.

known as the Bugshar *gaddi* and the appellant, Darshan Das, was appointed as the *Mohunt* thereof subject, *inter alia*, to the following conditions, namely (1) he should spend the funds and the income of the *Sanghat* solely on the objects of religion and charity; (2) provide sufficiently for the maintenance of all *faqirs* connected with the *Sanghat*; (3) be charitable to the poor and hospitable to the strangers; (4) celebrate all religious rites and services in a proper manner, and (5) should file in the court of the District Judge of Meerut on the 3rd of January, in each year commencing on the 3rd of January, 1910, an account of the receipts and expenditure of the income and profits of the properties appertaining to the said *Sanghat*. In the said decree it was expressly mentioned that upon the breach of any of those conditions Darshan Das would be liable to removal from Mohuntship. It appears that Mohunt Darshan Das did not care to file any statement of account up to the 23rd of May, 1916. On the 23rd of May, 1916, Puran Atal applied to the District Judge that Darshan Das had broken the conditions imposed upon him by the decree of the District Judge, dated the 7th of May, 1909, that he had misapplied the income of the properties of the *Sanghat* in objects quite foreign to those of the trust and had run into large debt and that he might be asked to render an account of the income and expenditure of the said properties.

The District Judge thereupon issued a notice on Mohunt Darshan Das ordering him therein to render the aforesaid account and to appear personally to explain the same. Some scraps of account were filed by Mohunt Darshan Das but he did not care to appear in court personally. Repeated efforts were made to secure his personal appearance but without effect. The Collector of Meerut did then apply to the District Judge that some satisfactory arrangement be made for the management of the trust. The District Judge thereupon asked the Collector to nominate three persons to take charge of the financial affairs of the *Sanghat* and requested the Tehsildar of the Hapur Tahsil where the main portion of the properties of the *Sanghat* is situate to make enquiries and to report about the state of affairs.

The report of the said Tehsildar was to the effect that Mohunt Darshan Das had broken most of the conditions under which he held his appointment, that he was grossly incapable of holding it, that although the annual income of the properties was about Rs 18,000, yet the *Mohunt* while neglecting all the objects of the trust had contracted enormous debts, that he did not come near the temple to perform any of the duties of the *Mohunt* and that he had crippled the resources of the trust for many years to come.

The District Judge thereupon by his order, dated the 9th of February, 1918, suspended the said *Mohunt* from his office as *Mohunt* and by an injunction prohibited him from having any

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further dealings with the properties of the *Sanghat* in question till such time as a proper suit be filed under section 92 of the Code of Civil Procedure with the sanction of the Legal Remembrancer and further ordered that in the interval a committee of three persons nominated by the Collector would take over the financial affairs of the *Sanghat*. Hence this appeal. The appellant also applied for the suspension of the injunction pending this appeal.

W. Wallach (*Offg. Government Advocate*), for the Collector of Meerut (with *Harendra Krishna Mukherjee*), for the respondent, Puran Atal.—We take a preliminary objection to the hearing of this appeal.

The order appealed against is not appealable either under Section 104 or under Order XLIII, rule 1 of the Code of Civil Procedure.

An appeal is a creature of the statute.

A. H. C. Hamilton, for the appellant.—No section is mentioned in the application under which the present proceedings were started nor does the learned Judge mention the provisions of law under which the order has been passed.

[TUDBALL, J.—That would not by itself give you any right of appeal.]

One of the grounds is that the order was *ultra vires*. Section 92 of the Code of Civil Procedure, 1908, does not confer upon the District Judge any jurisdiction to pass the order in question.

This appeal might be treated as a revision.

[TUDBALL, J.—The exercise of the revisional jurisdiction is quite discretionary. Looking to the merits, even if half of the facts found be true we ought not to interfere in a case like this.]

Those findings are arrived at in an *ex-parte* proceeding.

[TUDBALL, J.—That the proceedings were *ex-parte* was due to the appellant.]

The other side has not as yet launched any suit under section 92 of the Code of Civil Procedure nor has even applied for any sanction from the Legal Remembrancer although nearly 5 months have elapsed since the passing of the order in question.

W. Wallach, in reply.

The appointment of the appellant was subject to conditions and hence the District Judge was within his rights in suspending him.

[ABDUL RAOOF, J.—That would be a very dangerous precedent to lay down. In that view when once a trustee or a *Mohunt* had been appointed by a court no suit under section 92

of the Code of Civil Procedure will be necessary in the future as invariably such appointments are subject to conditions.]

[TUDBALL, J.—We might not have been inclined to interfere in view of the facts found if the respondent had shown any promptness in seeking sanction from the Legal Remembrancer for a suit under section 92 of the Code of Civil Procedure.]

The Collector was not the party to seek such a sanction.

Harendra Krishna Mukherjee, in explaining as to why such a sanction had not been sought for:—

The order has been appealed against and hence naturally the respondent waited for the result of the appeal. The management was left in proper hands hence there was no urgency for the sanction.

Puran Atal who had been a *Mohunt* before and who had been removed from Mohuntship in 1909 had very little hopes to get any sanction for a suit under section 92 of the Code of Civil Procedure. Puran Atal is not responsible for the laches of the persons who were to apply for the same. On the merits a strong case has been made out for the suspension of the appellant.

Their Lordships then proceeded to deal with the appeal as an application in revision.

The following judgment was delivered by

TUDBALL, J.—The facts of this case may be briefly stated. One Puran Atal was the Manager of a certain *gaddi*. It is an admitted fact that the *gaddi* in question is a trust for religious purposes. Puran Atal was removed from his position as trustee by the order of the District Judge of Meerut on the 7th of May, 1909. The present appellant Darshan Das was appointed in his place and certain directions were given to him among which was one that he should file accounts annually in the month of January. In 1913 two suits were brought against Darshan Das under section 92 of the Code of Civil Procedure both of which failed. In 1916 Puran Atal filed an application before the District Judge calling attention to the fact that Darshan Das had never filed any accounts and making certain allegations against him. The District Judge started an enquiry in the course of which the Collector of Meerut applied through the Government Pleader asking the court to make some arrangements for the better management of the *gaddi*. Notice was issued to Darshan Das and efforts were made to bring him into court. For reasons with which we are not now concerned, he did not appear and the District Judge made an *ex-parte* enquiry and finally passed the order of the 9th of February from which the present appeal has been preferred. The order was as follows:—“Mahant Darshan Das is prohibited from having any further dealings with the property of the *gaddi*. Proclamation will be made in

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the villages belonging to the *gaddi* that Darshan Das is prohibited from receiving rents or revenue, acting in any way on behalf of the *gaddi* for the future." Certain gentlemen appeared and they were also appointed as a sort of committee to look after the estate and the Judge suspended Darshan Das from his post pending the filing of a regular suit under section 92 of the Code of Civil Procedure. We also note that more than five months have passed and no attempt whatsoever has been made to file any such suit or to obtain the sanction which is necessary under section 92 for the filing thereof. A preliminary objection is taken that no appeal is allowed by the Code from the order which was passed. As far as we are able to judge the order has been passed without any jurisdiction whatsoever. The preliminary objection therefore has force, namely that no appeal lies. At the same time we are asked to treat this as an application in revision and we think that in the circumstances of the case we ought to do so. If Puran Atal had shown any activity or energy in obtaining sanction or in bringing a suit under section 92 we might have been prepared to reject this appeal on the ground that no appeal lies and to have refused to treat this as an application in revision because in all probability the matter would come before the court at a very early date in a regular suit, but it is to the interests of Puran Atal to delay in bringing such a suit and already a delay of some five months has occurred. We therefore think it best that we should take up this matter in revision. As we have pointed out the order is clearly without jurisdiction. There is no suit under section 92 pending before the District Judge. The Code gives him no powers to interfere in this matter unless and until a regular suit is filed in his court when it will be open to him to exercise all the powers as to the appointment of a receiver *etc.*, the Code gives him in order to protect the property. We fail to see that he has any powers to interfere, as he has done in this case and to suspend a trustee from his post on the application of a private person who has called attention to the fact that a breach of trust appears to have been committed. The Code lays down a regular procedure for suits on such facts as have been brought to the notice of the court and until the court is moved in that way, the Judge certainly has no power of supervision to interfere and to pass such an order. We therefore set aside in revision the order passed by the court below suspending Mahant Darshan Das and prohibiting him from having anything to do with the estate. The court below has also passed an order directing that the fees of the Government Pleader and the Collector's costs should be met from the *gaddi* funds. We can see no justification for such an order. That order will also be set aside. The Collector will have to bear his own costs. We think also that in the circumstances of this case, the other two parties to this matter should also bear their own costs throughout the litigation.

H. K. M.

RAMZAN (*Plaintiff*)*versus*BHUKHAL RAI AND OTHERS (*Defendants*)*

Agra Tenancy Act (II of 1901). section 20—Mortgage of occupancy holding—Mortgage void—Suit for redemption—Suit maintainable.

A usufructuary mortgage was made of an occupancy holding in 1906. The mortgage was void under section 20 of the Tenancy Act. The mortgagor sued to redeem the mortgage and offered to pay the money due thereunder :—*Held* that the plaintiff was entitled to get back possession on his paying the mortgage money as he had offered to do.

SECOND APPEAL against the decree of E. BENNET, Esq, District Judge of Gorakhpur, reversing the decree of the Munsif of Deoria.

Suit for redemption.

Ramzan brought a suit for redemption of a certain occupancy holding mortgaged under a deed of usufructuary mortgage of 1906. The court of first instance decreed the suit. The lower appellate court allowed the appeal and dismissed the suit on the ground that the mortgage of an occupancy holding after the passing of the Agra Tenancy Act is prohibited under section 20 of the Act.

The plaintiff appealed.

J. N. Misra, (for *Bhagwati Shanker*).—Even if the mortgage was illegal the court below ought to have given a decree for possession as the defendant was in possession under an illegal mortgage which conferred no rights on the mortgagee.

Moreover the defendants are estopped from denying the title of the appellant. The plaintiff in all fairness is ready to pay up the mortgage money.

The case of

Banmali Pande v. Bisheshar Singh, [1906] 3 A. L. J. R., 731,

is relied on by the court below is not applicable to the present case. That ruling lays down that a usufructuary mortgage of an occupancy holding after Act II of 1901 is invalid and unlawful and the mortgagee has no right to redeem a prior valid mortgage. It does not follow from this that the mortgagor of an illegal usufructuary mortgage cannot get back possession on payment of mortgage money.

* S. A. No. 1401 of 1916.

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The decision of this Court in

Bahoran Upadhy v. Utamgur, [1911] 8 A. L. J. R., 931,

lays down that a mortgagor seeking restitution of possession of the mortgaged property under a void mortgage must restore the mortgage money to the mortgagee, and in the present case the mortgagor voluntarily offers to pay the mortgage money. It is submitted that mortgagor is entitled to get back possession.

Surendra Nath Sen, for the respondent —Redemption can be allowed only of a legal and subsisting mortgage. If a mortgage is void under law it follows there is as a matter of fact no mortgage of which redemption could legally be allowed. The plaintiff has not brought a suit for possession on the allegation that the possession of the defendant under the mortgage was illegal. It is a suit for redemption. The effect of a decree for redemption in such a case would mean that the court has treated a mortgage which is void in law as a subsisting mortgage.

J. N. Misra, was not heard in reply.

The judgment of the Court was delivered by

*Richards,**C. J.*

RICHARDS, C. J.—In this case it appears that the plaintiff purported to make a usufructuary mortgage of an occupancy tenancy which was illegal, having regard to the provisions of section 20 of the Agra Tenancy Act. The present suit was instituted by the plaintiff in effect to redeem the property. The court of first instance decreed the claim. The lower appellate court reversed the decree of the court of first instance and dismissed the plaintiff's suit upon the ground that the mortgage was null and void. It seems to us that this decision is wholly wrong and inequitable. It might be that if the plaintiff came into court and asked to get back his property without payment of the mortgage money at all on the ground of the illegality of the transaction that the court would put him upon terms of paying the mortgage money. Even this view is not universally taken for one learned Judge at least has held that in such a case the owner of the occupancy tenancy could get back the property without paying the mortgage money. However in the present case the plaintiff very honestly comes in offering to pay the mortgage money. In our opinion he is clearly entitled to get possession on so doing. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with this modification that we decree the plaintiff's costs in all courts and that we decree that the time for payment be extended for six months from this date.

Appeal allowed—Decree modified.

PULE BISHUNATH RAO (*Defendant*)

versus

BRAMHANAND SWAMI (*Plaintiff*)*

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1918

July, 21.

RICHARDS

C. J.

TUDBALL, J.

Civil Procedure Code (Act V of 1908), section 115—Suit on mortgage—Sub-mortgage—Amount due on sub-mortgage ordered to be paid out of sale-proceeds—Decree directing property to be sold for mortgage money as well as for amount of sub-mortgage—Wrong decree—Application for amendment—Order that amendment uncalled for—Refusal to exercise jurisdiction—Revision.

A suit was brought for sale on a mortgage. The mortgagee had created a sub-mortgage, and in the judgment that was passed the court ordered that the property be sold, but that before the mortgagee was paid any money the sub-mortgagee should receive the money due under the sub-mortgage out of the sale-proceeds. In the decree as drawn up the property was ordered to be sold for the mortgage money as well as for the money due under the sub-mortgage. Upon an application by the mortgagor for amendment of the decree but it was refused with the order that the amendment was "uncalled for." *Held* that this order was tantamount to a refusal to exercise jurisdiction and the High Court's interference in revision was justified.

CIVIL REVISION from an order of MAULVI SHAH MUNIR ALAM, Additional Subordinate Judge of Benares.

Gokul Prasad (for whom *Bhagwati Shankar*), for the applicant.

Radha Kant Malaviya, for the opposite party.

The judgment of the Court was delivered by

RICHARDS, C. J.—This application in revision arises under the following circumstances. A suit was brought to realise the amount of a mortgage. It appears that the plaintiff had made a sub-mortgage. The court decreed the plaintiff's claim. Reading the judgment it is absolutely clear that the court intended that the property should be sold for the amount of the plaintiff's mortgage, interest and costs but finding that the plaintiff had made a sub-mortgage it directed that the sub-mortgagee should get the amount of her mortgage out of the proceeds of the sale before the plaintiff was paid. There seems to be very little doubt that the decree as drawn up directed the property to be sold not only for the amount of the plaintiff's mortgage but also for the amount of the sub-

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* Civ. Rev. No. 51 of 1918.

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mortgage, that is to say, that the defendant and the defendant's property was being made liable not only for the mortgage which the defendant had made but also the sub-mortgage which the plaintiff had made. Nothing could possibly be more unjust and unequitable and it is impossible to read the judgment as having any such meaning. An application was made by the defendant to bring the decree into accordance with the judgment pointing out this and another alleged error as to interest. We may point out that there had been an actual report made by the office of the court that the amount of the sub-mortgage had been added to the amount of the plaintiff's mortgage in the decree by mistake. The only order which the court below has made is to state that an amendment is "uncalled" for. We think that under the special circumstances of this case this amounted to a refusal to exercise a jurisdiction vested in the court. We allow the application and direct the lower court to take up the application of the defendant for amendment of the decree and to proceed to deal with it according to law, paying due regard to what we have stated above. We have mentioned that there was another allegation about interest, that the decree was not in accordance with the judgment in respect of interest also. We have not gone into this matter but the lower court will do so when the case goes back. The lower court must take up the judgment and the decree and see whether the latter is in accordance with the former. The applicant will have his costs including in this Court fees on the higher scale.

Application allowed.

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July, 24.

RICHARDS,
C. J.
TUDBALL, J.

MUHAMMAD ABDUL RASHID ALI

KHAN (*Judgment-debtor*)

versus

BUDH SEN AND ANOTHER (*Decree-holders*)*

Decree—Execution of decree—Property sold and purchased by one decree-holder—Application by judgment-debtor with consent of decree-holder to set aside sale—Court refuses to set aside sale—Court's power to set it aside.

In execution of a decree certain property belonging to the judgment-debtor was sold and purchased by one of the decree-holders. In the court below judgment debtor and the decree-holders (one of whom was also the purchaser) applied to get the sale set aside on the ground of inadequacy of price. The court refused to set aside the sale on the ground that it had no power in law to set it aside when the judgment-debtor and the decree-holders consented:—*Held* that the court had power to set aside the sale as there was no opposition on the part of the decree-holders or the purchaser.

* F. A. F. O. No. 65 of 1918.

FIRST APPEAL from an order of BABU SUDARSHAN DAYAL,
First Additional Subordinate Judge of Aligarh.

Benoy Kumar Mukerji, for the appellant.

The respondents were not represented.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts connected with this appeal are as follows.—There had been a mortgage decree. The property was advertised and put up to sale in the usual way and actually sold. After the sale one of the decree-holders purchased it (in all probability on behalf of himself and the other decree-holder). It appears that there had been some attempt at a compromise before the sale actually took place which fell through. It is alleged that the property was sold considerably below its value, because possible bidders were kept away thinking that the matter had been compromised between the parties. That something of this kind occurred is strongly corroborated by the fact that when an application to set aside the sale was made the pleader for both decree-holders signed the petition in token of the agreement of the decree-holders that the sale should be set aside. The learned Judge has not disputed the matters that we have mentioned in his judgment. On the contrary his judgment simply says that there is no law by which a sale can be set aside when the judgment-debtor and decree-holder consent. In the present case both the decree-holders through their pleader consented to the sale being set aside; and one or both of the decree-holders was the purchaser or purchasers of the property. Therefore every one concerned consented and there does not appear to have been any opposition on the part of either the purchaser or the decree-holders. Under these circumstances we think the court below ought to have set aside the sale and had power to do so. Even in this Court apparently the decree-holders, who, as we have already said, are also the purchasers are absent and apparently raise no objection to the appeal being allowed. We allow the appeal, set aside the order of the court below and set aside the sale, and direct that the property be re-sold according to law. We make no order as to costs.

Let our order be sent down as soon as possible.

Appeal allowed

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MUHAMMAD
ABDUL
RASHID ALI
KHAN

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C. J.

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July, 26.

RICHARDS,
C. J.
TUDBALL, J.DATA DIN (*Plaintiff*)*versus*NANKU AND OTHERS (*Defendants*)*

Civil Procedure Code (Act V of 1908), section 47—Hindu Law—Mitakshara—Suit on mortgage against father and son—Son exempted in the decree—Simple money decree against father—Execution against son disallowed—Subsequent suit against son barred.

A suit was instituted against a Hindu father and his son (who were members of a joint Hindu family governed by the *Mitakshara* Law) on the basis of a mortgage. The son contested his liability on the ground that there was no legal necessity. The result was that a simple money decree was granted against the father alone and in the decree it was stated that the son was "exempted" and costs were given to him against the plaintiff. On the decree being executed the sale of the father's share proved insufficient to pay off the decree. Thereupon it was sought to attach and sell the son's share, but upon objection being made by the son, he succeeded. A suit was accordingly brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability:—*Held* that the suit was barred by the provisions of section 47 of the Civil Procedure Code. *Held* also that the expression in a decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against that particular defendant.

SECOND APPEAL from a decree of BABU LALTA PRASAD JODHI, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Allahabad, confirming a decree of Babu Tirloki Nath, Additional Munsif.

Haribans Sahai (*Gajadhar Prasad* with him), for the appellant.

Kanhaya Lal, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises under the following circumstances. A suit was instituted against a father and son on the basis of a mortgage. A plea was put forward on behalf of the son that there was no family necessity. The result of the suit was that the court gave a simple money decree to the father and held that the son was not liable and in the decree stated that the son was "exempted" and that he should get his costs from the plaintiffs.

*S. A. No. 1656 of 1916.

We may pause here to say that we consider that this was exactly the same as if the court had by the decree expressly dismissed the suit with costs as against the son. The plaintiff decree-holder executed the decree against the father's estate. That having proved insufficient he sought to attach and sell the son's estate. The son objected in execution and his objection was allowed. Thereupon the plaintiff brought the present suit seeking a declaration that the son's property could be sold in execution of the decree on the principle of the pious obligation of a son to pay his father's debts. The learned Judge of this Court on being informed that a difficult question of Hindu Law, particularly having regard to certain remarks of their Lordships of the Privy Council in the recent case of *Ram Chandar v. Bhup Singh* (1), arose referred the appeal for the decision of two Judges.

On behalf of the respondent it has been pointed out that this question of law really does not arise because the allowing of the son's objection in execution was final and the present suit cannot be brought. Under section 47 all matters relating to the execution and discharge of the decree arising between parties to the suit must be disposed of in execution and not by a separate suit. There had been some conflict of authority previous to the passing of the Code of Civil Procedure of 1908. This Court had held that the parties must not only be parties to the suit but they must be parties to the decree. Any conflict of authority has been set at rest by the explanation which has been added to section 47, namely "for the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed; are parties to the suit." It was contended on behalf of the appellant that this explanation does not apply where a defendant has been merely "exempted." We think there is no force whatever in this contention. The expression in the decree exempting a particular defendant was probably an inaccurate expression but the operation of the decree was to dismiss the suit as against that particular defendant. We dismiss the appeal with costs.

Appeal dismissed.

(1) [1917] I. L. R., 39 All. 437; S. C., 15 A. L. J. R 437, (P. C.).

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July, 28.

PIGGOTT, J.
TUDBALL, J.SHABBAN BIBI (*Plaintiff*)*versus*KHALIQ SHAH AND ANOTHER (*Defendants*)**Mohammedan Law—Marriage—Treatment, evidence of.*

A Mohammedan lady brought a suit for dower as the widow of a deceased Mohammedan nobleman against his heirs. The lady was the daughter of a woman of questionable antecedents and she herself led a disreputable life before she was admitted by the said nobleman into his *harem*. The nobleman himself had illicit connexion with her. The lady alleged that she had been married to the Raja. The evidence in support of the marriage consisted of the depositions of two witnesses who were disbelieved and of long-continued and exclusive co-habitation:—*Held* that the connexion between the parties being in its inception an illegitimate one, it is difficult to infer a subsequent marriage from evidence of long-continued and exclusive co-habitation.

FIRST APPEAL from a decree of PANDIT SURAJ NARAIN MAJJU, Subordinate Judge of Azamgarh.

The plaintiff, Musammât Shabban Bibi, brought a suit for recovery of Rs. 40,000 as dower debt due to her from the estate of the late Raja Muhammad Salamat Khan. She alleged that she was married to the Raja at Patna in 1861-62, and that her dower was fixed at Rs. 40,000. The defendants, who were the heirs of the Raja in possession of his estate, denied that the plaintiff was ever married to him. They further alleged that she was the daughter of a dancing girl and was herself leading the life of one when she attracted the notice of the Raja who, after some years of illicit connexion with her, took her to live with him. The plaintiff denied these allegations of the defendants, and she produced direct evidence of the marriage alleged by her and also relied "on a mass of circumstantial evidence as proving co-habitation between herself and the late Raja, ostensibly on the footing of lawful marriage; she also undertook in this connexion to prove acknowledgments on the part of the said Raja, both express and by implication, of her status as his wife." The court of first instance held that the plaintiff had not been able to prove that she was the married wife of the deceased Raja, and dismissed the suit. The plaintiff appealed.

B. E. O'Connor, (with him *Iqbal Ahmad*), for the appellant, discussed the evidence and relied mainly on the circumstantial evidence in the case as establishing a marriage between the plaintiff and the

late Raja. He dwelt on the fact of the continuous and exclusive co-habitation between them as husband and wife, and submitted that the great confidence and esteem in which the Raja held her the Raja's open and public allusions to her as his wife, and his behaviour and treatment of the lady and her relations were explainable only on the basis of a lawful marriage having taken place between them. The direct evidence of marriage produced by the plaintiff was also discussed, and it was submitted that the circumstantial evidence by itself was such as to raise a very strong presumption, in fact and in law, of a marriage having taken place. Marriage being established, the amount claimed as dower should be decreed, inasmuch as it was not the case of the defendants that the dower consisted of a smaller amount than that claimed.

Tej Bahadur Sapru, (with him *S. M. Y. Hasan* and *Peary Lal Banerji*), for the respondents, discussed the evidence and submitted that the evidence established the fact that the plaintiff was the daughter of a public prostitute. He further contended that the circumstances of the case were such that the only legitimate inference was that the connection between the Raja and the plaintiff did not commence as that of husband and wife, but was an illicit one. It was true there was evidence of long and un-interrupted co-habitation; but although under the Mohammedan Law long co-habitation gave rise to a presumption of marriage, yet that rule was subject to an important exception. Where it was proved that the woman was a prostitute at the commencement of her relations with the man, so that the connexion between them was illicit in its inception, the presumption in favour of marriage did not arise. The following cases were relied upon :—

Gazanfar Ali Khan v. Kanis Fatima, [1910] I. L. R., 32 All., 345, P. O. ;

Musammat Jariut-ool-Butool v. Musammat Hoseinse Begum, [1867] 11 M. I. A., 194.

He commented on the direct evidence of marriage and dower.

B. E. O'Connor, replied.

The following judgments were delivered

PIGGOTT, J.—In this case the two defendants are the brother and nephew of the late Raja Muhammad Salamat Khan of Azamgarh, who died on April 3rd, 1912. He had made an arrangement in his life-time intended to secure the succession of his nephew, the younger defendant, to his title and the bulk of his estates; this arrangement seems to have been given effect to, with the sanction of Government as regards the title. The plaintiff, Musammat Shabban Bibi claims to be the sole surviving widow of the late Raja; she brings this suit to recover her dower debt, stated at Rs. 40,000 and claims at the same time subsidiary relief by way of

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declaration as to the property from which this dower debt is recoverable. She reserves her claim to possession of one-fourth of the estate, as an heir of the deceased under the Mohammedan Law, for a separate litigation. The defendants replied that the plaintiff was never married to Raja Muhammad Salamat Khan, and consequently no dower was ever fixed for her, or could be due to her; she was merely a dancing girl who had secured the favour of the late Raja and had been "kept in a separate house" by him. They pleaded further that, as long ago as February 22nd, 1886, Raja Muhammad Salamat Khan had made full provision for the plaintiff by executing in her favour a deed of gift conveying to her his proprietary rights in village Salamatgarh, of which the plaintiff was still in possession and enjoyment. At the same time the Raja had taken the precaution of obtaining from the plaintiff a deed under which the latter formally relinquished all claims against the estate of Raja Muhammad Salamat Khan. With respect to this deed of relinquishment the plaintiff's rejoinder was that she had never executed it, or at any rate had never set her name to it with any knowledge or understanding of its contents. It has also been contended, with reference to the terms of this document, that it has in any case no bearing on the claim for dower debt, whatever might be its effect on a claim to a share in the inheritance. The learned Subordinate Judge framed a number of issues, the majority of which he did not find it necessary to decide. On the main question in dispute he has held that "it has not been proved that the plaintiff is the married wife of the deceased Raja Muhammad Salamat Khan." With regard to the deed of relinquishment of February 22nd, 1886, he has held that it would not, on its terms, operate to bar a suit for dower supposing of course, that the plaintiff were a lawfully married wife and that a dower had been fixed for her and remained unpaid. He finds however that the plaintiff did execute this document "after hearing and understanding it," but declines to determine a technical objection as to the validity of its registration. He holds that the plaintiff would not, in any event, be entitled to obtain in this suit a declaration as to the property from which her dower debt, if proved, could be realized. In her memorandum of appeal to this court the plaintiff challenges all the findings of the court below which are against her; but of course the main questions before us are whether the plaintiff was or was not married to Raja Muhammad Salamat Khan and if so, what was the amount of her dower debt. The plaintiff attempted to prove her case on both these points by direct evidence. She was herself examined on commission, and she caused to be examined also on commission two witnesses, Nawab Shujayat Ali Khan and Sayyid Izhar-ud-din Ahmad, residents of Patna; these depose to a marriage at Patna in or about the year 1862 A.D., between the plaintiff and Raja Muhammad Salamat Khan at which a sum of Rs. 40,000 was fixed as the dower debt of the former. The plaintiff also relies on a mass of circum-

stantial evidence as proving co-habitation between herself and the late Raja, ostensibly on the footing of lawful marriage; she also undertakes in this connection to prove acknowledgments on the part of the said Raja, both express and by implication, of her status as his wife. The defendants on their side could scarcely be expected to produce much in the way of direct evidence in proof of their negation of the marriage, they impugned the veracity of the plaintiff's witnesses and suggested explanations of the circumstantial evidence relied on by the latter. They also put forward certain circumstances as supporting their contention that the position of the plaintiff in the late Raja's house-hold was rather that of a favoured mistress or concubine than of a wedded wife. On one point however, and one of considerable importance, they joined issue with the plaintiff in the most direct fashion and produced a body of evidence directly contradicting that of the plaintiff and of her witnesses. The plaintiff's account of herself is that she is the daughter of one Sadiq Husain Khan, originally a resident of Delhi, who removed (at some period not very clearly specified) to the city of Patna. She was married at about the age of eighteen to one Abad Husain, a Saiyid by race, and lived with him for a little more than two years, when he died, leaving her with an infant son, who received the name of Nanhe Khan. Some three or four years after the death of her first husband her parents arranged for her a second marriage with Raja Muhammad Salamat Khan. This took place at Patna, but the Raja took her home with him to his ancestral Fort at Azamgarh, introduced her there as his honourable wife and she lived with him as such for very nearly fifty years up to the time of the Raja's death. She makes a particular point of the kindly treatment of her son Nanhe Khan by his step-father, Raja Muhammad Salamat Khan, and of the affection evinced by the latter for Afzal Khan, son of the said Nanhe Khan. On the other hand the case for the defendants is that the plaintiff is the daughter of a disreputable woman of the name of Chhuttan, who was originally a Brahmini, but was converted to Mohammedanism, adopted the profession of a prostitute, and lived for many years in Azamgarh in the keeping of one Nanak Baksh (a Hindu, apparently a Khatri by caste) to whom she bore a number of children, including the plaintiff. The latter first attracted the notice of Raja Muhammad Salamat Khan when she was appearing in public as a dancing girl and was presumably also following the less reputable branch of her mother's profession. There was an illicit connexion between the plaintiff and the Raja which continued for some years before the Raja took this favoured mistress to live with him in his Fort.

The conflict of evidence on this point has a two-fold importance.

I hold it proved that the plaintiff was living in Azamgarh as the daughter of Musammat Chhuttan, while the latter was there

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under the protection of Nanak Bakhsh Khattri and carrying on the profession of a dancing girl. I accept as true the evidence for the defendants that Shabban Bibi was trained as a dancing girl and first came under the notice of Raja Muhammad Salamat Khan while appearing in public in this capacity. I have no doubt that the date of this may be fixed on the strength of Babbar Ali's statement as about 1854 A. D. I am satisfied that the connexion between the plaintiff and Raja Muhammad Salamat Khan was in its inception nothing more than ordinary illicit intercourse between the Raja and a dancing girl who had taken his fancy. I take it that Nanhe Khan was born under circumstances which made it impossible for any one to feel quite certain as to his paternity; reading between the lines of the evidence I strongly suspect that Raja Muhammad Salamat Khan came gradually to believe that the child had really been his own and that his subsequent attitude towards the plaintiff, towards Nanhe Khan and towards Afzal Khan was largely governed by this belief. That he did take Shabban Bibi to live with him in his Fort is admitted; that he did so after illicit intercourse between them had continued for some years I hold to be proved. On the other hand I find it also proved that he provided her with respectable quarters in his Fort, that he corresponded with her on terms of extraordinary confidence and intimacy that he allowed her to be spoken of as his "wife" and that he put her forward on several occasions, in matters involving public and official correspondence, under the designation of "my second wife." Nevertheless, it cannot be shown that he ever himself spoke or wrote of her as his "Rani" or that he ever committed himself to the statement that she was his wedded wife. As to the date on which Shabban Bibi passed under the exclusive protection of the late Raja, becoming a veiled lady inside his ancestral Fort, the evidence leaves me in some little doubt. It was certainly anterior by several years to Babbar Ali's statement of October, 1877, it may have taken place as early as 1861-2 A. D., the date given by the plaintiff for her marriage at Patna, but it was probably about 1866-8 A. D., according to the statement of the first defendant, who puts it ten or twelve years after the commencement of the illicit connexion.

In recording these conclusions I have anticipated the result of the further analysis which I undertook to make of the statements of the plaintiff's witnesses Shujayat Ali Khan and Izhar-ud-din Ahmad. I quite definitely disbelieve these two witnesses. It is not merely that I consider their testimony heavily out-weighted by direct and circumstantial evidence on the other side: my opinion is that a careful consideration of their statements shows them to be unworthy of credit.

[Here His Lordship discussed the evidence and concluded as follows:—]

I have given reasons enough for concurring with the court below in rejecting the direct evidence for the plaintiff on the subject of her marriage at Patna in 1861-2 A. D. This involves the failure of the claim for Rs. 40,000 on account of dower debt. It has not been suggested before us in argument that we are bound to come to some finding on the question of marriage or concubinage in order that, if we find a marriage of unknown place or date established by the circumstantial evidence, we might decree in favour of the plaintiff the minimum dower debt prescribed by Mohammedan Law. One reason why the point was not taken may be the provision made for the plaintiff by the deed of February 22nd, 1886, which is very far in excess of the minimum dowry. I feel serious doubts whether we ought to discuss further the circumstantial evidence in favour of the proposition that a marriage must have taken place, on some date or other, and probably inside the Fort at Azamgarh, between the plaintiff and the late Raja Muhammad Salamat Khan. The plaintiff has elected to reserve the question of her claim to a share in the estate to a separate litigation; in such a litigation she would have to take the opinion of the court as to the effect of her deed of relinquishment of February 22nd, 1886 (p. 44 R.) and also as to the validity of the dispositions of his property effected by the late Raja in his life-time. If the plaintiff desires to carry the matter further even a finding in favour of the marriage in the present suit would not operate so as to conclude the litigation. In the case now before us, the plaintiff stands committed to the plea that her marriage with Raja Muhammad Salamat Khan took place inside the house of Sadiq Husain Khan in the city of Patna in or about the year 1861-2 A. D. My finding is that no such marriage took place. The circumstantial evidence relied on by *Mr. O'Connor* is evidence that a marriage took place somewhere perhaps before 1877 or 1880 A. D., but certainly before the plaintiff went on pilgrimage to Mecca in 1887 A. D., ostensibly as the second wife of Raja Muhammad Salamat Khan. The evidence about this pilgrimage is a strong point in the plaintiff's favour; read in connection with the evidence of Shah Salimullah (p. 4A) who strikes me as a truthful witness, it becomes even stronger. This gentleman's father was a religious teacher of some local renown; he had made disciples of the late Raja and of his mother as well as of the plaintiff. The pilgrimage to Mecca must have taken place under the influence of this conversion and so to speak, under the auspicious of this spiritual guide. It seems equally hard to believe that Raja Mohammad Salamat Khan would have deceived his spiritual guide as to the plaintiff's position, or that the latter would have allowed him to make the pilgrimage in the company of his mistress, passing her off as his wife. Yet there are arguments on the other side, and more particularly the wording of the Raja's deed of February 22nd, 1886. It is true he once more calls Musammat Shabban Bibi "My second wife" but he

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avoids calling her his "Rani" or his "wedded wife," and the whole tone of the document is inconsistent with the idea that he regarded her as heir to a substantial share of his estate under the ordinary rules of Mohammedan Law.

I do not propose to pursue this matter further. It is one thing for a lady in the position of this plaintiff to ask the court to infer from evidence of long continued and exclusive co-habitation, on the ostensible footing of a lawful wife, that there must at some time or other have been a valid marriage between herself and the late Raja Muhammad Salamat Khan; it is not quite the same thing to set up a marriage at a particular time and place, and then to fall back on the circumstantial evidence when the case actually set up has been disproved. Moreover, when once the court has come to a clear finding, as I think we must do in this case, that the connexion between the parties was in its inception an illegitimate one, it is a very difficult matter to infer a subsequent marriage from the sort of evidence which we are asked to rely upon in this case. On the evidence as it stands I think the proper course is to dismiss the appeal upon a finding that neither the marriage set up by the plaintiff nor the dower debt claimed by her, is proved by the evidence.

WALSH, J., in a separate judgment concurred with PIGGOTT, J.

B. K. M.

CRIMINAL

1918

May, 23.

BANERJI, J.

RAGHUNATH AND OTHERS

versus

EMPEROR*

*Gambling Act (I of 1917), sections 3, 4—Keeping a common gambling house—
Facts necessary to be proved.*

In order to sustain a conviction of a person for keeping a common gambling house it is necessary for the prosecution to prove not only that he owned the house, or was the occupier of it and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of that person. Where a house is not proved to be a common gaming house, the presence of other persons therein will not raise a presumption against them; and even it were one, no presumption will arise against such persons unless it can be shown that gambling was going on at the time when they were present.

CRIMINAL REVISION from an order of T. A. STEWART, Esq., Magistrate, First Class of Meerut.

Nehal Chand, for the applicants.

R. Malcomson, (Assistant Government Advocate) for the Crown.

* Cr. Rev. No. 236 of 1918.

The following judgment was delivered by

BANERJI, J.—The applicants have been convicted under the Gambling Act No. III. of 1867, as amended by Act I of 1917, Raghunath has been convicted under section 3, the others under section 4 of the Act. The case against these persons was that they were carrying on wagering or betting on *sattas* relating to the sale of opium. Raghunath was charged with keeping a common gambling house. Under Act No. I of 1917 wagering or betting has been included in the definition of “game;” and any article used as a means or appurtenance of or for the purpose of carrying on or facilitating gaming is included in the expression “instrument of gaming.” What happened was this. The police raided the shop of Raghunath where he deals in cloth. They found the other accused (and some others) assembled there, sitting round a lighted lamp and some writing was being done by one of the persons assembled. The police seized a number of papers which were found in that room. They also found money in a box of Raghunath and loose silver pieces and money in the possession of the other accused. It was stated that the papers which were discovered were papers used for the purpose of betting and were therefore instruments of gambling. What the papers really were it is difficult to say. They contained writings which were in cypher. One witness, namely, Kundan Lal, (prosecution witness No. 6) attempted to explain what some of the papers meant. If his statement is correct the papers show that they related to betting. The paper which was being written at the time the police raided the house of Raghunath has not been produced or proved. I have considered the evidence and have heard the arguments addressed to me on behalf of the accused and the Crown. It is very difficult to say whether the papers found did in fact relate to wagering or betting. With the exception of one paper the others did not show that this betting, if any, was going on after the passing of Act No. I of 1917 which made betting an offence under the head of gambling. Having regard however to the nature of the papers, it may be assumed that they related to gambling. In order however to sustain the conviction of Raghunath for keeping a common gambling house it was necessary for the prosecution to prove not only that he owned the house, or was the occupier of it, and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of Raghunath. There is not a particle of evidence to show that he made any profit or gain out of the transactions which might have taken place in his house. It is possible that he made some profit but in the absence of evidence to show that profit or gain was made he could not be convicted merely upon suspicion. Therefore in my opinion his conviction for keeping a common gaming house as defined in Act I of 1917 cannot be sustained. As regards the other accused there is no evidence whatever that they were engaged in betting.

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or wagering when the police raided the house. As it has not established that the house was a common gaming house, their presence in that house can raise no presumption against them and even if the house was a common gaming house, no presumption will arise against them unless it can be shown that gambling was going on at the time when they were present. As to this there is no evidence whatever. It is probable, as I have said above, that gambling (that is betting or wagering) used to be carried on in Raghunath's house; but that alone would not justify his conviction or the conviction of the other accused in the absence of evidence showing that his house was a common gaming house within the definition of that expression in the Act and that the other accused gambled in that house. Under these circumstances the conviction must be set aside. I allow the application, set aside the conviction of the accused and the sentence passed on them and direct that the fines, if paid, be refunded. I also direct that the moneys seized in the house be returned to the persons from whose possession they were seized.

Application allowed.

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BANERJI, J
PIGGOTT, J

BHAGWAN DAS GONDKA (*Plaintiff*)

versus

RAM KUMAR RAMESHWAR DAS (*Defendant*)*

Code of Civil Procedure (Act V of 1908), Order XI, rules 6, 7, 21—Practice—Interrogatories—Suit for breach of contract—Irrelevant interrogatory.

A suit was brought to recover damages for breach of contract. The defendant put in a list of ten interrogatories for the plaintiff to answer. The interrogatories being served on the plaintiff, the plaintiff appeared in court answered three and objected to the rest as being irrelevant. Later on the defendant put in an application in which it was prayed that the plaintiff be ordered to answer the remaining interrogatories and the court thereupon passed an *ex-parte* order to this effect. "The plaintiff be asked to answer the interrogatories. If he fails to comply he will do so at his own risk." The plaintiff subsequently presented another application in which the court was asked to re-consider the *ex-parte* order and in which the former objection was reiterated. The court refused to re-consider the *ex-parte* order and said that the order was not "prejudicial to the plaintiff." The defendant then put in an application asking the court to dismiss the suit which was then set down for hearing on a subsequent date. On that date the court held that the interrogatories were not irrelevant, and without giving the plaintiff a farther opportunity of answering them, it proceeded to dismiss the suit :—*Held* that the order of the court

was wrong inasmuch as it was not justified by anything in Order 11 of the Code of Civil Procedure in postponing its adjudication on the question whether the interrogatories were relevant or not to the date of hearing and then refusing the plaintiff the option of complying, or refusing to comply with a clear and specific order directing him to answer such interrogatories as might be held to be relevant.

Held also that an objection under rule 6 of Order 11 required adjudication by the court, that the rule gave the plaintiff an alternative remedy and not that he was to ask the interrogatories to which he objected to be struck out.

FIRST APPEAL from an order of BABU KSHIROD GOPAL BANERJI, Subordinate Judge of Cawnpore.

B. E. O'Connor and *S. M. Sulaiman*, for the appellant

Motilal Nehru, *Tej Bahadur Sapru* and *Janki Prasad*, for the respondent.

The judgment of the Court was delivered by

Piggott, J.—This is an appeal against an order passed under Order 11, rule 21 of the Code of Civil Procedure dismissing a suit for want of prosecution, on the ground that the plaintiff had failed to comply with an order to answer interrogatories. The suit was between two trading firms and the claim was one for damages for breach of contract. The plaint was filed on the 15th of August, 1917 and issues were fixed on the 10th of September, 1917. On the 2nd of November, 1917, the defendant put in a list of interrogatories, ten in number, and asked that the plaintiff be ordered to answer the same. This order was served on the plaintiff on the 12th of November, 1917. Seven days later, that is to say on the 19th of November, 1917, the plaintiff came into court with a statement and affidavit, in the course of which he answered the first two, and claimed to have also answered the third of the interrogatories. In respect of the remaining seven he objected that they were irrelevant to the issues for trial. This was an objection taken under Rule 6 of Order 11 and it required adjudication by the court. The learned Subordinate Judge seems to have thought that the only remedy open to the plaintiff if he objected to answering any of the interrogatories, was to ask to have the interrogatories to which he objected set aside or struck out under Order 11, rule 7. It seems to us that Rule 6, above referred to gave the plaintiff an alternative relief of which in fact he availed himself. On the 22nd of November, 1917, in the absence of the plaintiff, the defendant put in an application, purporting to be under Order 11, rule 11 asking that the plaintiff be required to answer further, that is to say, to return answers to the remaining seven interrogatories. On this an *ex-parte* order was passed in the following terms:—"The plaintiff be asked to answer the interrogatories. If he fails to comply he will do so at his own risk."

On the 26th of November, 1917, the plaintiff presented to the court a formal petition asking it to re-consider the *ex-parte* order .

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of November 22nd. He reiterated that the interrogatories which he had failed to answer were irrelevant, and expressly appealed to the court to deal with this objection and to pass specific orders in respect of each of the questions objected to. It was in the order passed on this application that it seems to us that the learned Subordinate Judge went distinctly wrong. He began by saying that the order of the 22nd of November was not "prejudicial to the plaintiff" a vague expression which necessarily left the parties in doubt as to the intentions of the court. He concluded by saying that he declined to re-consider the said order. He did this admittedly without pronouncing any opinion on the question of the relevancy of any one of the interrogatories to which the plaintiff had objected. On the 1st of December, 1917, the defendant put in an application under Rule 21 asking the court to dismiss the suit, which was then set down for hearing on the 4th of February, 1918. Even this application the court did not deal with at once but directed that it should be put up on the date of the hearing. In the interval the parties caused commissions to be issued and witnesses to be summoned. The court then took up the defendant's petition of the 1st of December, 1917, took into consideration the question of the relevancy of the interrogatories to which the plaintiff had objected, held that those interrogatories were relevant, and then without offering the plaintiff any further opportunity of answering the same proceeded to dismiss the suit under the rule in question. The learned Subordinate Judge remarks that he was compelled to adopt this course, apparently by reason of his desire to correct abuses of procedure which he had observed in the conduct of other litigations in his court. He was certainly not compelled by the provisions of Order 11, rule 21 to dismiss the suit, and as a matter of ordinary business to the parties, he should have taken into consideration the fact that the plaintiff had been waiting from the 19th of November, 1917, to that date for a clear adjudication upon his objection to the relevancy of seven of the interrogatories. We think that the court below was not justified by anything in the provisions of Order 11 of the Code of Civil Procedure in postponing its adjudication upon this question to the date of hearing and then refusing the plaintiff the option of complying, or refusing to comply, with a clear and specific order directing him to answer such interrogatories as the court might hold to be relevant. The order which the court had passed on the 26th of November, 1917, was calculated to mislead the plaintiff. It does not seem to us that he had adequate warning of the course which the court below intended to take. For these reasons we set aside the order complained of and remand the suit to the court below for trial on the merits. Costs here and hitherto will be costs in the cause.

Appeal allowed. Cause remanded.

BALWANT SINGH (*Judgment-debtor*)

versus

JOTI PRASAD AND OTHERS (*Decree-holders*)*

Transfer of Property Act (Act IV of 1882), section 6 (a)—Hindu Law—Adoption by widow—Postponement of adopted son's estate during the widow's life—Transfer made by adopted son of property forming part of the estate in the widow's life-time—Spec successionis.

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D. K. adopted *B.* by means of a deed of adoption which provided that the latter would from that day acquire all the rights which an adopted son had under the law in all the property left (*matruka*) by Raja Raghubir Singh deceased and now in the possession of the Rani Saheba. But it had been agreed..... that according to the wish and permission of Raja Raghubir Singh, the Rani Saheba would continue to be owner and in possession (*malik aur qabiz*) of the entire *Reyasat* during her life. Subsequently *B.* transferred certain property of the *Reyasat* to *J.* and others. After the sale *B.* leased the property to *D.*, father of *I.* There was considerable litigation between *B.* and *J.* which eventually terminated in a decree based on compromise between the parties to the effect that in the event of *B.* paying to *J.* on a certain date certain sums of money by *J.* would give up all claims to the property in question, and that in the event of non-payment the suit of *J.* against *B.* would be decreed and the suit of *B.* against *J.* would be dismissed. *B.* did not pay the amounts as required and the result provided for in the decree followed. *J.* applied for execution of the decree, *B.* objected that he had only an expectant interest in the estate which interest was inalienable:—*Held* upon a construction of the adoption deed, the interest created in favour of *B.* was not a mere possibility of succession to the estate after the death of *D. K.* but that it was a vested right, the right of enjoyment and possession being only postponed, and that the sale was unaffected by the provisions of section 6 (a) of the Transfer of Property Act.

EXECUTION FIRST APPEAL from a decree of BABU RAGHUNATH PRASAD, Subordinate Judge of Saharanpur.

Nehal Chand, for the appellant.

B. E. O'Connor and *Lakshmi Narain*, for the respondents.

The judgment of the Court was delivered by

ABDUL RAOOF, J.—This appeal arises out of an execution proceeding under two decrees dated (1) the 22nd of June, 1917, and (2) the 15th of December, 1917, both of which were passed in one and the same suit No. 63 of 1915 (1) Rai Bahadur Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, plaintiffs

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versus (1) Choudhri Balwant Singh, (2) Rana Indar Singh, defendants. The application for execution was made on the 17th of December, 1917, and the prayer made was that, possession over talluqa Naogawn, entered in the list annexed to the application, be delivered to the decree-holders against the judgment-debtors Nos. 1 and 2. A further prayer was that the Collector of Saharanpur, who was in possession of the property as a receiver be asked by a Rubkar to deliver possession of the said property to the decree-holders and to hand over to them such sums of money as may be with him in deposit, on account of the profits of the said property. Objections were raised by Balwant Singh, judgment-debtor, to the execution of the decree. Those objections have been disallowed by the learned Subordinate Judge of Saharanpur by his judgment, dated the 5th of April, 1918. Choudhri Balwant Singh, judgment-debtor has appealed and in the memorandum of appeal has raised pleas embracing almost all the objections which he had raised in the court below. In order to appreciate the pleas raised and the argument addressed to the court on behalf of the appellant it is necessary to state shortly the previous history of the litigation.

One Raja Raghubir Singh was the owner of a considerable property known as the Landhaura Estate. He died in year 1868, leaving Rani Dharam Kuar, who was pregnant at the time, as his widow. It is an admitted fact that before his death he permitted and authorized his widow to adopt a son for him, in case the child born of the widow died in its infancy. He further gave permission to adopt another son in case the one adopted was to die in his childhood, in her life-time.

A child was born after the death of Raghubir Singh, but he having died, Rani Dharamkuar adopted one Indar Singh, in 1877. The latter having died, she adopted one Rambadan Singh in 1883, who also having died in 1885, one Bharat Singh was selected in 1893, for adoption, but before his adoption had taken place, he died in 1896. Eventually, Choudhri Balwant Singh the appellant in this appeal, was adopted on the 13th of January 1899 and a deed of adoption was executed on that date and was formally registered. The material portions of the said deed having a bearing upon the questions in dispute in this appeal are these:—

In paragraph 3, it is stated that on the death of the Raja, Rani Dharamkuar entered into proprietary possession of all kinds of property (هر قسم من ممتلكاته کی مالک و مستحق و قابض ہوئی) and that she was in possession of all the property belonging to the Reyasat of the said Raja Sahab at the time of the execution of the document. In paragraph 4, it is stated that being the owner of a considerable property, the Raja in his life-time, owing to religious needs and other requirements, was anxious to have a son born who may

fulfil the religious needs and who may be the owner of the Reyasat. In paragraph 5, it is stated that as the lady, at the time of his last illness, was pregnant, he did not adopt a son himself in his life-time. In paragraph 6, it is stated that during his last illness, having suddenly become hopeless of his life he by way of precaution, directed the lady, "That in case a daughter is born or if a boy having born dies, I enjoin upon you and order you that you should adopt a boy for me, so that he may keep our name alive and after your death may be the absolute owner and possessor of my entire estate and if perchance, the son adopted, according to this permission, dies in your life-time then you will continue to have the power of further adoption." In paragraph 10, it is stated that she in June 1898 selected Choudhri Balwant Singh, son of Choudhri Ramnawaz for the purpose of adoption and from that date the said Balwant Singh came under her protection and was brought up by her. In paragraph 11, it is stated that the executant adopted Choudhri Balwant Singh on the 13th of January, 1899. In paragraph 12, it is stated that, "The said Balwant Singh will be considered the adopted son of Raja Raghubir Singh and of the executant and he will perform all the religious duties towards the said Raja Sahab and the executant after the death of the executant and after her death he will be the absolute owner of the property of the Reyasat Landhaura. The most important provision is contained in para. 13, which runs thus :—

"That during her life-time the executant will continue to have all the rights over all the properties of the Reyasat of Landhaura left by Raja Raghubir Singh which a Hindu widow has over her husband's estate according to the Hindu Law and that she will continue to be the owner and in possession as before, that the said Balwant Singh, my adopted son, will have no right to interfere with my rights of ownership and with the management and supervision of the Reyasat during my life. But the said adopted boy will be maintained according to his position and status and he will be properly brought up and that she has adopted Balwant Singh on these conditions and Choudhri Ramnawaz, the father of Balwant Singh, has given him in adoption on these very conditions and this was in accordance with the wish and permission of the Raja Sahab....." On the same date Choudhri Ramnawaz Singh executed an *Iqrarnama* in which after mentioning that he had willingly given his son Choudhri Balwant Singh, aged 16 years, in adoption, to Rani Dharamkuar, he stated "that from this date the son ceases to have any connection with his natural family and that the said son will, from to-day, acquire all the rights which an adopted son has under the law in all the property left (میراثہ) by Raja Raghubir Singh deceased and which are in the possession of the Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh the Rani

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Sahaba will continue to be مالک اور قابض (owner and in possession) of the entire Reyasat during her life.....”

Disputes having arisen between Choudhri Balwant Singh and his adoptive mother, Rani Dharamkuar, the latter instituted a suit against him in 1905 with the object of getting rid of him. It is unnecessary to give the details of that litigation; it is enough to state that the suit was dismissed and Choudhri Balwant Singh was successful. His position as the adopted son of Raja Raghubir Singh was made secure.

In 1911 Choudhri Balwant Singh filed a suit No. 1 of 1911 against Rani Dharamkuar for possession of the properties of the Reyasat Landhaura, but the defendant having died during the course of the suit, in the month of November, 1912, the further prosecution of the suit became unnecessary.

During the course of the litigation with Rani Dharamkuar, Balwant Singh had to mortgage and sell portions of the property of the Reyasat in order to procure funds to carry on the fight with his adoptive mother. The property, the subject-matter of the present dispute, viz., Mauza Ahmadpur Naogavan was sold to the present respondents, (1) Lala Joti Prasad, (2) Lala Raghunath Singh and (3) Lala Beni Prasad, sons of Lala Bansi Lal, under a sale deed, dated the 3rd of March, 1911.

After selling the property in dispute to the respondents, Balwant Singh leased the property by a deed of lease, dated the 2nd of August, 1913, to Rana Dharam Singh, the father of Indar Singh, the judgment-debtor No. 2.

In 1914, Choudhri Balwant Singh filed a suit No. 61 of 1914 against the present decree-holders in which he assailed the sale deed, dated the 3rd of March, 1911, in favour of the respondents on the ground of fraud, want of consideration, etc., and prayed that it be set aside. That suit was referred to arbitration on the 17th of September, 1914, and when the award was filed in court certain objections were taken to its validity but eventually a decree was passed on the award on the 3rd of February, 1915, against Balwant Singh whose suit was dismissed on that date. In pursuance of the decree passed on the award, the present respondent decree-holders deposited Rs. 65,000 in court to be paid to Balwant Singh. Against this decree, Choudhri Balwant Singh filed an appeal in the High Court which was registered as F. A. No. 121 of 1915. In the meantime the present respondents filed a suit No. 63 of 1915 in the Court of the Subordinate Judge of Saharanpur against Choudhri Balwant Singh in which they impleaded Rana Dharam Singh, the lessee of the property in dispute, under the lease, dated the 2nd of August, 1913. Subsequently, the name of Rana Indar Singh, his minor son, was added to in the array of defendants, under the guardianship of Musammat Sukhdevi, the grandmother of Rana Indar Singh.

The reliefs claimed in the plaint were (a) that the lease dated the 2nd of August, 1913, be declared invalid and possession be delivered to the plaintiffs as against the defendants, 1 and 2, (b) that mean profits be awarded against the defendants, (c) that a sum of money by way of damages for the price of trees cut down by the defendants, be awarded against them.

That in addition to F. A. No. 121 of 1915, Choudhri Balwant Singh appellant *versus* Rai Bahadur Lala Joti Prasad and others, two other matters between the parties were pending in the High Court *viz.*, F. A. No. 123 of 1915, Civil Revision No. 2 of 1917 and as mentioned above the original suit No. 63 of 1915 Rai Bahadur Joti Prasad and others plaintiffs *versus* Choudhri Balwant Singh and Rana Indar Singh defendants, was pending in the court of the Subordinate Judge of Saharanpur. The respondents in this case and Choudhri Balwant Singh filed a compromise in the High Court by which they settled all their disputes. Two paragraphs of this compromise, which have a material bearing upon the present proceedings were these :—

(1) That if Balwant Singh pay on or before 19th September, 1917, in the court of the Subordinate Judge of Saharanpur for payment to Rai Joti Prasad and others aforesaid the following sums *viz.*

(a) Rs. 2,50,000 with simple interest thereon at the rate of 6 per cent per annum from 18th January, 1915, upto the date of payment.

(b) Rs. 65,000 with simple interest thereon at 6 per cent per annum from 17th March, 1915, up to the date of payment.

(c) The amount due under decree No. 51 of 1915 with interest as provided in the said decree upto the date of payment the said Rai Bahadur Lala Joti Prasad, Lala Raghunath Singh and Lala Beni Prasad shall and do hereby abandon all claim and interest under the sale of March, 1911 and their suit for possession of the taluqa Naogawan shall stand dismissed, parties bearing their own costs throughout the litigation and the Collector of Saharanpur as the receiver of the property shall deliver Naogawan to Choudhri Balwant Singh together with all profits in his hands.

(2) That if the said Choudhri Balwant Singh does not pay into court the amount aforesaid in terms of the preceding clause on or before the 19th of September, 1917, his suit and F. A. No. 121 of 1915, F. A. F. O. No. 123 and Civil Revision No. 2 of 1917 shall stand dismissed both parties paying their own costs and the original suit No. 63 of 1915 shall stand decreed with costs and the Collector of Saharanpur who is in possession of Naogawan as receiver appointed by the court shall deliver possession of the said Taluqa together with profits thereof in his hands to Rai Bahadur

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Lala Joti Prasad and others plaintiffs in that case." It was further stated in the compromise that, "This compromise is filed in the three cases pending in this Hon'ble Court and the parties will file a copy of this compromise in suit No. 63 of 1915 within one week from this date, and apply to the said court to decree the claim in accordance therewith." It appears that a copy of this compromise was filed in the court of the Subordinate Judge of Saharanpur in which the suit No. 63 of 1915 was pending and the learned Subordinate Judge was requested to pass a decree in the suit in accordance with the terms of the compromise. No objection was raised on behalf of Balwant Singh but Rana Indar Singh objected, that, as he was not a party to the compromise, a decree could not be passed as against him on the compromise and that as separate decrees could not be passed against the two defendants no decree should be passed even against Balwant Singh. The learned Subordinate Judge however, over-ruled the objections of Indar Singh and passed a decree against Balwant Singh on the basis of the compromise on the 22nd of June, 1917, ordering that a copy of the above mentioned compromise be attached to the decree.

Subsequently a compromise was also effected between the plaintiffs Rai Bahadur Lala Joti Prasad *etc.*, and Rana Indar Singh, under the guardianship of Rani Sukhdevi, his grandmother, and under the terms of the compromise a decree was passed by the Additional Subordinate Judge of Saharanpur in the suit, against defendant No. 2 also, on the 15th of December, 1917. Choudhri Balwant Singh did not deposit the amount which he was required to do, on or before the 19th of September, 1917, under the compromise. The necessary result of which was that the suit of Balwant Singh No. 61 of 1914 stood dismissed, and suit No. 63 of 1915 of the plaintiffs against Balwant Singh and Indar Singh stood decreed. Hence this application for execution of the two decrees passed in the suit No. 63 of 1915 was made and the court was asked to deliver possession to the plaintiffs, decree-holders over Taluqa Naogawan. The judgment-debtor No. 1 objected to the execution of the decree on the grounds:—

(1) That at the time of the execution of the sale deed, on the basis of which, the decree under execution had been obtained the objector had merely a chance of succession after the death of Rani Dharamkuar which could not be transferred under the law and having regard to the provisions of section 6 (a) of the Transfer of Property Act, no right vested in the transferees, under the sale,

(2) That the transfer being contrary to law; the compromise between the parties and the subsequent decree passed on the compromise could not validate the transfer.

(3) That the compromise ought not to have been accepted and a decree ought not to have been passed on its basis, under Order 23, rule 3 of the Code of Civil Procedure,

(4) That as the compromise was not filed in court within a week, as provided by the compromise, a decree ought not to have been passed on it. On behalf of the decree-holders it was urged that the provisions of section 6 (a) of the Transfer of Property Act was not applicable to the facts of this case.

(5) That the decrees passed in the suit No. 61 of 1914 and 63 of 1915 operated as *res judicata*.

(6) That the judgment-debtor, in his suit No. 61 of 1914 himself, had accepted the award inspite of an objection by the decree-holders and that he had benefitted under the award by receiving Rs. 65,000 under it and that he was now estopped from objecting to the award and the compromise.

The learned Subordinate Judge of Saharanpur decided that the case of an adopted son where the adoption was made by a widow on the condition that the adopted son would have no right during her life to the ownership or possession of the property was distinguishable from the case of a mere Hindu reversioner who is to succeed after the death of a widow. In his opinion inspite of a condition postponing the rights of an adopted son, till after the death of the widow, the adopted son would have a vested interest in the property left by the deceased owner. In this view, apparently, he did not think it necessary to deal with the question of estoppel and *res judicata* raised in the pleadings. He was of opinion that the interest acquired by Balwant Singh, being of a higher character, than the mere contingent reversionary interest of a collateral to succeed to property on the death of a Hindu widow, he was capable of dealing with it effectively though the operation of the transfer made by him may be postponed till after the death of the widow. He based his judgment on the general principles of the Hindu Law and disallowed the objections raised by the judgment-debtor. Towards the end of his judgment, there is an indication that he was also of opinion that the objection now raised by the judgment-debtor ought to have been raised by him at the time the compromise was filed and before a decree was passed on it. The pleas raised in the memorandum of appeal presented to this Court raise two main questions :—

(1) Whether the transfer made by Balwant Singh was ineffective as being opposed to the provisions of section 6 (a) of the Transfer of Property Act? and,

(2) Whether the subsequent compromise effected in the suits Nos. 61 of 1914 and 63 of 1915 had the effect of removing any defect existing in the sale. Only these questions were argued before us.

In order to determine the first question, we think it necessary first to examine the provisions of the deed of adoption together with those of the agreement, executed by the natural father of

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Balwant Singh In doing this we ought to keep in mind the general rules of the Hindu Law, as applicable to an adoption. The adopted son or his adoption leaves his father's *Gotra* and cannot take his estate nor does he offer *Pindas* to him. As soon as the adoption is made, he is transferred to the family of the adoptive father. He stands exactly in the same position as if he had been born to his adoptive father. He divests the estate of any person in possession of the property of the adoptive father. If a widow happens to be in possession of the estate the result of the adoption is that her limited estate at once ceases. He becomes the full owner of the property and the widow's rights are reduced to a mere claim of maintenance. Such being the law, it lies upon the judgment-debtor to establish beyond doubt that the deed of adoption contained such valid conditions as to prevent the operation of the law. He will have, in the first instance to show, that there was an intention to prevent the vesting of the right to property in the adopted son and that intention was given effect to by some legal and valid provision in the deed of adoption. On a consideration of the terms of that deed we find that there is nothing in it which would prevent the vesting of the right in the adopted son. It is provided in the deed that the son would leave the family of his natural father and would live with his adoptive mother. He would be brought up under her guardianship and would be supported and maintained according to his position and status, **مرتبہ اور حیثیت کے موافق**. This would show that Balwant Singh was to be treated as an adopted son and his position and status was to be maintained as such. In this view, the condition reserving to the widow the right of ownership and possession during her life-time would simply mean that though Balwant Singh was to be the rightful owner as an adopted son, the widow was to remain in possession during her life, exercising all the powers of ownership, as an ordinary Hindu widow. This construction, to a large extent, derives support from the clear wordings of the agreement executed by Ramnawaz Singh, the natural father of Balwant Singh,

”تاریخ امروزہ سے پسر مسطور کا اپنے خاندان سے کچھ تعلق نہیں رہا ہے اور پسر مذکور کو وہ حقوق جو قانوناً پسر متبني کو حاصل ہوتے ہیں آج کی تاریخ سے کل جائداد و متروکہ راجت دگھیر سنگھ صاحب مرحوم و مقبوضہ جنابہ رانی صاحبہ موصوفہ میں حاصل ہونگے۔ لیکن یہ شرط مزین مندر اور جنابہ رانی صاحبہ موصوفہ حسب منشاء وصیت و اجازت راجت دگھیر سنگھ صاحب مرحوم قرار پائی ہے کہ جنابہ رانی صاحبہ موصوفہ اپنی زندگی تک بدستور مالک اور قابض کل ریاست دھینگہ“

viz. “From this date the son ceases to have any connection with his natural family and that the said son will, from to-day,

acquire all the rights which an adopted son has under the law in all the property left (مترک) by Raja Raghubir Singh deceased, and which are in the possession of Rani Saheba. But it has been agreed between me and Rani Saheba that according to the wish and permission of Raja Raghubir Singh, the Rani Saheba will continue to be مالک اور قابض (owner and in possession) of the entire Reyasat during her life."

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In this view of the construction of the deed of adoption it becomes unnecessary to consider the question whether it is lawful for a Hindu widow to make a conditional adoption so as to prevent the adopted son from taking possession of, and enjoying rights of ownership over, the property of the adoptive father during her life and whether such a condition creates an interest in favour of an adopted son, of the nature which is contemplated by clause (a), section 6 of the Transfer of Property Act.

It has been held in several cases that an agreement depriving an adopted son of his right to take possession of the property of the adoptive father is not prohibited by the law and such an agreement has been given effect to. See for example.—*Kali Das v. Bijai Shankar and another* (1), and *Visalakshi Ammal v. Sivaramien and another* (2). But we have not been referred to any case in which it has been held that the interest of an adopted son under such a conditional adoption is exactly similar to the interest of a contingent collateral Hindu reversioner. The latter kind of interest has been held to be a mere chance of an heir apparent succeeding to an estate, and as such has been held to be non-transferable. Irrespective of the construction which we have put on the terms of the deed of adoption, we are of opinion that it has not been shown that the interest created in favour of Choudhri Balwant Singh under the conditional adoption in question was a mere possibility of succession to the Landhaura Estate after the death of Rani Dharamkuar. In our opinion both according to the interpretation of the deed of adoption and the law, a vested right was created in his favour, and merely his right of enjoyment and possession was postponed till after the death of the lady. Such being the case, we are of opinion that the transfer of talluqa Naogawan in favour of the decree-holders under the sale deed, dated the 3rd of March, 1911, was unaffected by the provisions of section, 6 (a) of the Transfer of Property Act.

We agree with the lower court that on this finding alone the objections of the judgment-debtor were bound to fail, but we are also of opinion that the subsequent compromise and the decrees passed thereon left no room for any contention on the point. Rani Dharamkuar having died in November, 1912, the property

(1) [1891] I. L. R., 13 All, 391. (2) [1904] I. L. R., 27 Mad., 577.

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vested in Choudhari Balwant Singh. He was at the time a married man 29 years old and could deal with it as he liked. Under the compromise he entered into a new agreement according to which the property sold was to vest in the decree-holders in the event of his failing to pay to them certain sums of money, before the 19th of September, 1917. The parties understood their positions fully and by a lawful agreement completed a binding contract. A decree was passed on the compromise which put an end to all disputes between the parties. It is too late now to try to go behind the compromise and the decree. It has, however, been argued on behalf of the appellant that if it was a mere expectancy that was transferred by the sale deed in question it was open to him to impugn both the compromise and the decree when possession was claimed in execution. In support of his contention the learned counsel, for the appellant, relied upon the case of *Ramasami Naik v. Ramasami Chetti and others* (1) That was a case relating to an impartible and inalienable zamindari. The nature of the interest which was transferred in that case by mortgage and the circumstances under which the consent decree had been obtained are stated at p. 261 of the report in these words :—

“ We now come to the most serious objection urged by the appellant. It is said that by the suit mortgage and the consent decree the 2nd to the 5th defendants purport to transfer only their chance of succeeding to the zamindari, and that such a chance or mere possibility is incapable of transfer in India by virtue of section 6 (a) of Transfer of Property Act. As pointed out by MUTTUSAMI AYYAR, J. (*Sivasubramania Naikar v. Krishnamoel*) (2) in the case of this zamindari the interest to which each zeminder succeeds is his separate property and consists of his right to the income of the zamindari as beneficial owner for life. This is the interest which defendants Nos. 2 to 5 have sought to transfer by the mortgage and the consent decree. At the dates of mortgage and decree they had a mere chance of succeeding to this interest dependent in the case of each on his surviving all the male members of the family older than himself so as to make him for the time being the oldest member.”

At the bottom of page 262 the learned Judges who decided the case remarked :—

“ It is further urged that the defendants cannot go behind the decree. If however, the mortgage did not operate as a transfer of interests of defendants 2 to 5 neither could the consent decree in the circumstances of the present case.”

(1) [1906] I. L. R., 30 Mad, 255.

(2) [1894] I. L. R., 18 Mad., 287, 291,

Now, what were the circumstances to which the learned Judges referred? The circumstances were these:—

The only interest which the defendants 2 to 5 in that case had, was a mere chance of succeeding to a life interest on the happening of certain event as described at page 261 above mentioned. In that case there be no doubt that the interest transferred was of a kind contemplated by section 6, clause (a) of Transfer of Property Act. The mortgage was made of such interest and *at the time the consent decree was passed it was still a mere chance.* In the present case irrespective of the nature of interest which Choudhri Balwant Singh possessed at the time of the sale deed, he had a full and complete interest which had come into existence before the compromise and the consent decree. If the widow had been alive at the date of the consent decree in that case the ruling might have had a bearing on this question. No case has been cited having a direct bearing upon the facts of the present case. In our opinion it is not open to the judgment-debtor to go behind the compromise and consent decree in this case.

Over and above all that we have mentioned above there is the fact that what Choudhri Balwant Singh purported to transfer both by the deed of sale and the compromise was not a mere expectancy but the full right of ownership even assuming that he had no vested interest at the date of sale he subsequently became the full owner and was such at the date of the compromise. He had received the sale consideration and the respondents had also paid a further sum of Rs. 65,000 and they are entitled to the estate which subsequently became vested in minor after the death of the Rani. At the date of the sale Choudhri Balwant Singh claimed to be the full owner and was actually suing the Rani for possession and he purported to transfer the full right. We think that the decision of the court below is right and the appeal should be and is hereby dismissed with costs.

Appeal dismissed.

CIVIL

1918

BALWANT
SINGH

v.

JOTI PRASAD.

Abdul
Raoof, J.

CRIMINAL

1918

July, 6.

BANERJI, J.

ISHWARI DUTT

versus

EMPEROR *

*Criminal Procedure Code, (Act V of 1898), section 110 (d) and (f)—
Security for good behaviour—Bad livelihood—Facts to be proved.*

Ishwari Dutt was called upon to furnish security for good behaviour on the charge of habitually committing extortion and of being so desperate and dangerous as to render his being at large without security hazardous to the community. All that was proved against him was that he promoted litigation and had considerable influence with *patwaris*. No instance of his having committed extortion was found:—*Held* that under the circumstances the order was not justified.

In order that a man might be held to be a man of desperate and dangerous character within the meaning of section 110, it must be shown that he had such a reckless disregard of the safety of the person and property of his neighbours that his being at large would be detrimental to the community and the fact that a man had considerable influence with *patwaris* was not sufficient to raise that inference.

CRIMINAL REVISION from an order of J. M. CLAY, Esq., District Magistrate of Garhwal.

C. Ross Alston and Krishnarao Narain Laghate, for the applicant.

R. Malcomson, (Assistant Government Advocate) for the Crown.

The following judgment was delivered by

Banerji, J.

BANERJI, J.—The applicant Ishwari Dutt has been ordered to furnish security for good behaviour. The charge against him was that he habitually committed extortion and was so desperate and dangerous that his being at large without security was hazardous to the community. No instance of his having committed extortion has been found or established in fact no instance has been given in which this man was said to have committed extortion or attempted to commit extortion. All that is proved against him is that he promotes litigation and has considerable influence with *patwaris*. Assuming the evidence on these points to be true they would not necessarily raise the inference that he committed extortion or attempted to do so. In promoting litigation he may have been supporting the right party. If of course it was shown that he habitually took or attempted to take money from litigants by

offering to them threats of supporting their opponents that would be a case of extortion or attempted extortion. But no such instance, as I have said above, has been found against him. His having influence with the *patwaris* would not raise the inference that he was so dangerous and desperate that his being left at large would be hazardous to the community. It must be shown that he had such a reckless disregard of the safety of the person and property of his neighbours that his being at large would be detrimental to the community, and if that were proved he would be a man of desperate and dangerous character within the meaning of section 110. This was held in *Wajid Ali v Emperor* ⁽¹⁾. The present case does not come within the purview of any of the clauses of section 110, and therefore the order passed against the accused was not justified. I accordingly set it aside and direct that Ishwari Dutt be released if he is in custody and that his security bonds be discharged if security has been furnished.

CRIMINAL

1918

ISHWARI

DUTT

v.

EMPEROR.

Bānerji, J.

(1) [1907] 11 C. W. N., 789.

Order set aside.

MAKHAN LAL PARSOTTAM DAS (*Defendant*)

versus

CHUNNI LAL BIRJ LAL (*Plaintiff*)*

CIVIL

1918

July, 23.

A. RAOOF, J.

Provincial Small Cause Courts Act (IX of 1887), section 25—Jurisdiction—Suit for compensation for breach of contract—Revision—Issue as to whether suit properly instituted decided—Whether case decided.

A suit for compensation for breach of a contract was brought in the Court of Small Causes at Agra. The defendant pleaded (1) that the suit did not lie at Agra, the contract having been broken at Allahabad; (2) that there was no breach of contract on the part of the defendant. On the first issue as to jurisdiction the court took evidence and held that the suit had been properly instituted at Agra. Upon an application in revision, *held* that no revision lay as the case had not been disposed of within the meaning of section 25 of the Provincial Small Cause Courts Act.

CIVIL REVISION from an order of BABU GOPAL DAS MUKERJI, Judge of the Court of Small Causes of Agra.

Damodar Das, for the applicant.

Narain Prasad Asthana, for the opposite party.

* Civ. Rev. No. 114 of 1918.

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MAKHAN LAL

v.
CHUNNI LAL

A Raoof, J.

The following judgment was delivered by

ABDUL RAOOF, J.—A preliminary objection is raised on behalf of the opposite party to the hearing of this application. The facts of the case are these :—The plaintiff brought a suit in the Court of Small Causes at Agra, claiming compensation for an alleged breach of contract by the defendant. The suit was contested by the defendant on two grounds, namely (1) that the suit was not cognizable by the Small Cause Court at Agra as the alleged breach of contract had taken place at Allahabad ; (2) that there was no breach on the part of the defendant and that the suit was not maintainable against him. As regards the first point the learned Judge of the court below took evidence and came to the conclusion that the suit was rightly instituted in the Court of Small Causes at Agra. It appears that the parties had requested the court to decide the first point at that stage before taking up the question raised on the second plea in defence. The defendant has filed this application for revision against the decision of the court below on the question of jurisdiction. Mr Narain Prasad argues that under section 25 of the Provincial Small Cause Courts Act in order to entitle a party to come up in revision it is necessary that the case must have been decided by the court below. That section runs thus :—“The High Court, for the purpose of satisfying itself that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such order with respect thereto as it thinks fit.” The learned Vakil who appears for the applicant replies that there has been a decision in the case by the court below within the meaning of section 25 and he relies upon two cases, namely, *Ramanathan Chetty v Maruthappa Kone and others* (1) and *Umesh Chandra Palodhi v. Rakhal Chandra Chatterjee* (2). The particulars of the latter case are clearly distinguishable from the facts of the present case. In that case what happened was that in a suit filed in a Court of Small Causes a question of title arose on the allegation contained in the plaint and the court was of opinion with reference to the provisions of section 23 of Act IX of 1887 that the suit should be tried by a Civil Court on the regular side. The plaint was therefore returned for presentation to a regular Civil Court. It was against the order returning the plaint under section 23 of the aforesaid Act that a revision was applied for and it was argued by the opposite party that as the case had not been decided on the merits the High Court had no power under section 25 of the Act to revise the order. It was held by the Calcutta High Court that it was not contemplated by the word “decided” that the case should have been decided on the merits. The learned Judges observed in their judgment as follows :—“We are not prepared as at present advised to put

(1) 25 I. C., 643.

(2) [1911] 15 C. W. N., 666.

this narrow construction upon the terms of section 25 nor to adopt the view suggested by the learned Vakil, for the opposite party, that the term "decided" in section 25 means to adjudicate finally on the merits. Besides in so far as the Small Cause Court is concerned the case has been decided."

In the case of *Ramanathan Chetty v. Maruthappa Kone* (1), the learned Judge who decided the case observed :—"Mr. Sheshagiri Shastri raises a preliminary objection before me that this petition does not lie under section 25 of the Small Cause Courts Act because there is no case decided by the Subordinate Judge sitting on the Small Cause side and he quoted *Subal Ram Dutt v. Jagadananda Mazumdar* (2), for the position that unless there has been a decision on the merits section 25 has no application. With all respect I am unable to follow this decision. The word "decided" in section 25 means "disposed of" It does not mean that there must be a decision upon the merits. In the present instance the case has neither been decided on the merits nor has it been disposed of in any other manner. It is still on the file of the court awaiting decision. Merely a preliminary issue as to jurisdiction has been decided and the application for revision is made against this decision of the preliminary issue. None of the cases cited are, therefore, applicable. The preliminary objection must prevail and the application must be rejected. Over and above this, having regard to the circumstances of this case, I do not think that this is a proper case for revision. I accordingly dismiss the application with costs. The stay order is hereby discharged. The record of the case will be sent back to the court below.

Application dismissed.

(1) 25 I. C. , 643. (2) [1909] 1 I. C., 288; S. C., 13 C. W. N., 403.

ANOHAL (*Plaintiff*)

versus

DALIP SINGH AND ANOTHER (*Defendants*) *

Code of Civil Procedure, (Act V of 1908), section 103—Pre-emption—Custom—Pre-emptor and vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence—Issue not decided by lower appellate court—High Court entitled to decide it.

Certain property was sold. The pre-emptor and the vendee were co-sharers with the vendor; the pre-emptor was brother of the vendor. In the suit for pre-emption the vendee pleaded, among other defences, that the pre-emptor had acquiesced in the sale being made to him. It was

* S. A. No. 691 of 1917.

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MAKHAN LAL

v.

CHUNNI LAL

A. Raoof, J.

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July, 1918.

RICHARDS,

C. J.

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admitted by the pre-emptor that he was in debt, that he had no money and that at the time of the sale he also was selling his own property. The court of first instance held the custom proved; but that the facts did not give rise to an inference of acquiescence on the part of the plaintiff. The suit was decreed, the lower appellate court held that the custom was not proved but did not decide the issue of acquiescence. The suit was dismissed:—*Held* that the lower appellate court not having decided the issue of acquiescence, it was open to the High Court in second appeal to decide the question; *held* also that the facts proved that the plaintiff knew of and acquiesced in the sale.

SECOND APPEAL from a decree of E. E. P. ROSE Esq., District Judge of Saharanpur, reversing a decree of Babu Kalika Singh, Subordinate Judge.

Nehal Chand, for the appellant.

Surendra Nath Sen, for the respondents.

The judgment of the Court was delivered by

Richards,
 C. J.

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The plaintiff was a co-sharer as also were the vendees but the plaintiff was own brother of the vendor whilst the vendees were distant connections. The vendees pleaded various defences. They denied the custom, they denied the plaintiff's preferential right, and alleged that the sale was made with the consent and knowledge of the plaintiff. The court of first instance held that the custom of pre-emption prevailed and that the plaintiff had a preferential right, and it held against the defendants on the issue of acquiescence. The lower appellate court held that the entry in the *wajib-ul-arz* was insufficient to establish the existence of the custom and that the weight to be attached to the record was greatly diminished by the fact that a number of other matters were recorded which could not possibly be customs in the very same clause.

The plaintiff has appealed. We may mention here that the lower appellate court has not dealt with the issue of acquiescence on the part of the plaintiff. We think that this issue ought to have been decided and inasmuch as the lower appellate court has not decided the issue we are entitled to decide the issue ourselves. We have already mentioned that the plaintiff is own brother to the vendor. *Prima facie* therefore if the plaintiff had been ready and willing to keep the property there would be no person to whom the vendor would be more likely to wish to sell the property than to his own brother. It is not pretended that there was any quarrel or dispute between the brothers. In the written statement it was expressly pleaded that the plaintiff had acquired in the sale, that he was a man who was heavily in debt; that his property was under mortgage; that he had previously sold a large portion of his property and that five days before the sale deed was executed, he

had sold another portion. The plaintiff when cross-examined admitted that he was in debt. He admitted that he had sold a considerable portion of his property and that one sale had taken place almost simultaneously with the sale to the defendants the vendees in the present suit. Evidence was produced on behalf of the vendees to the effect that the sale to the vendees had been negotiated by the two brothers and that the plaintiff at that very time wanted to sell his own property to the vendees who explained that they had not sufficient money to buy the shares of both brothers. The witnesses who deposed to these facts were hardly (if at all) cross-examined in respect to these matters. Bearing in mind the initial probability of this evidence being true having regard to the close relationship that existed between the vendor and the plaintiff, namely, that they were own brothers we think it extremely surprising that the learned Subordinate Judge who tried this case in the first instance absolutely discarded the evidence. The learned Subordinate Judge says that if the plaintiff knew of the sale the vendee would have required the plaintiff to be a witness to the sale deed. The vendees no doubt might have done this had they anticipated roguery on the part of the plaintiff. But if, on the other hand, the evidence be true that the plaintiff was actually asking the vendee to purchase his own property at the very same time it is hardly surprising if the vendees never anticipated that after they had purchased the other brother's share a suit of this nature would have been instituted. The learned Subordinate Judge says :—" It is further urged that the plaintiff is in debt and had not the means to purchase a share. I do not think this argument plausible. Plaintiff could advance Rs. 120 or had sufficient property by selling part of which he could raise Rs 1,120."

Now in the present case it is admitted by the plaintiff himself that he was in debt, that he had no money and that he was selling his own property and yet the learned Subordinate Judge thinks that there was no force in the argument that he would in that condition be unwilling to purchase this property. The learned Judge says that the plaintiff could easily have raised the money by selling another portion of his property. This seems to be a very poor argument. It does not appear very reasonable that a man who has no ready money should sell a share which is already in his possession for the privilege of buying another share which is not in his possession having of course to meet some expense in connection with the transfer.

Under the circumstances of the present case we have not the least hesitation in holding that the plaintiff knew and acquiesced in the sale to the vendees defendants.

We dismiss the appeal with costs.

Appeal dismissed.

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ANCHAL

v.

DALIP SINGH,

Richards,

C. J.

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1918

July, 30.

PIGGOTT, J.
WALSH, J

RAM FAQIR (Plaintiff)

versus

BINDESHRI SINGH AND ANOTHER (Defendants) *

Code of Civil Procedure (Act V of 1908), section 11—Cross-appeals—Two decrees—One decree becomes final—Effect on appeal from the other—Res judicata—Previous suit deciding question of title of the nature cognizable by a Small Cause Court—No appeal from the decision.

The plaintiff brought a suit in the court of the Munsif to recover possession over a half share in two groves numbered 123 and 2 respectively. The suit was dismissed in respect of No. 2 and it was decreed in respect of No. 123. There were two appeals to the lower appellate court, the plaintiff assailing the decree in respect of No. 2 and the defendants that in respect of No. 123. Both the appeals were tried together and disposed of by one judgment, but two decrees were passed whereby the plaintiff's appeal was dismissed, and the defendant's appeal was allowed, the case being remanded. The plaintiff appealed against the second decree to the High Court. In regard to grove No. 123 the plaintiff sued the defendants for damages for cutting down two trees. The suit was of the nature cognizable by a Court of Small Causes, but it was instituted in the court of a Munsif. In that suit the defendants denied the plaintiff's title, and the issue as to title was decided in the plaintiff's favour. In the present suit instituted in the same court the plaintiff again set up his title which the defendants denied. The Munsiff held that the decision in the former suit operated as *res judicata*. The lower appellate court reversed the finding:—*Held* (1) that the fact of the decree in regard to grove No. 2 having become final did not operate to bar the plaintiff's appeal in respect of grove No. 123 on any principle of *res judicata*, (2) that the present suit was barred by the rule of *res judicata* by virtue of the decision on the question of title in the previous suit irrespective of the fact that the decree in that suit was not appealable to the High Court, the suit being of a Small Cause Court nature.

SECOND APPEAL from a decree of PANDIT RUP KISHUN AGHA, Officiating Second Additional Subordinate Judge of Jaunpur, confirming a decree of Babu Phul Chand Mogha, Additional Munsif.

Gokul Prasad, for the appellant.

S. M. Sulairan, for the respondents.

* S. A. No. 1874 of 1916.

The judgment of the Court was delivered by

PIGGOTT, J.—In the suit out of which this appeal arises the plaintiff, who is the appellant in this Court claimed possession of a half share in each of two groves, together with damages. The groves are situated in different villages and may be described by the serial numbers in the village papers under which they are referred to in the judgments of the courts below. One grove was numbered 123 and the other was numbered 2. The court of first instance in substance dismissed the plaintiff's claim in respect of grove No. 2; but it decreed his claim for grove No. 123. There was an appeal by the plaintiff against the decree of the court of first instance, in so far as that decree dismissed his claim for grove No. 2. There was also an appeal by the defendants against the same decree in so far as it allowed the plaintiff's claim for grove No. 123. The two appeals were heard together and a single judgment was written by which the questions raised in both the appeals were disposed of. Different decrees were passed. On the plaintiff's appeal the order was that this appeal be dismissed so that the decision of the court of first instance, in so far as it was called in question by the plaintiff, was affirmed. On the defendant's appeal there was an order of remand arising out of certain pleadings and findings to be referred to presently. The appeal now before us is against the decision of the lower appellate court on the appeal filed by the defendants against the decree of the court of first instance. When this appeal came up for hearing before a single Judge of this Court two preliminary objections were raised. One of these was well-founded so far as it went, that is to say, the defendants respondents correctly urged that this appeal was not really a second appeal, but a first appeal from an order of remand, and should have been filed as such. This objection is of a technical nature and it has been disposed of by the referring of the appeal itself to a Bench of two Judges. We have jurisdiction to hear this appeal under the rules of this Court and a mere misdescription of the appeal as "second appeal No so and so" instead of "first appeal from order," does not affect the merits of the case or the jurisdiction of this Court. The appellant will not, in any event, be entitled to recover costs in excess of what he would have had to pay on a first appeal from order but that matter can be considered when the decree of this Court comes to be prepared. The other objection was that the plaintiff was not entitled to appeal against this order of remand, or against any other order or decree which the lower appellate court might have seen fit to pass on the defendants' appeal unless he also appealed against the decision dismissing his own appeal about grove No. 2. Reliance is placed on a large number of authorities of this Court, out of which it is quite sufficient to refer to the decision on *Ram Lal v. Chhab Nath* (1), which is the

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(1) [1890] I. L. R., 12 All., 578.

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foundation of the subsequent case-law on the subject. The case now before us is clearly distinguishable from any of these. In the appeal brought by the plaintiff against the decision of the court of first-instance no question was raised, and none could be decided, as to the rights of the parties in respect of grove No. 123. The court simply determined the question of the respective rights of the parties to grove No. 2. Its decision on this point was final; it proceeded upon findings of fact and no second appeal could have been brought against it with the slightest prospect of success. The plaintiff was bound to acquiesce in the decision against him so far as grove No. 2 was concerned, but there was nothing in the decree by which his appeal to the court below stood dismissed which in any way affected or purported to affect his rights in respect of grove No. 123. It is not even as if it could be contended that the plaintiff was injuriously affected by the dismissal of his appeal, because that dismissal left the decision of the court of first instance intact. The plaintiff had a decision in his favour about grove No. 123 and the order passed upon his appeal left that decision where it was. That decision has only been disturbed by the order of remand passed upon the appeal of the defendants in the court below, and against that order the present appeal lies. It is clearly not barred either by the words of section 11 of the Code of Civil Procedure, or by any conceivable principle of *res judicata*. We have now to consider the main point raised by the appeal itself, and for this purpose it is necessary to set out certain additional facts. In the year 1914 this same plaintiff had brought against these same defendants a suit in which he claimed damages amounting to Rs. 30, as his share of the price of two trees which the defendants had cut down in grove No. 123 on the ground that the defendants had appropriated the timber entirely to themselves in derogation of the plaintiff's rights as owner of a moiety share in the grove. This suit was a suit of the nature cognizable by a Court of Small Causes; but it was not instituted in such a court. Presumably there was no Court of Small Causes in existence at Jaunpur, and this suit for damages was instituted in the court of the Additional Munsif and was tried by him as a regular suit. In reply to the plaintiff's claim the defendants denied his title to a moiety share, or to any other share in grove No. 123. There was an issue on this point and that issue was decided in favour of the plaintiff. After also determining the further issue raised as to the amount of damages, the Munsif proceeded to give the plaintiff in that suit a decree for Rs. 20. Now in the present litigation the plaintiff once more sets up his title to the moiety share in grove No. 123. The suit has actually been brought in the very same court which tried the suit of 1914, and the first issue for disposal is precisely the same issue as was tried out in the former suit, namely the validity or otherwise of the plaintiff's claim to a moiety share in grove No. 123. The learned Additional Munsif held that he had himself

once already decided this issue in a previous suit between the same parties, that decision operated as *res judicata* and the question could not be tried over again. This finding has been reversed by the learned Subordinate Judge on appeal. Holding that the question of title in respect of grove No. 123 was not *res judicata* in the plaintiff's favour by reason of the suit of 1914, that court has remanded the case, so far as it concerned the plaintiff's claim to grove No. 123, for trial on the merits. The appeal being against this order of remand, what we have to determine is whether the decision in the suit of 1914 was or was not *res judicata* in the present litigation. On the wording of section 11 of the Code of Civil Procedure the case seems a clear one. The suit was between the same parties litigating under the same title. The same question was directly and substantially in issue in both the suits, and in the suit of 1914 it was decided in the plaintiff's favour by a court competent to try the subsequent suit now under consideration by us in this appeal. As a matter of fact both the suits as we have already pointed out were brought in one and the same court, that is to say, the court of the Additional Munsif of Jaunpur. The former was of a nature triable by a Court of Small Causes and the present suit is not. There is therefore this distinction, that in the suit of 1914 no second appeal would lie, whereas in the present suit a second appeal will lie, subject to the appropriate provisions of the law. The Second Explanation to section 11 of the Code of Civil Procedure has been inserted in the present Act (No. V of 1908), and it expressly provides that, for the purposes of this section, the competence of a court (that is to say its competence to try any subsequent suit) shall be determined irrespective of any provisions as to a right of appeal from the decision of such court. This explanation would seem to have been expressly designed to set at rest the controversy sought to be raised on behalf of the present respondents. This view has been taken by a learned Judge of this Court in the only reported case we can find in which the question has been expressly considered and decided since the passing of Act No. V of 1908; namely the case of *Musaddi Lal v. Jwala Prasad* (1). We have been referred to a number of older rulings of this Court, one of which is discussed by MR. JUSTICE CHAMBER in *Musaddi Lal v. Jwala Prasad* (1). All those decisions were passed before the Second Explanation to what is now section 11 of the Code of Civil Procedure had been enacted. It is quite true that, in order to apply the rule of *res judicata* at all, it must be found that the question of title was directly and substantially in issue in the suit of 1914. It has been contended before us that in some of the older decisions, as for instance in *Inayat Khan v. Rahmat Bibi* (2), in *Chet Ram v. Ganga* (3).

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(1) [1912] 10 A. L. J. R. 106. (2) [1879] 1. L. R., 2 All., 97.

(3) [1886] A. W. N., 44.

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it has been taken for granted that the decision of any court in a suit of a Small Cause Court nature about a question of title should be regarded as merely incidental. In view of the change in the law effected by the passing of Act No. V of 1908, it seems unnecessary to discuss these elder decisions. We find ourselves in entire agreement with the view taken by MR. JUSTICE CHAMIER in *Musaddi Lal v Jwalā Prasad*(1), which was a case in all essential matters on all fours with the present one. It is worth noting that we have been referred to one other case of this Court decided since the passing of the present Code of Civil Procedure, namely the case of *Dulare Lal v. Hazari Lal*(2). That case is distinguishable from the present in one essential point. The suit for damages, the decision in which it was sought to plead as *res judicata* in a subsequent suit for the establishment of title, had been brought in a Court of Small Causes, and subsequently transferred to the court of a Munsif. It was pointed out that, under the provisions of the Provincial Small Cause Courts Act itself, a suit would not change its nature when it was transferred from a Court of Small Causes to that of a Munsif but that it would be tried by the Munsif only as a Court of Small Causes. This is the reason given by the learned Judge of this Court for holding, in the appeal before him, the decision in the suit for damages would not operate as *res judicata* in the subsequent suit for establishment of title. In that case the suit for damages was instituted in and was, in the eye of the law tried by a Court of Small Causes, that is to say, by a court which, independently altogether of any provisions as to a right of appeal, would not be a court competent to try a subsequent suit for title. We are of opinion therefore that the decision of the lower appellate court on this question of *res judicata* was wrong and must be reversed. On this appeal therefore we set aside the order of remand which was passed on the appeal of the defendants in the court below, and in lieu thereof we dismiss the appeal of the defendants to that court. The plaintiff will be entitled to his costs in this and in the lower appellate court, subject only to this qualification that he will not be entitled to recover as costs in this Court anything more than he would have paid on a first appeal from order. It may be pointed out that the result of the order which we now pass is that the decree of the court of first instance is restored in its entirety. There is no possible question of an appellate decision resulting in the existence of two inconsistent decrees on one and the same litigation each of them apparently capable of independent execution. We mention this fact as further illustrating our decision upon the preliminary objection.

Appeal decreed.

(1) [1912] 10 A. L. J. R., 106. (2) [1914] 12 A. L. J. R., 858.

MAHMUD ALI (*Defendant*)*versus*TAMIZ-UN-NISSA BIBI (*Plaintiff*)*

Provincial Small Cause Courts Act (IX of 1887), section 25, Art. 41—Jurisdiction—Suit for contribution arising out of satisfaction of a joint debt.

CIVIL

1918

July, 30.

RICHARDS,
C. J.
TUDBALL, J.

A Mohammedan died leaving two brothers, a sister and a daughter as his heirs, and also certain property. He also left debts due by him to one J. Each of the heirs was entitled to shares in the property according to the Mohammedan Law. The daughter having purchased the shares of the sister and one of the brothers, her share was augmented to $\frac{8}{15}$ and the other brother's share was $\frac{2}{15}$ in the property. The daughter paid off the debt due to J, and then brought a suit in the Small Cause Court against the brother for contribution, the brother being liable for $\frac{2}{15}$ of the debt proportionately to his share:—*Held* that the suit was cognizable by the Small Cause Court and article 41 to the Small Cause Courts Act did not exclude it from the cognizance of the court.

CIVIL REVISION from an order of MAULVI ABDUL HALIM, Judge of the Court of Small Causes of Bulandshahr.

S. M. Sulaiman, for the applicant.

S. M. Y. Hasan, (for whom S. A. Haidar,) for the opposite party.

Referring Order.

ABDUL RAOOF, J.—This application for revision arises out of a suit brought by Musammat Tamiz-un-nissa against the defendant Mahmud Ali for a certain sum of money. The case as stated by the plaintiff in the plaint was this:—One Mahbub Ali died leaving as his heirs Mahmud Ali and Yakub Ali, brothers, Musammat Rasul-un-nissa, a sister and Musammat. Tamiz-un-nissa, a daughter. On his death he left certain property which was inherited by these heirs according to their shares under the Mohammedan Law. At the time of his death he was indebted and among the creditors there was one Jas Ram who held two pro-notes executed by Mahbub Ali. The plaintiff states that her share under the Mohammedan Law in the property left by the ancestor was five *sehams*. The share of Mahmud Ali and Yakub Ali, the brothers of Mahbub Ali was two *sehams* each, and that of Musammat Rasul-un-nissa, one *seham*. The plaintiff further states that she paid off the debt due to Jas Ram by executing a bond in favour of the sons of Jas Ram. In paragraph 3 of the plaint the plaintiff stated that having purchased the shares of Yakub Ali and Musammat Rasul-un-nissa in the property left by Mahbub Ali, she became the owner of eight *sehams* and the defendant Mahmud

* Civ. Rev. No. 21 of 1918.

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Ali owned two *seham*s out of the entire property of 10 *seham*s. It is further stated that the defendant Mahmud Ali was therefore liable to pay the debts due from Mahbub Ali to the extent of $\frac{2}{10}$ and it was to recover this $\frac{2}{10}$ of the debt paid off by the plaintiff to the sons of Jas Ram, that this suit was filed. The suit was instituted in the Court of the Judge of Small Causes at Bulandshahr. One of the pleas raised in defence by the defendant was that the suit was not cognizable by a Small Cause Court. The defendant relied upon Article 41 of Schedule II of the Provincial Small Cause Courts Act. The court of first instance relying upon the ruling in the case of *Roshan Lal v. Ram Lal*⁽¹⁾, disallowed the plea and decided the suit upon the merits and gave a decree in favour of the plaintiff. The present application for revision has been filed against the decree of the Judge of the Small Cause Court. The decree of the court below is given in these terms:—"The plaintiff's claim for Rs 101-8-3, the amount in claim and Es. 32-14, costs of suit, be decreed against the estate of Mahbub Ali Khan, which is in the possession of the defendant." In the first ground of revision, the defendant appellant repeats his ground of objection as to the jurisdiction of the Judge of the Small Cause Court, and in the second ground he raises the plea that as the plaintiff in her own plaint asks for a decree against the assets of Mahtub Ali, the suit was not cognizable by the Court of Small Causes. The case has been argued before me at some length on behalf of both the parties and a number of rulings have been cited by the counsel on either side to which I will refer later on. *Dr. Salaiman* who appears for the applicant argues that upon the plaint filed by the plaintiff, it is clear that she based her claim upon the ground that the parties were sharers in a joint property which had come to the heirs of Mahbub Ali, as his assets and that therefore they were all liable to pay the debts of Mahbub Ali proportionately according to their shares in the assets left by him. That being the nature of the suit, he argues that the suit was a suit for *contribution by a sharer in joint property* in respect of payment made by him of money due from a co-sharer. On the other hand *Mr. Yusuf Hasan* has argued that in order to make the article applicable, it ought to be made clear that the payment in respect to which contribution was claimed, was made on account of the joint property. He also argues that the present suit can hardly be called a suit for contribution. He says the debt due to Jas Ram was not a debt for which the parties may be said to be jointly responsible. It was not a debt due upon a joint bond or under a joint decree, but it was a debt due against each of the heirs of Mahbub Ali, separately on account of his share of liability attaching to him on account of having inherited assets from the common ancestor. It is difficult to decide, what Article 41 contemplates by the words "a suit for

(1) [1907] 4 A. L. J. B., 543.

contribution by a sharer in joint property." The cases which have been relied upon on either side have no direct bearing on the facts of the present case. Mr. Yusuf Hasan has relied upon the case reported in Indian Law Reports, Volume 28, page 292, which was a case of joint judgment-debtors; one of the judgment-debtors having paid off the money due on the joint decree sued the others for contribution. He has relied upon the case reported in 4 A. L. J. R., 543 That was also a case of a joint decree. He has also relied upon the case reported in Weekly Notes for 1906, page 6. That also was a case of a joint decree against co-judgment-debtors. On the other side *Dr. Sulaiman* has relied upon the cases reported in 13 A. L. J. R., 452, Indian Law Reports, XXIII Calcutta, page 189; XXIV Indian Cases, page 259 and XXVII Indian Cases, page 56. In the case reported in XXIV Indian Cases, the plaintiff came on the allegation that he was not liable to make any payment at all, but that he had made a payment for the benefit of the defendant. It was held in that case that the suit could not be said to be one for contribution at all and therefore could not come under Article 41. In Indian Law Reports, XXIII Calcutta, page 189, the facts were quite different from those of the present case and the rule there laid down was rather too broad. In the case reported in 13 A. L. J. R., 452, the payment there made was certainly on account of the property jointly held by the parties. Joint tenants holding land jointly under a zemindar were held jointly responsible for payment of rent although they had by private arrangement divided the plots for their separate cultivation and one of the tenants had been made to pay the rent for the entire holding. When he sued for contribution, it was held that the suit came strictly within Article 41 and it was excepted from the cognizance of the Court of Small Causes also. As I have stated above, none of the cases relied upon by the parties have a direct bearing on the facts of this case. The point raised is of some importance and I think it will be better if it is decided by a larger Bench. I therefore refer this case to a Bench of two Judges.

The judgment of the Court was delivered by

RICHARDS, C. J.—The main point raised as a ground for revision is that the suit was one which was not cognizable by the Small Cause Court. It is contended that it is excluded by Article 41 to the Schedule to the Small Cause Courts Act. We are satisfied that the suit brought by the plaintiff was not of the nature specified in Article 41 of the Act. We see no sufficient reason to interfere with the decree of the Small Cause Court in any other matter raised by the memorandum of appeal. We reject the application, make no order as to costs.

Application dismissed,

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August, 1.

PIGGOTT, J.
WALSH, J.EAUSHAN LAL AND OTHERS (*Defendants*)

versus

KANHAIYA LAL AND OTHERS (*Plaintiffs*) **Limitation Act (IX of 1908), section 20—Mortgage—Part payment—Payment by mortgagor*

A mortgage was made to A on 8th January, 1891. A brought a suit on this mortgage on 7th November, 1914. He impleaded in this suit as defendants—(1), the mortgagors, (2) one set of subsequent mortgagees and (3) certain purchasers of a portion of the equity of redemption in the mortgaged property under a sale deed, dated 24th June, 1913. The third set of defendants only contested the suit on the ground that it was barred by limitation. A alleged that the suit was within time by reason of three payments made by the mortgagors on account of interest as such, the last of the payments being on 25th November, 1902. This payment was made by the mortgagors by means of a sale by the mortgagors to certain prior mortgagees of some property other than the third that was covered by the mortgage in suit. *Held* that the payment having been made towards interest as such by the mortgagors, who were liable to pay, took effect against the third set of defendants, purchasers of a part of the property, and the suit was within time.

SECOND APPEAL from a decree of D. R. LYLE, Esq., District Judge of Agra, modifying a decree of Saiyed Muhammad Shafi, Additional Subordinate Judge of Muttra.

Nehal Chand (for B. E. O'Connor, Tej Bahadur Sapru with him) for the appellants.

Narain Prasad Asthana (*Surendra Nath Sen* with him), for the respondents.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—The essential point for determination in this second appeal lies within a very narrow compass. The plaintiff sued to enforce a simple mortgage of January the 8th, 1891. They impleaded the mortgagors as defendants first party, one set of subsequent mortgagees as defendants second party and the present appellants, as purchasers of a portion of the equity of redemption as defendants third party. The defendants of the first and second parties do not contest the suit at any rate at this stage. The defendants third party contend that the claim is barred by limitation. *Prima facie* this suit, instituted on 7th of November, 1914, would

* S. A. No. 1652 of 1916.

be well outside the prescribed period of limitation for a suit on a simple mortgage of January the 8th, 1891. The plaintiff's case is that limitation is saved under section 20 of the Indian Limitation Act (No. IX of 1908) by three payments on account of interest as such, the last of these payments is of a sum of Rs. 800 made on the 25th of November, 1902. This payment is proved beyond doubt. It was made by means of a sale by the mortgagors to the prior mortgagees of certain property other than that hypothecated, in the simple mortgage-deed in suit. The consideration for the sale was a sum of Rs. 800. There was an express acknowledgment that on that date namely the 25th of November, 1902, a sum of Rs. 1,400 was due as interest on the deed of January the 8th, 1891; in order to pay off a portion of this interest the property specified in the deed of November the 25th, 1902, was sold for a sum of Rs. 800 and the entire consideration was set off in part payment of the interest as above stated. The present suit is within limitation from the 25th November, 1902, and it is not denied that section 20 of the Indian Limitation Act would apply, as against the mortgagors themselves the contention is that the provisions of that section cannot be applied so as to save limitation as against these appellants, who are subsequent purchasers of a portion of the equity of redemption. The appellants bought under a sale deed of June the 24th, 1913, a portion of the property hypothecated under the plaintiff's mortgage of January the 8th, 1891, along with certain other property with which of course this suit is not concerned. They paid a sum of Rs. 9,000 a large part of which was due to them on account of previous transactions between themselves and their vendors. They undertook however to pay off a certain older mortgage of the year 1911, which again seems to have been executed in satisfaction of an older mortgage of 1905, by which again a still older mortgage of December the 21st, 1899 was paid off; and under this mortgage a portion of the property now in suit was hypothecated. The appellants contend before us that they occupy two positions. They are not merely purchasers of a portion of the equity of redemption under their deed of June the 24th, 1913, but they are also entitled to stand in the shoes of the mortgagees under the deed of December 21st, 1899. Even this mortgage however is subsequent in date to the mortgage in suit, so that the real question for determination, namely, whether the payment of interest effected by the deed of November the 25th, 1902, does or does not save limitation as against these appellants, has to be determined upon the wording of section 20 of the Indian Limitation Act on substantially the same principles, whether we deal with these appellants as purchasers of the equity of redemption or as subsequent mortgagees in respect of a portion of the property in suit. We have not been referred to any reported case of this Court, but in the Calcutta High Court there is a good deal of authority and this authority seems to us, as to the learned Judge

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of the court below, very strongly in favour of the plaintiffs-respondents. The important cases are *Krishna Chandra Saha v. Bhairab Chandra Saha* (1) and *Domi Lal Sahu v. Roshan Dobay* (2). In each of these cases the transaction pleaded as extending the period of limitation was a payment on account of interest. Now on behalf of the appellants, strong reliance has been placed on another case of the same court decided a little before either of the two cases reported above. This is the case of *Surjiram Marwari v. Barhamdeo Persad* to be found in Volume 1 of the Calcutta Law Journal Reports at page 337. The question there was of an acknowledgment by the mortgagor as saving limitation against a subsequent mortgagee. The learned Judges who decided that case relied partly on the wording of section 19 of the Indian Limitation Act and partly on an English case, that of *Bolding v. Lane* (3). That case was itself discussed shortly afterwards before the House of Lords in a case referred to in the subsequent Calcutta decisions, namely the case of *Chinnery v. Evans* (4). The case of *Bolding v. Lane* (3), was not dissented from in *Chinnery v. Evans* (4), but it was distinguished against and explained. And it is quite clear that a distinction was drawn between the effect of a payment and the effect of a mere acknowledgment. This point has been very clearly brought out in another decision of the Privy Council, on appeal from the Supreme Court of Canada, in the case of *Lewin v. Wilson* (5). The words of LORD HOBHOUSE at page 645 of that report are worth quoting:—"It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding v. Lane* (3), be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If, therefore, we find that the Legislature has used different language about the two cases we must not readily conclude that it has done so by accident or without meaning it." This is probably the reason why the decision in *Surjiram Marwari v. Barhamdeo Persad* (6), although referred to in argument, was not discussed by the learned Chief Justice of the Calcutta High Court when deciding the case of *Krishna Chandra Saha v. Bhairab Chandra Saha* (1). He felt that he was dealing with a different section of the statute, and that a decision based upon section 19 of the Indian Limitation Act, whether correct or not, was not necessarily an authority on a case

(1) [1906] I L. R., 32 Cal., 1077. (2) [1906] I. L. R., 33 Cal., 1278

(3) [1863] 1 De G. J. & S., 122; S.C. (4) [1864] 11 H. L. O., 115.

(5) [1896] 11 A. C., 639.

(6) 1 O. L. J. B., 337.

which turned on the wording of section 20 of the same Act. We have been referred to one or two other decisions substantially to the same effect, but we think that on the authorities and on the wording of section 20 of the Indian Limitation Act the decision of the court below was clearly right and that this appeal must fail. It may be that the mortgagors dealt unfairly with these appellants on June the 24th, 1913, when they conveyed certain property to the latter without stating that a portion of this property was also subject, along with other property, to a simple mortgage of the year 1891 which was still in force. But it is to be noted that in the sale deed above referred to in favour of the appellants there is no definite statement on the part of the vendors that the property which they are conveying is subject to no charge other than those specified in the deed itself, still less is there any express covenant of title or of indemnity. The question however of the rights and liabilities *inter se* of these appellants and their vendors, the persons impleaded as defendants first party in this suit, is not before us. The question is whether anything which took place between these parties in the year 1913, can affect the rights of the present plaintiffs in respect of their mortgage-deed of January the 8th, 1891. If the question is put in this way it seems clear that the answer must be in the negative. The suit as brought is not barred by limitation, time being saved by the payment on account of interest effected by the sale of January the 25th, 1902. This appeal therefore fails, and we dismiss it with costs.

Appeal dismissed.

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THE MUNICIPAL BOARD OF BENARES (*Defendant*)

versus

GAJADHAR (*Plaintiff*)*

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U. P. Municipalities Act (No. 11 of 1916), section 326 (4)—Suit for establishment of title and injunction—Notice—Suit not maintainable.

August, 3.

A *chabutra* belonging to the plaintiff projected on to a public road. The plaintiff applied to the Municipal Board of Benares for leave to rebuild that *chabutra* which was refused. The Municipal Board then caused a notice to be served on the plaintiff in June, 1916, requiring him to remove the *chabutra*. The plaintiff then served a notice of action on the Municipal Board on 14th July, 1916, but commenced the present action on 4th August, 1916, i. e., before the expiration of the two months provided for in section 326 of the Municipalities Act as being necessary

RICHARDS,
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* F. A. F. O. No. 58 of 1918.

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for a suit to be instituted. The reliefs originally sought were—(1) the establishment of the plaintiff's title; (2) injunction. The Municipal Board contended *inter alia* that the suit could not be maintained as no legal notice had been served by the plaintiff. The plaint was then amended in respect of that relief only. Even after the amendment the relief was for a declaration that the platform and the *saihan* were ancestral property of the plaintiff that he and his ancestors had been in possession thereof for a long time and that the Municipal Board had no right to get the same demolished and he also asked for an injunction. The first court held that the suit could not be instituted as no valid and legal notice had been given. The lower appellate court held that the notice was not necessary and remanded the suit:—*Held* that the injunction not being the only relief claimed service of notice as provided in section 326 of the Municipalities Act was necessary and the suit having been commenced before the expiration of two months of the notice could not be maintained.

FIRST APPEAL from an order of P. K. RAY, Esq., Additional Subordinate Judge of Benares

Gokul Prasad, for the appellant

Saila Nath Mukerji, for the respondent.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit brought by the plaintiff against the Municipal Board. Later on we shall refer to the relief the plaintiff claimed before and after the amendment of the plaint. The dispute between the parties commenced by an application for leave to build or re-build a *chabutra* and a *saihan*. The Municipality refused and there were various negotiations between the parties to which it is unnecessary for us to refer, except to say that no final agreement was arrived at between the parties. If a map which is on the record correctly describes the premises, it would appear that the *chabutra* projects on to a public road. All orders made by the Municipality on these applications for leave to build and re-build are subject to appeal as mentioned in the Municipalities Act of 1916 and they cannot be challenged in any other court. Accordingly if the plaintiff's cause of action has anything to do with the orders which the Municipality made upon the application of the plaintiff he has no cause of action. It has been suggested on behalf of the plaintiff that the structure is very old. Even if this be true the Municipal Board under section 211 of the Act have power to require the owner to remove the structure if it overhangs, projects or encroaches on a street or into or upon any drain, sewer or aqueduct therein. The present suit seems to have been founded on a notice which the Municipal Board caused to be served requiring the plaintiff to remove the *chabutra*. This notice was served on the 17th of June, 1916. Section 326 of the Act provides that no suit shall be instituted against a Board in respect

of any act done until after the expiration of the two months after the notice prescribed in that section has been served. Now the act of the Municipality which gave rise to the present cause of action was the notice which they caused to be served in June, 1916. Admittedly the notice of action served by the plaintiff was on the 14th of July, 1916. and the suit was commenced on the 4th of August of the same year, that is admittedly less than two months after the notice of action had been given. It would seem therefore that *prima facie* the plaintiff's suit was premature. As it originally stood it was clearly a suit for a declaration to establish the plaintiff's title to the land, and ancillary thereto an injunction. In order to avoid the consequence of the want of the prescribed notice under the Act the plaintiff amended his plaint but only in respect of the relief asked for. His amendment is in reality an amendment in language only not in substance he still asks for a declaration that the platform and the *saiiban* is ancestral property of the plaintiff and that the plaintiff and his ancestors have been for a long time in possession and occupation thereof that the Municipal Board has no right to get the same demolished and that according to law the notice issued by the Municipal Board regarding the demolition thereof is invalid and void and then he prays that an injunction may be issued. The only exception to the provision requiring notice of action is to be found in clause 4 of section 326 which is as follows :—"Provided that nothing in subsection (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by giving of the notice a postponement of the commencement of the suit or proceeding." Even after the amendment the suit is not a suit in which the *only* relief claimed is an injunction. Furthermore from the very nature of the suit and the allegations made by the plaintiff and defendant respectively, it is absolutely clear that the object of the suit would not be defeated either by the giving of the notice or the postponement of the commencement of the suit. The real substance of the suit is the title to the land. Even if the Municipal Board had carried out their alleged threat to demolish the building as it stands, it could very easily be restored after the plaintiff had established his title. The total value placed upon the *chabutra* is the sum of Rs. 25. We think that the decree of the court of first instance is correct and should be restored. We allow the appeal, set aside the order of the lower appellate court and restore the decree of the court of first instance with costs in both courts.

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Appeal allowed.

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August, 6 7.

RICHARDS,
O. J.
TUDBALL, J.MUHAMMAD HUSAIN KHAN (*Plaintiff*)*versus*HANUMAN AND OTHERS (*Defendants*)*

Transfer of Property Act (IV of 1882), section 91—Usufructuary mortgage of Sir lands prior to Tenancy Act—Sale of mortgagor's proprietary rights after Tenancy Act—Ex-proprietary tenancy originated—Redemption of mortgage.

In 1898 and 1899 two usufructuary mortgages of certain *sir* plots were made. After 1902 the mortgagor's proprietary rights were sold and purchased by the defendants. The defendants subsequently acquired the mortgagee rights also. The mortgagor then brought the present suit for redemption:—*Held* that upon the sale of proprietary rights the mortgagor became entitled to occupy the *sir* land as ex-proprietary tenant and as such he had an interest in the property within the meaning of section 91 of the Transfer of Property Act which enabled him to redeem the usufructuary mortgage.

SECOND APPEAL from a decree of E BENNET, Esq., District Judge of Gorakhpur, reversing a decree of Maulvi Ali Ansar, Munsif of Deoria.

The plaintiff Muhammad Husain Khan, came to court alleging that he and his step-brother, Newaz Khan, executed in 1898 a usufructuary mortgage of two *Sir* plots, numbered 138 and 139, in favour of one, Sarju Teli, for Rs. 41 and put the mortgagee in possession; that subsequently in 1899 they again executed a usufructuary mortgage of two other *Sir* plots in favour of the same man and delivered possession; that during the years 1904 and 1905 the entire proprietary rights of the plaintiff and the major portion of that of Newaz Khan were sold and a portion was acquired by one Chamru and another portion by Sheikh Shahamat; that sometime between 1907 and 1909 Chamru took an assignment from Sarju Teli of the mortgage of 1898 and Sheikh Shahamat obtained an assignment of the mortgage of 1899, and they took possession of the mortgaged plots; that the mortgages as well as their assignments had been effected by unregistered deeds; and that subsequently by a compromise Sheikh Shahamat allowed redemption of the mortgage of 1899. He alone brought the present suit in 1915 against Chamru for redemption of the mortgage of 1898. He sought possession of only one of the two plots mortgaged, *viz.*, No. 138, on payment of Rs. 41, the entire mortgage

* S. A. No. 1925 of 1916.

money, alleging that by a partition of the village the other plot, No. 139, had fallen to the share of Newaz Khan who was in possession of it. Sarju Teli and Newaz Khan were also impleaded as defendants. Chamru having died after the institution of the suit, his sons were brought on the record and they alone contested the suit. They denied the existence of the mortgage and the fact of Chamru having ever taken any assignment of any mortgage from Sarju Teli, and alleged that Chamru had been in possession of the land as *khud kasht* and so were they. The Munsiff found the facts alleged by the plaintiff to be established and decreed the suit. On appeal by the mortgagees the District Judge concurred with the Munsiff in his findings of fact, but was of opinion that the mortgagor having lost his proprietary rights had no right to redeem, and so allowing the appeal dismissed the suit. The plaintiff filed this second appeal which coming on for hearing before KNOX, J., was referred by him to a larger bench.

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Kamalakanta Verma, for the appellant.

[TUDBALL, J.—What right has the appellant to maintain this suit?]

On losing his proprietary rights, the appellant became entitled under section 10 of the Agra Tenancy Act to occupy the *Sir* plot in dispute at a preferential rate of rent as an ex-proprietary tenant. As such he is a person having an interest in the mortgaged property within the meaning of section 91 of the Transfer of Property Act and is entitled to redeem. If the appellant is not allowed to redeem he would be deprived, for no fault of his, of a valuable right conferred upon him by statute, namely, the right of an ex-proprietary tenant.

When a proprietor after mortgaging his *Sir* loses his proprietary rights and becomes an ex-proprietary tenant, the mortgage does not become ineffectual but takes effect as a mortgage of the ex-proprietary rights.

Sham Das v. Batul Bibi, [1902] I. L. R., 24 All., 538.

It follows that the ex-proprietary tenant has the right to redeem.

In the case of

Chuni Lal v. Sikishan Singh, [1911] 8 A. L. J. R., 227,

not only was the right to redeem recognised, but it was held that the ex-proprietary tenant could redeem on payment of a proportionate share only of the mortgage debt.

The right to become an ex-proprietary tenant in respect of his *Sir* lands is part and parcel of a *zemindar's* proprietary rights. Therefore, what was mortgaged in 1898 included the latent right

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to become an ex-proprietary tenant. Thus, though the plaintiff has lost his proprietary rights, a portion—howsoever small—of the bundle of rights mortgaged in 1898 is still left to him, and he is therefore entitled to redeem.

The principle laid down in

Bhagwana v. Bhagwan Das, [1915] 13 A. L. J. R., 925

also supports me.

Haribans Sahai, for the respondents :—The cases of

Sham Das v. Batul Bibi, [1902] I. L. R., 24 All., 538,

Ohuni Lal v. Sikishan Singh, [1911] 8 A. L. J. R., 227,

do not apply. In those cases the proprietary rights had been lost and ex-proprietary rights acquired before 1902 when the present Tenancy Act came into force. Under the old Rent Act the mortgage of an ex-proprietary tenancy had been held to be valid, and so it was held in the cases cited above that the mortgage took effect as a mortgage of the ex-proprietary rights. In the present case the proprietary rights were lost and the ex-proprietary tenancy acquired after 1902. Under the present Tenancy Act the mortgage of an ex-proprietary tenancy is forbidden. Therefore, the mortgage in this case could not take effect as a mortgage of the ex-proprietary rights, and so the plaintiff has no right to redeem. I rely on the principle laid down in

Dwarka Chand v. Khadim Husain, 9 I. C., 553.

Kamalakanta Verma, was not called upon to reply.

The following judgments were delivered.

Richards,
C. J.

RICHARDS, C. J.—This appeal arises out of a suit for redemption. The facts may be very shortly stated for the purpose of explaining the question which we have to decide.

In the years 1898 and 1899 two usufructuary mortgages were made. The property mortgaged was *sir* plots. Later on, after the year 1902, the mortgagor's proprietary rights were sold and purchased by the defendants or some of them or the predecessors of some of them. Subsequently the defendants (or some of them) purchased the mortgagee rights. It is unnecessary to discuss which of the defendants purchased which of the mortgagee rights. Then the present suit was instituted to redeem the mortgage of 1898. The court of first instance decreed the claim. The lower appellate court reversed the decree of the court of first instance and dismissed the suit. On the case coming before a single Judge of this Court it was referred to a larger bench.

The argument in favour of the defendants is that the plaintiff having lost his proprietary right has ceased to have any interest in the property and he cannot therefore redeem. It is said that what he mortgaged was his proprietary right in the *sir* plot. When the proprietary right was sold the right to redeem the mortgage (if any) was transferred to the vendee of the proprietary right. This is the argument. I consider that the contention is not well founded. As soon as the proprietary rights of the mortgage were sold he became entitled to the rights which the Tenancy Act gives to an ex-proprietor in respect of his *sir* land, that is, the right to occupy the *sir* land at a preferential rent so long as that rent is paid and the statutory conditions fulfilled. The mortgagee of 1898 stood between the mortgagor and his right to occupy the *sir* land as an ex-proprietary tenant and in my opinion he was a person who had an interest in the property within the meaning of section 91 of the Transfer of Property Act. In my opinion if the mortgagor, or his representative, of the mortgage of 1898 had gone to the original usufructuary mortgagee, and if that usufructuary mortgagee had never parted with his mortgagee rights, the mortgagee would have no answer to the claim for redemption upon payment of the mortgage money. If the original mortgagee would have had no defence to such a suit I cannot see that the purchaser of mortgagee rights, even if he has also acquired the proprietary rights, has any answer to a suit for redemption. I would allow the appeal and restore the decree of the court of first instance.

TUDBALL, J.—I fully agree. When the appellant's proprietary rights were sold the law reserved to the ex-proprietor one out of his bundle of rights so that he certainly still retains an interest in the property mortgaged sufficient in my opinion to enable him to redeem.

BY THE COURT.—We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts. We extend the time for payment to three months from this date.

K. V.

Appeal allowed.

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Richards,
C. J.

Tudball, J.

PRIVY COUNCIL.

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Feb. 28

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SHAW, SIR
JOHN EDGE,
MR. AMER
ALI, SIR
WALTER
PHILLIMORE,
BART.,
SIR LAW-
RENCE
JENKINS.

IMAMBANDI AND OTHERS (*Defendants*)

versus

SHEIKH HAJI MUTSADDI AND OTHERS (*Plaintiffs*).

Mohammedan Law—Guardianship—Mother—Minors—Power of de facto guardian—Immovables—Alienation—Validity—Legitimacy—Acknowledgments—Presumption of marriage—Documentary evidence—Admissibility—Code of Civil Procedure (Act V of 1908), Order 13, rule 1.

Under the Mohammedan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as trespasser.

A mother is entitled only to the custody of the person of her minor child, but is not the natural guardian and has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant.

A father alone, or if he be dead, his executor (under the Sunni law) is the legal guardian of his minor child. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather, and should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian devolves upon the Judge as representing the Sovereign. But the powers of even the *de jure* guardians to intermeddle with the property of a minor are confined within legal limits. If the mother is the father's executrix or is appointed by the Judge as the guardian of the minors, she has all the powers of a *de jure* guardian. If there is no legal guardian, the person in charge of a minor (*e. g.* the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities (such as food, clothing or nursing), but has no power to deal with the immovable property.

The Mohammedan law makes a sharp distinction between "goods and chattels" and immovable property with regard to the powers of dealing by guardians.

Ayderman Kuth v. Syed Ali, [1912] I. L. R., 37 Mad., 514, disapproved.

Clear and reliable evidence that a Mohammedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother.

Mahatala Bibes v. Prince Ahmed Halcem oos-Zaman, [1881] 10 Calo., L. R., 298, approved and applied.

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order 13, rule 1, of the Code of Civil Procedure, 1908, may be admitted at any subsequent stage at the discretion of the Court.

APPEAL from judgment and decree, of the Calcutta High Court (MOOKERJEE and CARNDUFF, JJ.) affirming a judgment and decree of the Subordinate Judge of Saran. The facts of the case sufficiently appear from their Lordships' judgment. Ismail Ali Khan died leaving widows and children. Zohra claimed that she was his widow and that two of her children were his children. Zohra for herself and her children executed a conveyance in favour of the plaintiffs who brought the present suit in ejectment against Ismail Ali Khan's admitted wives and their children. The reliefs sought were (1) a declaration of the title and status of the plaintiffs' vendors and (2) a decree for possession of the shares covered by the deed of sale. The defendants denied that Zohra was married to Ismail and that her children were legitimate. Issues were framed. The eighth issue was as follows. "Of what properties the plaintiffs are entitled to recover possession?" The Subordinate Judge decided all the material issues in favour of the plaintiffs and allowed the claim against the contesting defendants. The High Court affirmed that decision. In reference to the contention that Zohra as the *de facto* guardian of her minor children was incompetent to alienate her children's shares, the learned Judges of the High Court said as follows:—

"It has finally been contended that Enayet Zohra, as merely the *de facto* guardian of her children, was not competent to alienate their shares, and upon this point reliance has been placed upon the cases of

- Moyna Bibi v. Banku Behari Biswas*, [1912] I. L. R., 29 Calo., 473 ;
- Tafazzul Hossein v. Basid Sheikh*, [1906] 4 C. L. J., 485 ; I. L. R., 34 Calo., 36 ;
- Ramcharan Sanyal v. Anukul Chandra Acharjya*, [1906] 4 C. L. J., 578. I. L. R., 34 Calo., 65 ;
- Durgazi Row v. Fakir Saheb*, [1907] I. L. R., 80 Mad., 197 ;
- Ummi v. Kesho*, [1908] I. L. R., 80 All., 462 ;
- Syedani v. Vilayat*, [1872] 17 W. R., 239 ;
- Hanuman v. Babuan*, 6 M. I. A., 413.

The question thus raised, does not, however, properly arise in the present suit. The contesting defendants do not claim through

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Zohra's children; on the contrary they completely repudiate any claim of the latter and it is not open to them to contend that they will be prejudiced if a decree is made in favour of the plaintiffs. It is conceivable that the plaintiffs may have to face a contest with the ninth and tenth defendants, when they come of age and are able to assert their own rights; but, in the present litigation the plaintiffs are entitled to succeed as against the first seven defendants, who have denied the title of their vendors.

Hence this appeal.

Upjohn K. C. (with him *Majid*), for the appellants.—Concurrent findings of the courts below that Zohra was the wife of Ismail Ali Khan cannot stand in this case because the courts arrived at them by improperly excluding the account books from consideration. The accounts filed by the defendants were genuine and the grounds on which the lower courts excluded them were not put to the defendants' witnesses. The family accounts for more than twenty years showed that Zohra was not the wife of Ismail and in fact it was conceded before the Subordinate Judge that "the entries in these books completely disprove and demolish plaintiffs' case and this fact is admitted by the learned counsel for the plaintiffs." The account books were admissible under s. 34 of the Indian Evidence Act, 1872. Reference was made to

Gabinduandari v. Jagadamba, [1870] 6 B. L. R., 168, 171.

There is no evidence to support the concurrent finding that the defendant mutilated the accounts. If the accounts are not left out of consideration the concurrent findings of the lower courts on the other part of the case cannot stand as they were arrived at after excluding the accounts: See

Tayammaul v. Sashachalla Naiker, [1865] 10 M. I. A., 429-434;

Musammatt Rajeswari Kuar v. Rai Bal Krishan, [1887] 14 I. A., 143;

Pauliem Valloo Chetty v. Pauliem Sooryah Chetty, [1877] 4 I. A., 109;

Venkateswara Iyan v. Shekhari Varma, [1881] 8 I. A., 143.

The evidence did not establish the alleged marriage ceremony. The requirement of Mohammedan law of an unambiguous acknowledgment before witnesses is a matter of substance and not of evidence.

Baillie's Digest, (1865 ed.), pp. 4, 5, 7, 749; Baillie's Mohammedan Law of Inheritance (1824), pp. 28 and 31; Fatawai Alamgiri, Vol. 4, p. 48; and

Ahlemannissa v. Mahomed Hatem, [1904] I. L. R., 31 Cal., 849.

The evidence as to alleged acknowledgments was not sufficiently specific as to the person referred to to raise any presumption:

Ashrufood-dowlah v. Syder Hossein, [1866] 11 M. I. A., 94;

Botoolum v. Koolsoom, [1876] 25 Suth. W. R., 444.

Further, Zohra was not the legal guardian of the minors and had no power to alienate their shares :

Mata Din v. Ahmad Ali, [1912] L. R., 39 I. A., 49.

The plaintiffs could not recover more than Zohra's share.

De Gruyther K. C. (with him *Sir W. Garth*), for the respondents, was asked by their Lordships to confine his argument to the question as to whether the mother was competent to alienate the minor's share. The widow has power to alienate the minors' share as their *de facto* guardian. Her act is voidable and not void and the minors on attaining majority would be free to avoid the transaction. The case of *Mata Din v. Sheikh Ahmad Ali* (supra) did not decide the point. The sale was good subject to the minors' right to set it aside on the ground that it was not for their benefit or was not made for any necessity or any other valid cause. Reliance was placed on the judgment of *ABDUR RAHIM, J.* in

Ayderman Kutti v. Syed Ali, [1912] I. L. R., 37 Mad., 514.

The following cases were discussed :—

Sita Ram v. Amir Begam, [1886] I. L. R., 8 All., 324 ;

Nizamuddin v. Ananli, [1896] I. L. R., 18 All., 373 ;

Majidan v. Ram Narain, [1903] I. L. R., 26 All., 22 ;

Ummi Begam v. Kesho Das, [1908] I. L. R., 30 All., 462 .

Syedun v. Velayet, [1872] 17 Sath. W. R., 239 ;

Bhutnath Dey v. Ahmed Hosain, [1855] I. L. R., 11 Cal., 417.

Moyna Debi v. Banku Behari Biswas, I. L. R., [1902] I. L. R., 29 Cal., 473.

Tafazzal v. Basid, [1906] I. L. R., 34 Cal., 36 ;

Ram Charan Sanyal v. Anukul Chandra Acharjya, [1906] I. L. R., 34 Cal., 65 ;

Kali Dutt Jha v. Abdul Ali, [1888] I. L. R., 16 Cal., 627 ;

Hurbai v. Hiraji, [1895] I. L. R., 20 Bom., 116 ;

Baba v. Shivappa, [1895] I. L. R., 20 Bom., 199 ;

Pathummabi v. Vittil Unmachabi, [1902] I. L. R., 26 Mad., 734 ;

Durgazi Row v. Fakeer Sahib, [1907] I. L. R., 30 Mad., 197 ;

Abdul Khader v. Chidambaram Chettiar, [1908] I. L. R., 32 Mad., 276 ;

Thottoli Kotilan Aliyumma v. Kunhammed, [1910] I. L. R., 84 Mad., 527 ;

Amba Shankar v. Ganga Singh, [1905] O. O., 97 ;

Nawab Wala Qadar Husain Ali Mirza v. Muhammad Asim Khan, [1915] 18 O. O., 168.

The judgment of their Lordships was delivered by

MR. AMEER ALI.—This is an appeal from a judgment and decree of the High Court of Calcutta, dated the 30th August, 1911, which affirmed the decree of the Subordinate Judge of Saran awarding to the plaintiffs possession of a share in certain landed property situated in that district.

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The property in suit belonged originally to one Ismail Ali Khan, a wealthy Mohammedan inhabitant of the Sub-Division of Siwan in the Saran district. The plaintiffs allege that on his death in March 1906 he left him surviving three widows and several children, and that from one of these widows named Enayet-uz-Zohra, acting for herself and for her two minor children, they purchased the share in suit for the possession of which they brought the present action.

It appears that shortly after Ismail Ali Khan's death the contesting defendants 1 to 7 applied to the Revenue Courts for mutation of names (as proprietors) in the Collector's records, and, as usually happens in these cases in India, specially in Mohammedan families, immediately this application was made, a claim was put forward on behalf of Enayet-uz-Zohra and her children that they were equally entitled with the other heirs of Ismail Ali Khan to have their names entered as co-sharers in the estate by right of inheritance, the allegation being that Zohra was one of his lawfully wedded wives and that her children were his legitimate issue. The Revenue Courts rejected her claim, holding that it was not established to their satisfaction that she was Ismail Ali Khan's married wife or that the children were his lawful issue. They accordingly made an order directing the registration of the contesting defendants' names in succession to Ismail Ali Khan.

It should be mentioned here that the defendants 1 and 5 are admittedly Ismail Ali Khan's married wives, defendants 2, 3, and 4 are his issue by defendant 1, and defendants 6 and 7 his daughters by defendant 5.

The plaintiffs are dealers in hide and live also at Siwan. There seems to have been litigation between them and Ismail Ali Khan in his life-time, and since his death they seem to have espoused Zohra's cause. The deed executed by Zohra bears date the 10th June, 1906, and purports to convey to the plaintiffs the shares of both herself and her minor children, and in the suit they are included as defendants 8 to 10. The reliefs sought are of a two-fold character : *first*, a declaration of the title and status of the plaintiffs' vendors ; and, *secondly*, a decree in favour of the plaintiffs for possession of the shares covered by the deed of sale.

The contesting defendants denied, as they had done in the Revenue Courts, that Zohra was one of Ismail Ali Khan's married wives or that her children were his legitimate issue, and they further contended that the shares the plaintiffs claimed to recover did not pass under the sale. The sixth issue framed by the Sub-ordinate Judge seems to relate to this point.

The plaint was filed on the 25th March, 1909, but it does not appear to have been admitted until the 2nd April. The con-

testing defendants filed their written statements in July 1909 ; after that the case dragged its slow length along until the 18th June, 1910, when the actual trial began. In the interim, however, various interlocutory orders were made, including an order for the appointment of Zohra as guardian *ad litem* for her children (though her interest in the suit was clearly adverse to theirs). Admittedly she was never appointed under the Guardian and Wards Act (VIII of 1890) a guardian of their property.

The examination in court of the plaintiffs' witnesses commenced on the 16th June, 1910 ; on the 18th June (the date given in the judgment of the High Court does not appear to agree with the date in the order sheet) they applied for a summons against the defendants for the production of certain *bahis*, or account books, belonging to Ismail Ali Khan for the Fasli years 1294 to 1313 (1887—1906). The order on this application was as follows : " I decline to issue summons at this stage." And there, so far as the plaintiffs were concerned, the matter was allowed to rest.

As a large part of the judgments of both the courts in India is occupied with an examination of these *bahis*, viz., whether they are reliable or not, it is necessary to mention that these very books had been produced and filed in Ismail Ali Khan's life-time on his behalf in the litigation between him and the plaintiffs ; after his death they were returned to the contesting defendants' pleader, when it was discovered that a large number of leaves were abstracted from several of the books. This was represented to the presiding officer of the court where the books were filed, but there is nothing to show the result of the representation. The plaintiffs' case appears to have closed on the 26th June, and on the following day the defendants commenced to examine their witnesses. On the same day they produced the *bahis*. The Subordinate Judge's order on their petition is in these terms :—" On the defendants' application filing therewith the *bahis* from 1294 to 1311 Fasli, it is ordered that they be kept with the records, and that the plaintiffs' pleader be informed accordingly." About this time the missing leaves turned up mysteriously. The trial Judge says he received them by post from some unknown source ; and apparently after receipt he handed them to the proper officer. Upon becoming aware of this fact the defendants applied to the court that the torn-out leaves thus re-discovered might be admitted in evidence ; and on the 29th June, whilst the trial was proceeding and evidently in the presence of the pleader for the opposite party, the Subordinate Judge ordered that the leaves in question should be used as evidence, and marked them as Exhibits F 1 to F 5.

It is hardly likely that the leaves were originally abstracted by the defendants and that this roundabout way was adopted for the purpose of getting the books admitted as evidence. On the face of it, the suggestion appears to be absurd.

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The use the contending defendants wished to make of the account books was of a negative character. These books contain regular entries of payments by Ismail Ali Khan to his admitted wives, defendants 1 and 5, under the honorific designation of *Haveli Kalan* ("senior mansion") and *Haveli Khurd* ("junior mansion"), being euphemisms for wives. There is no entry, however, of any payment to Zohra. The defendants accordingly asked the court to draw from the absence of any such entry in her name the inference that she was not Ismail Ali Khan's wife and did not hold the same position as the other ladies. Counsel for the plaintiffs seems to have been greatly impressed by this argument; in fact, he appears to have conceded that, if the books were to be relied upon Zohra's claim must fail. He was thus driven to challenge their genuineness. The Subordinate Judge appears to have taken the same view; he thought that the books must be first eliminated before the direct evidence could be properly appraised, and this reasoning runs through the judgments of both the courts in India. The trial Judge on certain grounds came to the conclusion that the *bahis* must be put aside from consideration as unreliable. He then proceeded to discuss the oral testimony; and in the result found that Zohra was, in fact, a wife of Ismail Ali Khan, and that the defendants 9 and 10 were his children by her. He accordingly decreed the plaintiffs' claim. And his decree has been affirmed by the High Court of Calcutta. The learned Judges of the High Court also felt impressed with the absence of entries in the *bahis* in Zohra's name, and therefore proceeded to deal with them first. This mode of treatment has been strongly assailed, not without reason, before this Board. It seems to their Lordships that the true criterion for the determination of the question at issue was missed by both the courts. The *onus* of establishing the title of their vendors lay primarily on the plaintiffs; the evidence furnished by the books was negative and inferential, and in substance directed to the corroboration of the defendants' witnesses, who denied that Zohra was one of Ismail Ali Khan's wives. Rule 1, Order XIII of the Civil Procedure Code requires the parties or their pleaders to produce at the first hearing of the suit all the documentary evidence of every description in their possession or power "on which they intend to rely." But it does not exclude the discretion of the court to receive any such documentary evidence at any subsequent stage. In the present case the books had been filed previously in another court, and when produced on the 27th June they were in fact received and ordered to be placed with the records. There seems to have been no objection to their reception for non-compliance with the provisions of the Code. If the plaintiffs had taken notes of certain entries in the books, as is alleged they had done when the *bahis* were in the other court, they could surely have cross-examined the defendants' witnesses, who were called to prove the books, as to the discrepancies. Their Lordships are not satis-

fied that the books are not the genuine account-books of Ismail Ali Khan. What effect the absence in them of entries in Zohra's name may have in the consideration of the general evidence is another matter.

In the absence of any statutory provision making compulsory the registration of Mohammedan marriages, the Indian courts, in case of a dispute as to the *factum* of a marriage, are usually left to discover, or attempt to discover, the truth from a mass of conflicting and often very unsatisfactory evidence of witnesses. Such has been the burden cast on the courts in the present instance. The plaintiffs have endeavoured to prove in two ways that Zohra was one of Ismail Ali Khan's wives, *viz.*, *first*, by direct evidence of an actual marriage, and, *secondly*, by the acknowledgment by him of her children as his legitimate issue, and by the presumption of marriage arising from such acknowledgment. The defendants, on the other hand tried to show that Zohra was a woman of loose character, with the object apparently of establishing that it was most unlikely a man in Ismail Ali Khan's position would marry such a person. They also called a number of witnesses, who are said to have been on terms of intimacy with him, to state that they never heard him speak of Zohra as his wife. Including the inference from the account books, all the evidence on the defendants' side is purely and naturally negative. In their Lordships' opinion, the oral testimony regarding the solemnisation of a marriage accompanied by ostentatious ceremonies and high dower is by no means satisfactory, and if the case had stood there, the absence of Zohra's name in Ismail Ali Khan's account books might have weighed heavily against her. But their Lordships find clear evidence of a reliable character regarding his acknowledgment of her children. Her case, therefore, comes within the rule of Mohammedan law to which GARTH, C. J., and WILSON, J. (afterwards SIR ARTHUR WILSON), gave expression in *Mahatala Bibee v. Prince Ahmed Haleem-ooz-Zaman*(1).

In their Lordships' opinion, the legal presumption arising in favour of Zohra from the acknowledgment of the children is not displaced by the mere inference the defendants seek to draw from the absence of entries in her favour in Ismail Ali Khan's account books. Such absence is capable of explanation, and it is possible she could have explained it had her attention been called to the matter. One explanation, however, is on the surface: on the facts proved in the case it is quite clear that this lady's father though belonging to the same clan as Ismail Ali Khan, was a man considerably inferior in social status: it is not at all unlikely that the deceased was not particularly proud of his connection with the daughter. This would explain both the absence of the entries and his reticence about her to ordinary acquaintances and even friends.

(1) [1881] 10 Cal. L. R., 298.

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On the whole, their Lordships are of opinion that both Zohra and her children are entitled to their legal shares in the inheritance of Ismail Ali Khan. But the courts in India have awarded to the plaintiffs, on the basis of the deed of purchase from Zohra, a decree for possession of her share and the shares of defendants 9 and 10. And the question is whether they have acquired any title to the infants' shares under the sale by the mother. The defendants objected in the High Court to the decree of the Subordinate Judge on the ground that she had no power to convey her children's interest to the plaintiffs. The learned Judges overruled the objection on the ground that the question did not arise in the present case. Their Lordships regret to have to differ from this view. This is an action in ejectment; the defendants are in possession; the plaintiffs, if they are to obtain possession of the minors' shares, must do so on the strength of their own title. It is essential, therefore, to consider whether the title they allege to have acquired under the conveyance by Zohra is well-founded.

The question how far, or under what circumstances according to Mohammedan law, a mother's dealings with her minor child's property are binding on the infant has been frequently before the courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force; the other declares them wholly void and ineffective. In the former class of cases, the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or encumber the minor's property.

In this conflict of opinion, their Lordships think it desirable that a definite rule should, if possible, be laid down; and with this object they propose to review briefly the provisions and principles of the Mohammedan law, as they apprehend it, governing the subject.

It is perfectly clear that under the Mohammedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni law), is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term "*de facto* guardian" that has been applied to these persons is misleading: it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous; and the judgment of the Board in *Matadin v. Ahmed Ali*⁽¹⁾, clearly indicated it. There, an infant's

(1) [1912] L R., 39 I. A., p. 49.

share was sold by the elder brother, in whose charge the child was, along with his own share, to pay a joint ancestral debt. The vendee at the time of the sale was in possession of the whole property under a mortgage executed by the ancestor. On attaining majority the younger brother, ignoring the sale, brought a suit against the vendee-mortgagee for the redemption of his own share. The defence set up was that the sale by the infant's *de facto* guardian, made for a valid necessity, was binding on the infant. The lower courts decreed the plaintiff's claim; on appeal to this Board the arguments proceeded on the same lines as in the present case, though in reverse order.

LORD ROBSON, in delivering the judgment of the Board observed as follows :—

"It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it."

And he went on to add :—

"There has been much argument in this case in the courts below, and before their Lordships as to whether, according to Mohammedan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

And he then proceeded to state the reasons why that was not considered necessary.

This latter passage in LORD ROBSON's judgment has created the impression that their Lordships' decision was confined to the special facts of that case and left open the general question regarding the validity of alienations by unauthorised guardians of the property of minors.

As already observed, in the absence of the father, under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infants' property devolves on the Judge as the representative of the Sovereign (Baillie's "Digest," ed. 1875, p. 689; Hamilton's *Hedaya*,

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Vol. IV, p. 555). No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may "sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss," dealings with his immovable property are subjected to strict conditions (Baillie's "Digest," p. 687). The reason for the restrictions is thus given in the *Hedaya* (Vol. IV, p. 553):—

"The ground of this" (the difference in the power of dealing with the two kinds of property) "is that the sale of movable property is a species of conservation, as articles of that description are liable to decay, and the price is much more easily preserved than the article itself. With respect, on the contrary, to immovable property, it is in a state of conservation in its own nature whence it is unlawful to sell it—unless, however, it be evident that it will otherwise perish or be lost, in which case the sale of it is allowed."

In fact, the Mussulman law appears to draw a sharp distinction between movable and immovable property (*a'kar*) in respect of the powers of guardians, as will be seen from the following passage in Baillie's "Digest," p. 689:—

"With regard to the executor of a mother or brother,—when a mother has died leaving property and a minor son, and having appointed an executor, or a brother has died leaving property and a minor brother, and having appointed an executor, the executor may lawfully sell anything but *akar*^o belonging to the estate of the deceased, but can neither sell the *akar*, nor lawfully buy anything for the minor but food and clothing, which are necessary for his preservation. The executor of a mother has no power to sell anything that a minor has inherited from his father whether movable or immovable, and whether the property be involved in debt or free from it. But what he has inherited from herself when it is free from debts and legacies, the executor may sell what is movable, but he cannot sell *akar*. If the estate is involved in debt or legacies, and the debt is such as to absorb the whole, he may sell the whole, the sale of *akar* coming within his power: and if the debt does not absorb the whole, he may sell as much of it as is necessary to defray the debts, and as to his power to sell the surplus there is the same difference of opinion as has been stated above."

When the mother is the father's executrix, or is appointed by the Judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and pur-

^o *Akar* is immovable property, and includes houses, groves, orchards, &c.

ports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant. This rule, however, is subject to certain exceptions provided for the protection of a minor child who has no *de jure* guardian. A fatherless child is designated in the law-books an "infant-orphan" (*yateem saghir*). The *Hedaya* classifies the acts that may have to be done for an infant under three heads. It says:—

"Acts in regard to infant-orphans are of three descriptions, *viz.*: (1) Acts of guardianship, such as contracting an infant in marriage, or selling or buying goods for him, a power which belongs solely to the *walee*, or natural guardian, whom the law has constituted the infant's substitute in those points; (2) acts arising from the wants of an infant, such as buying or selling for him on occasions of need, or hiring a nurse for him, or the like, which power belongs to the maintainer of the infant, whether he be the brother, uncle, or (in the case of a foundling) the *mooltakit*, or *taker-up*, or the mother, provided she be the maintainer of the infant; and as *these* are empowered with respect to such acts, the *walee*, or natural guardian, is also empowered with respect to them in a still superior degree; nor is it requisite, with respect to the *guardian*, that the infant be in his immediate protection; (3) acts which are *purely advantageous* † to the infant, such as accepting presents or gifts, and keeping them for him, a power which may be exercised either by a *mooltakit*, a brother, or an uncle, and also by the infant himself, provided he be possessed of discretion, the intention being only to open a door to the infant's receiving benefactions of an advantageous nature." (Vol IV, p. 124, Bk. XLIV).

The examples given under the second head indicate the class of cases in which the acts of an unauthorised person who happens to have charge of a child are held to be binding on the infant's property. They also help to explain and illustrate the extent of such "*de facto* guardian's" powers. The permissibility of these acts depends on the emergency which gives rise to the imperative necessity for incurring liabilities without which the life of the child or his perishable goods and chattels may run the risk of destruction. For instance, he may stand in immediate need of aliment, clothing, or nursing; these wants must be supplied forthwith. He may own "slave" or live-stock, food and fodder must be immediately procured. And these imperative wants may recur from time to time. Under such circumstances power is given to the lawful guardian to incur debts or to raise money on

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‡ A *mooltakit* is a person who undertakes to bring up a foundling or an orphan-child.

† In the original the words are *nafa mahaz*, which mean "unmixed benefit."

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the pledge of the minor's goods and chattels (*mata*)* (*Majma-ul-Anhar*, Vol. II, p. 571). And this power, in the absence of a *de jure* guardian, the law extends to the person who happens to have charge of the child and of the child's property, though not a constituted or authorised guardian.

There is no reference to the pledge or sale of immovable property (*a'kar*), as the power of dealing with that class of property is confined to the *de jure* guardians, and is treated in the *Fatawai-Alamgiri* in a separate chapter (Baillie's "Mohammedan Law of Sale." Chapter XVI).

It is to be observed that under the third "description" of acts that may be needful for an infant, a person in charge of a child, although not a *de jure* guardian, may validly accept on behalf of his ward an unburdened bounty, it being an act "purely advantageous" to the child, to use the expression of the *Hedaya*.

The reasoning on which it is sought to give to persons who happen to have charge of the person and property of a child, and are, therefore, called "*de facto* guardians," the same powers as are possessed by *de jure* guardians, is purely inferential. It proceeds on the analogy of a dealing by an outsider who purports to sell another's property without any authority from the real owner. Such a person in the Hanafi law is called a *fazuli*, or, as Mr. Hamilton spells it, *fazoollee*, which expression is defined by Richardson to mean a person "busying himself in things not belonging to him, or acting without authority." With the effect of the acts of a *fazuli* their Lordships will deal presently. Before doing so, they wish to refer briefly to the state of the decisions in the Indian Courts.

The Calcutta High Court, in sustaining transactions entered into by *de facto* guardians, has proceeded mainly on considerations of necessity for and benefit to the infant. The other High Courts, generally speaking, have cut the Gordian knot by holding that all such dealings with a minor's property were void.

Their Lordships do not feel called upon to examine in detail either set of decisions. But the last case on the subject in the Madras High Court requires their careful and respectful consideration; *Ayderman Kutti v. Syed Ali* (1). In their judgment in this case the learned Judges have examined the law at considerable length, and their decision appears to divide itself into three broad propositions, *first*, that as regards the powers of guardians, *de jure* as well as *de facto*, the Mohammedan law recognises no distinction as to the nature or kind of property, *viz*, whether it is immovable or movable; *secondly*, that in substance the powers of an unauthorised person who has charge of an infant are co-extensive with those of a lawfully con-

* Mr. Hamilton translates *mata* as meaning "personal chattels."

(1) [1912] I. L. R., 37 Mad., 514.

stituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant; and; *thirdly* (and this seems to form the essence of the judgment), that dealings by "a *de facto* guardian" are neither void nor voidable, but are "suspended" until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it.

With regard to the first of the above propositions, their Lordships have already indicated their views. In their opinion, the Mohammedan law, for obvious reasons, makes a distinction, and a sharp distinction, between "goods and chattels" (*mata*) and immovable property (*a'kar*) with regard to the powers of dealing by guardians.

The second proposition, speaking with respect, appears to their Lordships to lose sight of the fact that the acts of *de jure* guardians also are subject to the conditions of necessity for or benefit to the infant. So that upon the reasoning of the Madras judgment, the powers of "a *de facto* guardian" would, to all intents and purposes, be co-extensive with those of a *de jure* guardian. This conclusion would wipe out one of the most important safeguards provided by the Mohammedan law for the protection of the interests of infants. The learned Judges say that:—

"The law as regards the effect of dealings with a minor's property by a *de facto* guardian otherwise than in a case of absolute necessity or clear advantage to the minor is but a corollary of the general rule relating to *salisly* [*sic*], a person professing to deal with another's property, but without having legal authority to do so, i. e., by a *fasuli*, as he is technically called; such sales generally are treated as *mauquf*, or dependent."

Then, after referring to various authorities, they continue as follows:—

"The result of the above discussion is that, according to Mohammedan jurists, in cases of urgent and imperative necessity, such as those mentioned, the *de facto* guardian can alienate the property of the minor, no distinction being made between movable and immovable property."

It would have been an advantage to their Lordships if they had been placed in a position to judge for themselves, on the actual texts, the meaning of the Arabian text-writers and commentators. However, the *Hedayah* and the *Fatawa-i-Alamgiri* are recognised as standard authorities in India on the Hanafi branch of the Sunni Law. Of the *Hedayah* there is a rendering in English made by Mr. Hamilton under the orders of Warren Hastings; and a large part of the *Fatawa-i-Alamgiri* has been paraphrased into English by Mr. Neil Baillie, which is commonly known as Baillie's "Digest" (Hanafi Law). Both Mr. Hamilton and Mr. Neil Baillie in their renderings have, with the object of elucidation, occasionally added phrases which do not exist in the original, but

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on the whole the English versions of the *Hedayah* and of the *Fatawa-i-Alamgiri* are valuable works on Mohammedan Law.

The subject of sales by unauthorised persons is treated in the *Hedayah* in a separate section entitled "of *Fazoollee Beea*," or the sale of the property of another without his consent" (Book XVI, Vol II, p. 508). It says:—

"If a person were to sell the property of another without his order the contract is complete, but it remains with the proprietor either to confirm or dissolve the sale as he pleases. Shafel is of opinion that the contract, in this case, is not complete, because it has not issued from a lawful authority, for that is constituted only by property or permission, neither of which exist in this case."

It then proceeds to give the arguments of the Hanafi doctors in support of their view that the unauthorised contract is "complete." And then it adds:—

"If the proprietors should die, then the consent of the heirs is of no efficacy in the confirmation of the *Fazoollee* sale, in either case, that is, whether the price have been stipulated in money or in goods; because the contract rested entirely on the personal assent of the deceased."

In other words, the so-called sale remains wholly ineffective until it receives the "confirmation" of the owner, to whom alone belongs the power of "confirming" it. If he dies before he has "confirmed" it, the transaction falls to the ground, as the right to adopt the *fazuli's* act does not pass to his heirs.

In the *Fatawa-i-Alamgiri*† the subject is treated under the designation of "dependent sales" (Vol. III, p. 245; Baillie's "Mohammedan Law of Sale," pp. 218-219):—

"When a person sells the property of another, the sale is suspended, according to us [i.e., the Hanafis], for the sanction or ratification of the proprietor and the existence of both the parties to the contract, and of the subject of sale, is a necessary condition to the validity of his sanction

If the owner should die before sanctioning the sale, sanction by his heir would not suffice to give it operation. Sanction by an owner himself renders a sale operative."

The word in the above passage translated as "suspended" is derived from the same root as the word that has been translated in the heading as "dependant," and in this connection really means "is dependent upon," also the words "or ratification" have been introduced by Mr. Baillie by way of explanation. The word *ijazat* in the original is rightly rendered into "sanction."

° Correctly, Bai'.

† The "Book on Sale" in the *Fatawa-i-Alamgiri* has been rendered into English by Mr. Baillie under the name of the "Mohammedan Law of Sale."

The *Majma'-ul-Ankar* states the rule relating to a sale by a *fazuli* in similar terms; it says in substance that such a sale is "established" (takes effect) on the sanction of the *malik* (owner), subject to four conditions, which it specifies. And then it adds significantly that according to Shafei (the founder of the second great Sunni school of law) all dealings by an unauthorised person are absolutely void (*batil*): Vol. II, p. 88.

In their Lordships' opinion, the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazuli* sales, so far as they appear in the *Hedaya* or the *Fatawa-i-Alamgiri*, to dealings with the property of minors by persons who happen to have charge of the infants and their property—in other words, the "*de facto* guardians."

The Hanafi doctrine about *fazuli* sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mohammedan Law as to every other system.

In this connection it should be noted, that whilst Chapter XII deals exclusively with the effect of "dependent sales," in Chapter XVI the rules relating to the powers of guardians are discussed at considerable length (Baillie's "Mohammedan Law of Sale," p. 243; *Fatawa-i-Alamgiri*, Vol. III, p. 229). The following rule lays down the conditions governing sales by the executor (*i.e.*, the appointed guardian) of the immovable property of an infant:—

"And, according to modern decisions, the sale of immovable estate by an executor is lawful only in one of the three cases following: that is, where there is a purchaser willing to give double its value, or the sale is necessary to meet the minor's emergencies, or there are debts of the deceased, and no other means of paying them." Baillie's "Mohammedan Law of Sale," p. 247; *Fatawa-i-Alamgiri*, Vol. III, p. 233.

Having regard to the object in view, this dictum appears to their Lordships to apply to all forms of property which, like *a'kar*, combine both security and permanency. But it does not exclude the discretion of the Judge to sanction any alteration of investment in the interests of the infant.

The following case affords a further illustration of the limitations on the powers of "*de facto* guardians":—

"A woman after the death of her husband sells property that belonged to him, supposing herself to be his executrix, and her husband having left minor children; she after some time declares that she was not the

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executrix, her assertion, however, is not to be credited as against the purchaser, but the sale remains in suspense till her children arrive at puberty. If they should admit that she was the executrix, the sale by her is lawful; but if they deny the fact, the sale is void; and though the purchaser should have manured the purchased land, he has no recourse for reimbursement against the woman. What has been said is on the supposition that the woman sues for a cancellation of the sale, on the ground that she was not the executrix; but if the minor sue on that ground, his claim is to be heard." (Baillie, p. 249; *Alamgiri*, Vol. III, p. 234.)

The rest of the passage is immaterial for the purposes of this judgment.

The above case shows that even where the mother believes she is vested with authority as her husband's executrix, and in that belief purports to deal with the minor's property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser's position; but if the transaction is impugned by the rightful owner—*viz.*, the infant—the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act.

A further rule, which is given in the "Book on Pledges" (Mortgages) (*Kitab-ur-Rahn*) of the *Fatawa-i-Alamgiri*, which does not appear to have been translated by Mr. Baillie, is equally explicit. After stating the principle applicable to the powers of the father to pledge or mortgage his minor child's property, it goes on to say: "the mother: if she pledges (mortgages) the property of her infant child, it is not lawful, unless she be the executrix [of the father] or be authorised therefor by the guardian of the minor; or the Judge should grant her permission to pledge the infant's property. Then it is lawful; and the right to possession and user is established in the *murtahin* (pledgee or mortgagee) without power of sale;" (*Fatawa-i-Alamgiri*, Vol. V, p. 638).

It seems to their Lordships that the power to sell cannot be wider than the power to mortgage.

For the foregoing considerations their Lordships are of opinion that under the Mohammedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a "*de facto* guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser. It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title.

Their Lordships are accordingly of opinion that the decree of the High Court, in so far as it awards to the plaintiffs possession of the shares of the defendants 9 and 10, should be discharged, and, subject to this variation, it should be affirmed and the appeal be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

Their Lordships cannot help deprecating the practice which seems to be growing in some of the Indian Courts of referring largely to foreign decisions. However useful in the scientific study of comparative jurisprudence, judgments of foreign Courts, to which Indian practitioners cannot be expected to have access, based often on considerations and conditions totally different from those applicable to or prevailing in India, are only likely to confuse the administration of justice.

Truefitt & Francis.—Solicitors for the appellants.

T. L. Wilson & Co.—Solicitors for the respondents.

A. P. P.

Decree varied.

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Oudh Land-Laws—Tenures recognised in Oudh—Proprietor, under-proprietor, and tenant—No other kind of tenure recognised—Incidents of tenure attached by law—Cannot be varied by consent of tenure-holder—Oudh Rent Act, 1868 (Act XIX of 1868) sections 3, 52, 102.

The Oudh Rent Act, 1868, recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh, viz., "proprietor", "under-proprietor" and "tenant".

The law attaches to the status of under-proprietor certain rights, among them the right to transfer, and while he retains that status he cannot be divested of any of those rights.

When therefore at the time of a settlement a land-owner applied to be recorded as an under-proprietor, and under pressure from the settlement officer consented to be recorded as an under-proprietor without right of transfer:

Held, that this was creating a tenure unknown to the law, and that no effect could be given to the words "without right of transfer" in the Settlement Officer's decree.

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APPEAL from a decree of the Judicial Commissioner of Oudh, dated April 29, 1914, affirming a decree of the Subordinate Judge of Partabgarh.

The facts of the case are sufficiently stated in their Lordships' judgment. The plaintiff sued to recover possession: he had been ejected by the Rent Court, which had jurisdiction to eject him if he were a "tenant," but not if he were an "under-proprietor" within the meaning of Act XIX of 1868. The suit was decreed by the Subordinate Judge, who held that plaintiff was an under-proprietor within the meaning of the Act, and this decision was affirmed by the Judicial Commissioner.

Defendant appealed.

De Gruyther, K. C., (*Dube* with him) for the appellant.—All rights in Oudh having been confiscated after the Mutiny, every person there has to show a re-grant from Government. Here the second summary Settlement was made with Sheocamber and conferred an absolute interest on him. The respondent's only claim is under the compromise, which was long prior to Act XIX of 1868. The Settlement Officer could only give effect to that compromise. The words *kabizdarmiani* translated under-proprietary, do not of necessity mean a heritable and transferable interest. The Settlement officer's order shows that those words are not conclusive. We say the interest he got was heritable, but not transferable.

[VISCOUNT HALDANE.—Suppose a Judge has declared him to be an under-proprietor without power of transfer. What is the legal effect of such declaration?

[LORD SUMNER.—The Act of 1866, which was in force at the time of the compromise, only gave statutory force to administrative orders which were in effect before since 1856.]

That date is wrong (see Syke's *Taluqdari Law*, p. 144 at top).

[LORD SUMNER.—But from 1866 at all events under-proprietors had a definite sense.]

The Settlement officers could not have understood that *kabizdarmiani* meant under-proprietor in that sense, or they would never have directed an enquiry.

[LORD SUMNER.—The Settlement officer had no authority to adjudicate: He might refuse to record the agreement, but he could not pass a separate decree.]

[LORD DUNEDIN.—It may be *kabizdarmiani* was ambiguous and the intention of the parties could not be gathered from the document alone.]

[LORD SUMNER.—That would mean they had not come to terms. Unless they were *ad idem* the decree had no binding effect].

The Settlement officer was not bound by any Civil Procedure Code, he had instructions from Government to compromise dis-

putes as much as possible. They came to him with a vague agreement and he got them to come to a more definite one. The plaintiff's only right is under the Settlement officer's decree, and that does not make him an under-proprietor within the meaning of the Act.

H. N. Sen, for the respondent, was not called on.

Their Lordships' judgment was delivered by

MR. AMEER ALI.—The sole question for determination in this appeal relates to the status of the plaintiff-respondent under the Oudh Land Laws, *viz.*, whether he is an "under-proprietor" or, as the defendant alleges, a mere lessee. The suit was brought in the court of the Subordinate Judge of Partabgarh to recover possession from the defendant, the talukdar of Rajapur, of the village of Daulatpur, lying within the taluka, on the ground that it was owned by the plaintiff as "under-proprietor," and that he had been wrongfully dispossessed therefrom by the defendant in execution of a rent decree. The defendant denied the plaintiff's title as "under-proprietor," and alleged that he was only a lessee, and was, therefore, liable under the Rent Law to ejectment for default in the payment of his rent. The Subordinate Judge held in favour of the plaintiff, and decreed his claim for possession and for mesne profits during the period he has been kept out of possession. And this decree has been affirmed by the court of the Judicial Commissioner of Oudh. The defendant now appeals to His Majesty in Council.

A short statement of the facts will explain the relative position of the parties, as also the nature of their respective contentions. The plaintiff and defendant are closely related, being cousins in the first degree. The taluka of Rajapur, now held by the defendant, was settled with his father, Sheoamber Singh, in 1859. In 1861, in the course of the regular settlement, the plaintiff applied for a settlement of a half share with him on the ground that he was jointly entitled to the estate with Sheoamber. On this petition he was directed to "bring a claim at the time of settlement." Six years later, whilst the regular settlement was still proceeding, he applied again to the settlement authorities to have his name recorded as a co-owner in respect of a moiety of the taluka.

In this petition the grounds of his claim were more specifically stated: that his father, Lal Din Singh, and Sheoamber were full brothers and members of a joint family, and that the taluka had been acquired in the name of Sheoamber for the benefit of both brothers. This petition was entered as a suit before the Extra Assistant Commissioner of Partabgarh. Sheoamber contested the claim of the plaintiff to a half share of the property, but admitted his right to maintenance as a junior member of the family. Before trial, however, the parties compromised the dispute. The terms of

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the settlement arrived at are embodied in a joint petition filed in court on the 29th October, 1867. By this compromise, in consideration of the plaintiff withdrawing his suits and abandoning his claim to a share of the taluka, Sheoamber gave to him the village of Daulatpur, at a rent of rupees 461-4, being the Government revenue payable thereon, together with certain lands situated in other villages at fixed rentals. As regards the village of Daulatpur the plaintiff was to pay, besides the "rent," the wages of the patwari and chaukidar and the village expenses. And then followed the conditions of the grant, "that the plaintiff will pay to the talukdar, the defendant, the above-mentioned *jama* every year; that the plaintiff and his heirs will appropriate the profits of the above-mentioned village and lands, and that the defendant will have no right to resume them or to enhance the rent."

The prayer of the petition is important. It runs thus :—

"The plaintiff therefore prays that all the suits filed by the plaintiff, with the exception of these in respect of the village Daulatpur, 34 Bighas land of village Jogapur, and 26 Bighas (*sic*) land of village Rajapur, be dismissed, and that a decree for the under-proprietary right of the entire village Daulatpur, 34 Bighas land of village Jogapur, and 26 Bighas (*sic*) land of village Rajapur be passed in favour of the plaintiff."

There is no dispute that the words *qabiz darmiani* in the original of this petition are correctly rendered as meaning an "under-proprietary right."

On the 1st November, 1867, the Extra Assistant Commissioner made an order that the "under-proprietary rights" in respect of the lands within his jurisdiction should be decreed to the plaintiff in terms of the compromise; and that as regards Daulatpur, which apparently lay outside his jurisdiction, the petition should be referred for final orders to the Settlement officer.

The matter relating to Daulatpur then came before the Settlement officer (Mr. Forbes) on the 8th June, 1869, and he recorded the following order on the petition of compromise :—

"Plaintiff has filed a deed of compromise setting forth that defendant has agreed to grant plaintiff an under-proprietary right in Mauza Daulatpur, subject to an annual payment of 461-4 rupees, and certain *Sir* in two other villages (which has been judicially recorded by the S. M.). Plaintiff to bear patwari's and choukidar's dues. Defendant never to have the power, he or his posterity, of ever increasing the demand now fixed. This is verified by the parties in my presence. As, however, there is no grant or reservation of the right of transfer, the Court sends for defendant, his agent being too ignorant and useless, and will have the matter formally cleared up before passing any order"

On the 14th June the case was again placed before the settlement officer, when the final order which has given rise to the present contest was made. It is in these terms:—

“Decree—an under-proprietary right in Mouza Daulatpur in favour of plaintiff without right of transfer, subject to an annual payment of 461·4 rupees, and subject also to the other conditions contained in the deed of compromise.”

On the 21st October, 1872, a further agreement was entered into between Sheoamber and the plaintiff describing themselves respectively, as “the proprietor and under-proprietor” of the village of Daulatpur. The terms of this document have an important bearing on the contentions of the defendant and his attempt to reduce the plaintiff’s status to that of a lessee. The first clause recites that—

“The Government has assessed the *Jama* of this village at 450 rupees. The income from mines is separate from this. If any mine be discovered in our village, then we, the superior—and under-proprietor, will be liable to pay to the Government a share out of the income (of those mines).”

In the third clause Sheoamber Singh declares that he is the talukdar and “lambardar of Rajapur,” that after his death the taluka would devolve in the male line to a single heir by rule of primogeniture. The description “lambardar” is significant; it shows that the Government revenue in respect of Daulatpur is paid through him.

The fifth clause among other matters records the under-proprietor’s undertaking to pay “the salaries of the patwaris and chaukidars along with the last instalment.” And further that, “the leases and receipts will be given to the tenants after getting them recorded by the patwari;” and the under-proprietor undertakes to “get the payments made by each tenant recorded in the patwari’s *siaha*”: “In case of any fault being committed by a patwari or a chaukidar, the under-proprietor was at liberty to make an application to the Government for his dismissal, and in case of his dismissal to get other nominee of his appointed in the place of the dismissed patwari or chaukidar with the sanction of the Government.”

It is clear from this document that the acknowledged status of the plaintiff was quite different from what is now attempted to be fixed upon him.

Since 1869 the plaintiff’s name stands recorded in the village register as “under-proprietor” and a sub-settlement appears to have been made with him. In August 1899 the defendant himself brought a suit against the plaintiff for arrears of rent in which he described their relative positions as that of “superior proprietor and under-proprietor” respectively, of the village of

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Daulatpur. From 1872 to 1909 there does not appear to have been any contest regarding the status of the plaintiff. In 1902 he mortgaged the village to one Safdar Hossain and let him into possession. This man defaulted in the payment of the rent and the defendant thereupon brought a suit against the plaintiff under section 52 of the Oudh Rent Act (XXII of 1886) and obtained a decree. In execution of this decree the defendant ejected the plaintiff and took possession of the village. The plaintiff then brought a suit under clause 10, section 108 of the Rent Act for recovery of possession and obtained a decree in his favour in the court of the Deputy Collector, which, however, was set aside on appeal by the Commissioner whose order of dismissal of the plaintiff's action was affirmed by the Board of Revenue on the ground that so far as the Revenue Courts were concerned the matter was *res judicata* in consequence of the decision in the defendant's suit under section 52 and that the plaintiff's remedy lay in the Civil Courts. This view of the Board as to *res judicata* has necessitated further litigation extending over six years.

The Board's order was made on the 30th November, 1911, and the present suit was brought on the 2nd August, 1912.

Their Lordships cannot help observing that, so far as appears from the record, the defendant for the first time in 1909, in the proceedings in the Revenue Courts, put forward the contention that the plaintiff was not an "under-proprietor" but only a "lessee." In his written statement in the present action he did not commit himself specifically to that contention. In paragraph 3 he simply states:—

"It is admitted that a compromise was entered into, but the power of transfer was never allowed. The word *qabiz-darmiani* during those days did not particularly mean what it now means in legal phraseology."

He does not say, however, what it actually meant. This was left to his pleader to develop in the statement recorded by the court under the provisions of the Civil Procedure Code. It was then that he expressly took up the position that the plaintiff was a mere "lessee" and, therefore, liable to ejectment. And he based his contention on the words "without right of transfer," introduced as would appear *ex abundanti cautela* by the settlement officer (Mr. Forbes) in his order of the 14th June, 1869, on the petition of compromise jointly executed by Sheoambar and the plaintiff.

The position of a *qabiz-darmiani* or "under-proprietor" was fully understood in Oudh before the passing of Act XIX of 1868, which definitely crystallized and gave statutory recognition to his rights and status. It had come into being from the circumstances of the times; the exactions of the revenue collectors under the old regime had forced many small proprietors to protect themselves

against oppression by engaging with some more powerful neighbour to pay the Government revenue through him, but retaining their right in the property. In 1866 the Indian Legislature recognised their right to obtain a sub-settlement of their property, and the Act of 1868 clearly defined their position.

It recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh, *viz.*, "proprietor," "under-proprietor," and "tenant." It defines a "proprietor" thus; "Proprietor" does not include an under-proprietor. Where there are two private rights of property, one superior and the other subordinate, in the same land, "proprietor" means the holder of the superior right only. (The importance of the words "rights of property" cannot be overlooked in connection with the present dispute).

An "under-proprietor" is defined in the following words: "Under-proprietor" means any person possessing a heritable and transferable right of property in land, for which he is liable to pay rent."

And a "tenant" is defined to mean any person, not being an under-proprietor, who is liable to pay rent.

That the Act does not recognise any other status except the three it defines is clear from section 102, which gives the right to sue under its special provisions for the recovery of land from which the "applicant" has been illegally dispossessed to "landlord, under-proprietor, and tenant," "Tenants" are divided into two classes, *viz.*, those with the right of occupancy and those without such right. Tenants with a right of occupancy have a "heritable," but not a "transferable," right, and all tenants are entitled to a lease and are liable to be ejected for default in the payment of rent, which they may resist on different grounds.

It is thus absolutely clear that the Act draws a sharp distinction between an "under-proprietor" and a "tenant." And this was the law when Mr. Forbes made his "decree" on the 14th June, 1869. The parties had come to a compromise and embodied the terms in a document which both had signed. Sheoambar had given to the plaintiff, in consideration of his withdrawing his suits, then pending, for a half-share of the taluka, the "under-proprietary right" in the village in question on a rent which was the exact amount of the revenue payable thereon to Government, and had expressly abandoned any right "to take back or resume the property" so given. Nothing could be clearer than the intention of the parties expressed in this document, that Sheoambar intended to give and the plaintiff intended to take the properties as "under-proprietor." When the matter went before the settlement officer, he, in an excess of caution, wanted to ascertain from Sheoambar whether the talukdar wished to convey to the plaintiff "the right to transfer." Sheoambar was sent for, but failed to attend; and

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the plaintiff, to avoid further harassment, appears to have agreed to the passing of a decree without "right of transfer." The settlement officer's order involves a contradiction in terms. He "decrees" to the plaintiff the status of an "under-proprietor," and then adds the words "without right of transfer," which totally nullifies the previous declaration. He must have been aware of the law, and must have used the word "under-proprietor" in its statutory and, what is more, its ordinary sense, the sense in which the parties had, their Lordships have no doubt, used it in their deed of compromise. As the Commissioner in the suit under section 52 observed, Mr. Forbes' decree "created a tenure which is quite outside the Rent Act as it now stands." More correctly, it created a tenure unknown to the law as it then stood.

A good deal of stress has been laid on the fact that the plaintiff agreed to a decree with those words added, showing that he himself gave up before the settlement officer his right to transfer. The plaintiff was declared to be an "under-proprietor" in accordance with the terms of the compromise; the law attaches certain rights to that status; so long as he retains that status he remains clothed with those rights, and he cannot be divested of those rights unless and until he loses that status. Their Lordships are of opinion that the words "without right of transfer" in Mr. Forbes' decree do not affect the rights of the plaintiff as under-proprietor; and that the decrees of the Courts in India are perfectly right. Their Lordships will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

A. P. P.

Appeal dismissed.

T. L. Wilson and Co.—Solicitors for the appellant.

Ranken, Ford and Chester.—Solicitors for the respondent.

KANHAI LAL

versus

RRIJ LAL AND ANOTHER.

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Hindu Law—Mitakshara—Disputed succession—Compromise—A person taking benefit of compromise subsequently claiming as reversioner—Estoppel.

A, a Hindu governed by the Mitakshara died leaving a widow and a daughter by her. The widow's right to succeed was disputed by two widows of A's predeceased brothers and by the appellant, A's sister's son, who claimed to have been adopted by one of these widows to her deceased husband. A compromise, to which all four ladies and the appellant were parties, was made : under it each lady took one-fourth, and though appellant took nothing immediately, his adoption and his right to succeed to his adoptive mother's share were recognised. Later on appellant obtained possession of this share by relinquishment. Then A's daughter died, leaving a daughter of her own ; later still A's widow died. Appellant and his brother claimed, as next reversioners, the whole of A's property, save only the one-fourth share already in appellant's possession.

Held ; that the appellant having entered into and taken the benefit of the compromise was precluded from claiming as reversioner.

Samsuddin Gulam Hoosein v. Abdul Hussin Kalimuddin, [1906]
I. L. R., 31 Bom., 165, distinguished.

CONSOLIDATED APPEALS from decrees of the Allahabad High Court, affirming and reversing respectively two decrees of the Subordinate Judge of Shahjahanpur.

These two appeals arose out of two suits in which appellant and his brother claimed that on the death of Musammat Ram Dei they were entitled under the Mitakshara to inherit the property left by her husband, Bahadur Lal, many years before.

In these appeals the sole question for determination was whether appellant's claim was precluded by his compromise of a family dispute and his acts thereunder. The High Court, affirming one and reversing the other of the two trial Judges, held that appellant was so precluded.

B. Dube (with him *De Gruyther*, K. C.) for the appellant.—Appellant had no interest in the property at the date of the compromise (1892) : his reversionary right did not accrue till Ram Dei's death in 1912. His right to claim as reversioner was therefore not affected.

March, 15.
VISCOUNT
HALDANE,
SIR JOHN
EDGE, MR.
AMEER ALI
AND SIR
WALTER
PHILLIMORE
BART.

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[VISCOUNT HALDANE.—You come now under another title, and say that you were only making a misrepresentation when you claimed to be adopted son, and thereby induced these people to surrender their rights. Under what principle of equity can you do that?]

Appellant got a new right in 1912; a right which no one contemplated in 1892. It is this new right which he is enforcing. He bargained and sold his right as adopted son, but not his contingent right as reversioner. He was not competent under Hindu Law to deal with his right in expectancy, if any:

Samsuddin Goolam Husein v. Abdul Hussein Kalimuddin, [1906] L. L. R., 31 Bom., 165;

Amrit Narayan Singh v. Gaya Singh, [1917] 45 I. A. 85;

Transfer of Property Act, 1882, section 6 (a).

In 1892 appellant compromised his then claim to succeed immediately as adopted son of Badri Nath. He did not intend, even if he could, to deal with his rights upon the succession opening on Ram Dei's death. He did not in 1892 make any representation by which respondents' position became worse, and he is therefore not estopped by the compromise from enforcing his present claim. Reference was made to

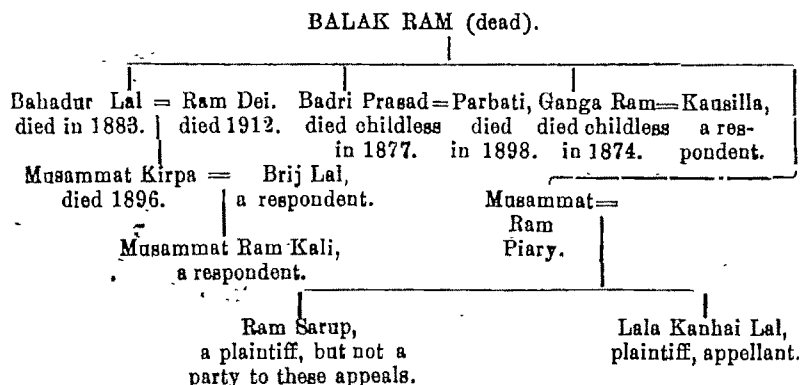
Hari Kishan Bhagat v. Kashi Pershad Singh, [1914] 42 I. A. 65, Indian Evidence Act, 1872, section 115.

Sir Erle Richards (with him *J. M. Parikh*), for the respondents were not called on.

Their Lordships' judgment was delivered by

*Sir John
Edge.*

SIR JOHN EDGE.—These are consolidated appeals from decrees, dated the 15th June, 1915, of the High Court at Allahabad, made in appeals from decrees of the court of the Subordinate Judge of Shahjahanpur. There were two suits, in each of which Lala Kanhai Lal and his brother, Ram Sarup, were the plaintiffs. Lala Kanhai Lal is now the appellant in these consolidated appeals. Ram Sarup's rights were established and are not now in question; he is not a party to these appeals. In one of these suits Lala Brij Lal and his daughter, Musammat Ram Kali, were defendants, they are now respondents to one of these appeals. In the other suit Musammat Kausilla and Lala Sham Lal, who claims through her, were the defendants, they are the respondents to the other of these appeals. In each suit Lala Kanhai Lal claimed as a reversioner to one Bahadur Lal, who died in 1883. Bahadur Lal was a member of a Hindu joint family descended from one Balak Ram. The pedigree of the joint family so far as it is now material is briefly as follows:—



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Upon the death of Ram Dei, on the 14th May, 1912, Lala Kanhai Lal and his brother, Ram Sarup, were the reversioners to Bahadur Lal. The only question which their Lordships have to consider in these appeals is the question whether Lala Kanhai Lal has not been precluded from claiming as a reversioner by his having been a party to a compromise which was entered into in 1892. If he is not precluded from claiming as a reversioner he is entitled to succeed in these appeals.

At the time of his death in 1883 Bahadur Lal was by survivorship the sole owner of the family estate; and on his death his widow, Musammat Ram Dei, became entitled to that estate for her life, Musammat Parbati and Musammat Kausilla being entitled only to maintenance. The title of Musammat Ram Dei was, however, disputed by Lala Kanhai Lal, Musammat Parbati and Musammat Kausilla. Lala Kanhai Lal set up a claim to the family estate alleging that he had been adopted by Musammat Parbati to her deceased husband, Badri Prasad and was entitled to the whole estate as such adopted son. His case was that there was a custom in the family which enabled a brother to adopt his sister's son and that Musammat Parbati had received her husband's authority to make the adoption. It is not necessary to consider whether there was any foundation for that case. Musammat Parbati's case was that the brothers Bahadur Lal, Badri Prasad, and Ganga Ram had separated; that also was the case set up by Musammat Kausilla. Each of these widows claimed for life one-third of the family estate. Musammat Parbati also alleged that she had validly adopted Lala Kanhai Lal to her deceased husband, Badri Prasad.

In order to protect her own interests and the interests of her daughter, Musammat Kirpa, who was then living, Musammat Ram Dei brought two suits in the court of the Subordinate Judge of Shahjahanpur. The earlier of those suits was brought on the 20th January, 1891, against Lala Kanhai Lal and Musammat Parbati and in that suit Musammat Ram Dei claimed a declaration that the alleged adoption of Lala Kanhai Lal by Musammat Parbati was

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null and void. That suit was dismissed by the Subordinate Judge on the technical objection that the plaint had not been properly verified. From the decree dismissing that suit Musammat Ram Dei appealed to the High Court at Allahabad. The later of those two suits was brought on the 4th February, 1892, against Musammat Parbati and Musammât Kausilla and in it Musammat Ram Dei claimed amongst other reliefs a declaration that her late husband Bahadur Lal had been the owner and in possession of the entire property of the joint family; that after his death she, Musammat Ram Dei, was in possession of and entitled to that property according to Hindu Law; and that Musammat Parbati and Musammat Kausilla had no right other than that of maintenance.

Before the suit of the 4th February, 1892, came on for trial Musammat Ram Dei, Musammat Parbati, Musammat Kausilla, Musammat Kirpa, and Lala Kanhai Lal had entered on the 1st August, 1892, into the following agreement of compromise:—

"We Musammat Ram Dei, widow of Bahadur Lal, Musammat Parbati, widow of Badri Prasad, Musammat Kausilla, widow of Ganga Ram, Musammat Kirpa, daughter of the said Bahadur Lal, and Kanhai Lal, the adopted son of the said Musammat Parbati, by caste Agarwal, residents of muhalla Muzaffarganj, in Shahjahanpur, do declare as follows:—

"Whereas disputes relating to property and 'imlak' have existed between Musammats Ram Dei, Parbati and Kausilla and I, Musammat Kirpa, daughter of Ram Dei, and I, Kanhai Lal, the adopted son of Parbati, are also regarded as claimants, we, the five persons, of our free-will and accord and in a sound state of body and mind, declare that we have appointed Maharaj Badri Prasad, the general attorney of Musammat Durga Dei, as referee, and he should divide the whole of the property consisting of villages, houses and shops as specified below and his decision as regards the profits for the past years, the villages sold after the death of Bahadur Lal and the cases at present pending in the Civil and Revenue Courts, whatever it may be, will be admitted and accepted by us. There will be no objection or denial on our part. If any of us, the executants, take any objection, it will not be entertainable. The mode of partition of property agreed upon is that with the exception of the 'Thakurdwara' of Musammat Ram Dei, the 'Thakurdwara' of Musammat Parbati, the villages of Bartara, Nagra Badhipura, the grove situate in Panwari and the 10 biswa share of Simri, tahsil Pawayan, which have been made a 'waqf' of for the expenses of the 'Thakurdwara' and for charity, he should make four equal lots of all the villages, the shops, the banking kothis and the money-lending business, the decrees, bonds and account-books in such a way that each lot may, so far as possible, contain the above things as a whole. After the preparation of the lots, Musammats Ram Dei, Parbati, Kausilla, and Kirpa may each duly draw one of the lots. After that they should make applications for mutation of names in the

revenge department and get (their) names recorded. I, Musammat Kirpa, and L. Kanhai Lal, will have no claim against any share as regards this property. Every sharer will be the owner and possessor of (her) property and will have power to make every kind of transfer as a proprietor.

The said Maharaj Sahib may come to any decision he pleases as regards the partition and preparation of lots and the settlement of disputes mentioned above and enter all the particulars in detail in the arbitration award by the end of September, 1892, and get it registered. All that will be admitted and accepted by us. None of us will deviate from it.

"This agreement has accordingly been executed to stand as evidence.

"Dated the 1st of August, 1892.

"By the pen of Lala Prashad, Kayaath, resident of Rang Muballa.

Ditto	(Sd.)	RAM DEI.
Ditto	"	PARBATI.
Ditto	"	KAUSILLA.
Ditto	"	KIRPA.
Ditto	"	KANHAI LAL."

The arbitrator made two awards dated, respectively the 12th and the 13th January, 1893. That of the 12th January, 1893, was filed in the suit of the 4th February, 1892, in which Musammat Parbati and Musammat Kausilla were defendants, and that suit was dismissed as withdrawn by Musammat Ram Dei. The appeal to the High Court, in the suit of the 20th January, 1891, was not supported, and was dismissed.

Under the awards of the arbitrator one-fourth of the family property was allotted to Musammat Ram Dei, one-fourth to Musammat Kirpa, one-fourth to Musammat Parbati, and one-fourth to Musammat Kausilla, and they respectively obtained possession of the properties allotted to them. In the award of the 13th January, 1893, the arbitrator stated:—

"Kanhai Lal has been adopted by Musammat Parbati, but he has nothing to do with the other Musammats' property as such adopted son. Nor has he now any claim to their property. As regards the matter between Musammat Parbati and Kanhai Lal, it is not necessary to explain his rights in this award. Kanhai Lal's rights in the property comprised in Musammat Parbati's lot are quite safe."

So far as appears by the agreement of compromise and the awards, Lala Kanhai Lal got no share in the family property, but in fact he got the one-fourth share which was allotted to Musammat Parbati, and he further obtained the benefit of having the validity of his adoption by Musammat Parbati left undecided by a court of law. On the 22nd August, 1898, Musammat Parbati executed, in favour of Lala Kanhai Lal, a deed of relinquishment of the property which had been allotted to her under the compromise and the award of the 13th January, 1893. In that deed she stated:—

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"The immovable property, such as zamindari houses and shops detailed as below, belonged to Lala Badri Prasad, the husband of me, the executant. I, the executant, have, with the permission of my husband, adopted to my husband and myself, Lala Kanhai Lal, son of my husband's sister, for the benefit of the soul of my husband in the next world. Kanhai Lal aforesaid has been living with me from the date of the permission to adopt. It is he who is the absolute owner of the entire property and legal representative of the entire property left by my husband. But the name of me, the executant, has continued to be recorded in the revenue papers against the zamindari property. I am not the owner thereof. Kanhai Lal aforesaid is the owner of the entire property of my husband. Now I, the executant, do not also want my name to stand recorded in the revenue papers. Therefore I, of my own free will and accord, without force and coercion, relinquish my claim to the whole of zamindari property and houses and shops, detailed as below, in favour of Kanhai Lal, adopted son of my husband and myself, and covenant in writing that Kanhai Lal aforesaid is the owner of the entire property detailed below as representative of my husband, Lala Badri Prasad. He has acquired as absolute owner all sorts of powers in respect of the property detailed below. Up to this time my name stood recorded in the papers only fictitiously. Now I do not want that my name should stand recorded in the column of proprietors. My name, which is entered against the whole of the zamindari property, should be expunged and the name of Kanhai Lal be entered in the papers."

In accordance with that deed of relinquishment, Lala Kanhai Lal obtained mutation of names in his own favour, and he has hitherto enjoyed that share of Musammât Parbati as his own property, and his right to it has not been questioned in either of the present suits. The properties which Lala Kanhai Lal has claimed in these suits as a reversioner to Bahadur Lal are the properties which were allotted in January, 1893, to Musammât Ram Dei, Musammât Kirpa, and Musammât Kausilla respectively.

The suits in which these appeals have arisen were not tried by the same Subordinate Judge. In one of these suits the Subordinate Judge held that Lala Kanhai Lal was precluded by his having been a party to the compromise from now claiming as a reversioner. In the other of these suits a different Subordinate Judge decided that Lala Kanhai Lal was as a reversioner not bound by the compromise. The decrees of the court of the Subordinate Judge were appealed to the High Court, and the appeals were considered by the High Court in one judgment. The High Court decided that Lala Kanhai Lal having been a party to the agreement of compromise of 1892, and having taken a benefit under that settlement of the dispute, was bound by it and could not go behind it. The result was that Lala Kanhai Lal's suits were dismissed. From

the decrees of the High Court made in accordance with that judgment these appeals have been brought.

It has been contended on behalf of Lala Kanhai Lal that the agreement of compromise of 1892 could not deprive him of his right to claim as reversioner unless it is capable of being treated as a conveyance of his right as a reversioner, and that he did not intend in 1892 to convey or assign such right when it might accrue to him. As it now appears, Lala Kanhai Lal was not a reversioner in 1892, and did not become a reversioner until Musammat Ram Dei died in 1912. All the interest which he had in the property of the family in 1892 was the mere possibility of becoming an immediate reversioner in case he should be living when Musammat Ram Dei might die, and when Bahadur Lal's daughter, Musammat Kirpa, might die without a son. It was also contended on his behalf that Lala Kanhai Lal in 1892, whatever his intention may have been, was not in law competent to convey or relinquish any future possible right as a reversioner, and as an authority in support of that contention the decision of the High Court at Bombay in *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* (1), was relied upon. That decision is not in point. There is no question here of a conveyance of, or of an agreement to convey any future right or expectancy, or of an agreement to relinquish any future right or expectancy. The question here is whether Lala Kanhai Lal did not by his acts in 1892 debar himself from now claiming as a reversioner.

The facts in this case are simple. In 1892 the family was a Hindu joint family to which the ordinary Hindu Law applied. All the sons of Balak Ram had died. Ganga Ram had died childless in 1874, and Badri Prasad had died childless in 1877. Bahadur Lal had died sonless in 1883, leaving his widow, Musammat Ram Dei, surviving him. Musammat Ram Dei became, on the death of Bahadur Lal, entitled for life to a Hindu widow's right to the whole of the family property. Lala Kanhai Lal had then no right of any kind to any share in the family property, but he set up a claim to the whole property based on the allegation that he had been validly adopted by Musammat Parbati to her deceased husband, Badri Prasad. If that claim had been substantiated by proof of a valid adoption, Lala Kanhai Lal would have been entitled to the whole family property, and Musammat Ram Dei would have been entitled merely to maintenance. Although as a general rule of Hindu Law a man cannot adopt his sister's son, the claim was a serious one. Lala Kanhai Lal's case was that, according to an Agarwal custom (the family was of the Agarwal caste), which governed the family, a man could lawfully adopt his sister's son, and he alleged that Badri Prasad had given Musammat Parbati authority to make the adoption, and that he, Lala Kanhai Lal, had

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been validly adopted to Badri Prasad. That Lala Kanhai Lal might have found it difficult or impossible to prove that he had been validly adopted is immaterial. He made the claim; it was a serious one, and it was supported by Musammat Parbati and it must have influenced Musammat Ram Dei, who was induced, doubtless mainly by that claim, to consent to a division of the family property, in which she obtained for herself merely a one-fourth share. The claims which were set up by Musammat Parbati and Musammat Kausilla, that the three sons of Balak Ram had separated, must also have influenced Musammat Ram Dei to agree to the compromise of 1892. Lala Kanhai Lal was a party to that compromise. He was one of those whose claims to the family property, or to shares in it, induced Musammat Ram Dei, against her own interests and those of her daughter, Musammat Kirpa, and greatly to her own detriment, to alter her position by agreeing to the compromise, and under that compromise he obtained a substantial benefit, which he has hitherto enjoyed. In their Lordships' opinion he is bound by it, and cannot now claim as a reversioner.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

A. P. P.

Appeal dismissed.

Barrow Rogers and Nevill.—Solicitors for the appellants.

E. Dalgado.—Solicitor for the respondents.

SRI RAJAH RAMA RAO (*Plaintiff*)*versus*RAJAH OF PITTAPUR (*Defendant*.)

Hindu Law—Mitakshara—Maintenance of junior members—Basis of the right—Impartible semindari—Not the subject of co-parcenary—Right to maintenance out of impartible semindari—Founded on custom.

The right to maintenance of the junior members of a *Mitakshara* joint family; so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases. Two other categories of persons have by special texts a right to maintenance under the *Mitakshara* law, *viz* :—

1. Those who are debarred from inheriting by personal disqualifications, *e. g.*, the idiot, the blind from birth, the madman, &c.,
2. Certain near relations, *viz*, the widow, the parent, and the infant child.

But these categories are exhaustive.

It is now definitely decided that in impartible properties there is no co-parcenary : hence in such properties no one can claim maintenance on the ground that but for the custom of impartibility he could sue for partition.

Custom may and does affirm a right to maintenance out of an impartible Raj in certain members of the family. In the case of sons this custom is so well recognised that proof of it in individual cases is unnecessary. But there is no invariable or certain custom that any below the first generation from the late Raja can claim maintenance as of right : any special custom to that effect must be pleaded and proved.

The grandson of the late Rajah of Pittapur, an impartible Raj, sued the devisee of the Raj for maintenance on the ground that, by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party.

Held, that there was no legal basis for any such claim.

APPEAL from a decree of the Madras High Court, dated March 19th, 1915, reversing a decree of the Subordinate Judge of Rajahmundry.

The facts of the case are sufficiently stated in their Lordships' judgment and in the judgment of the Madras High Court (SANKARAN NAIR and OLDFIELD, JJ.) reported at 39 Mad., 396. The

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May, 2.

VISCOUNT
HALDANE,
LORD
DUNEDIN,
LORD
SUMNER, SIR
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plaintiff's suit was decreed by the Subordinate Judge, but dismissed on appeal by the High Court.

Plaintiff appealed to the Privy Council.

Upjohn, K. C. (Dunne, K. C. with him), for the appellant, submitted that any devise made by the holder of an impartible Raj must be subject to the right of maintenance given by the *Mitakshara* to the junior members of the holder's family. The present holder of the Pittapur Raj has taken by devise from the late holder: he can only take subject to the obligation to maintain the members of the family.

[LORD DUNEDIN:—Could he devise to a stranger?]

Apparently he is not confined to the members of the family, but here it so happens that he has devised to the next person entitled to succeed.

An impartible estate is family property only in a limited sense, and the holder has in general the right of alienation:

Sartaj Kuari v. Deoraj Kuari, [1888] 15 I. A., 51;

but it is not self-acquired property, and the junior members of the holder's family have a right to be maintained out of it. Such right exists notwithstanding the power of alienation: the maintenance is a charge on the impartible estate:

Muttuswamy Jagaveera Yellappa Naicker v. Venkateswara Yettaya, [1868] 12 M. I. A., 203;

Sri Raja Venkatasurgaya v. Court of Wards, [1899] 26 I. A., 83 (the Pittapur Case);

Mallikarjuna Prasada Naydu v. Durga Prasada Nayadu, [1900] 27 I. A., 151;

Kaliyanna v. Rengappa, [1905] 32 I. A., 161;

Periasami v. Periasami, [1878] 5 I. A., 61, 70;

Tikait Durga Prasad Singh v. Tikaitni Durga Koomvasi, [1878] 5 I. A., 149;

Naragunty Lutchmeedavamah v. Vergama Naidoo, [1861] 9 M. I. A., 86, at pp. 85, 86;

Baboo Beer Pertab Sahes v. Maharajah Rajender Pertab Sahes, [1867] 12 M. I. A., 1.

In none of these decisions has it been doubted that maintenance is chargeable on an impartible estate.

The next question is whether the right to maintenance can be defeated by the holder of the impartible estate by alienation. We submit not. The Transfer of Property Act, 1882, (Act IV of 1882) section 39 assumes that the right to maintenance is a real

right: it lays down that the right may be enforced against a voluntary transferee or transferee with notice. The Hindu Wills Act (Act XXI of 1870), section 3 provides that a Hindu testator cannot by his will defeat the right to maintenance.

To the same effect is the Probate and Administration Act, (Act V of 1881), section 149 (c).

Dunns followed.—The High Court seems to have concluded that the right to maintenance is dependent on there being co-parcenary. That this is not so is apparent from the case of the widow. In Bombay it has even been held that if a co-parcener could sue for partition he could not sue for maintenance.

Note to Himmat Singh v. Ganput Singh, 12 Bom. H. C. R., 96.

The right to maintenance continues even in case of forfeiture:

Goolab Koomour v. Collector of Benares, [1847] 4 M. I. A., 246.

The right is attached to the property, and is not affected by the decision in

Sartaj Kunwari v. Deoraj Kuari, (s. c.)

In the case of the widow, it has been held that her right to maintenance, even when against her husband's father it was only a moral right, became a legal right against his property in the hands of his son.

Janki v. Nand Ram, [1888] I. L. R., 11 All., 194 (F. B.).

Here the defendant is a gratuitous taker, and whether or not he is the *aurasa* son, the last holder has given him the zemindari on the footing of his being the *aurasa* son: he is bound to maintain plaintiff out of the income of the zemindari so obtained.

De Gruyther K. C. (*Kenworthy Brown* with him), for the respondent.—There is no text of the *Mitakshara* which supports the present claim. Impartible property is not the property of the joint family to which the holder belongs: it is not the subject of co-parcenary. The effect of property being partible is discussed in Mayne's Hindu Law, para. 275: the principal incidents are that—

1. In co-parcenary property no member can alienate.
2. The manager can alienate for necessity only.
3. Every person who has acquired an interest by birth can claim partition.
4. On the death of a co-parcener his interest passes by survivorship and not by inheritance.
5. Every member of the co-parcenary has a right to be maintained from it.

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The right to maintenance arises by reason of co-ownership : Mayne, Hindu Law, para. 450. The right of the widow to maintenance is provided for by special texts which do not apply to a male member. At paragraph 450 Mayne refers to sundry special texts which give rights to maintenance to various persons. The case of

Muttusvami Jagaveera Yettappa v. Venkataswami Yettappa (S.O.), turned on one of these texts, relating to the illegitimate son, which will be found in Stoke's Hindu Law Books, p. 426 (Ch. I, XII—3).

The son has no right to be maintained from his father's self-acquired property : Mayne para. 454.

In the case of an impartible estate the son is entitled to maintenance as against his father by custom: this custom does not extend to grandsons. The cases relied on are cases of son against father or brother against brother, but there is no case extending the right to a grandson or nephew.

The existence of such rights depends upon custom :

Ekradeshvar Singh v. Janeshvari Babuasin, [1914] 42 I. A., 275, at page 279.

In the case of the *Pachete Raj* it was held that the right to maintenance only extended to the sons and daughters of the Raja :

Nilmony Singh Deo v. Hingoo Lal Singh Deo, [1879] I. L. R., 5 Cal., 256.

The cases prior to *Sartaj Kuari v. Deoraj Kuari*, 15 I. A., (S. C.), all proceeded on the basis that the impartible raj was joint family property, and that therefore the right to maintenance attached to it as a matter of course : it is now however clearly settled that in an impartible estate there is no interest acquired by birth and no co-parcenary.

Sartaj Kuari v. Deoraj Kuari, [1888] 15 I. A., 51, at pp. 64, 65;

Sri Raja Rao v. Court of Wards, [1899] 26 I. A., 83.

There is no survivorship in impartible estate, for the reason that there is no right to claim partition: the two are correlative.

Chelikani Venkayamma v. Chelikani Venkataramanayamma, [1902] 29 I. A., 166, 164, 165.

Plaintiff here does not come as a relative, but claims that he is entitled to a portion of the income because defendant is a gratuitous taker. Plaintiff had no claim against the deviser, much less against defendant. Even his father was not a co-parcener : he has not lost any right to partition, and is not entitled to any maintenance as a consequence of any such loss. There is no authority in Hindu Law in support of his claim.

Kenworthy Brown, followed.—There is no general custom in an impartible Raj that any below the first generation from the last Raja are entitled to maintenance.

Nilmony Singh Deo v. Hingu Lal Singh Deo, [1879] I. L. 'R. 5 Cal, 256, at p. 259.

Upjohn, in reply.—Plaintiff's right to maintenance accrued on his birth. The right to maintenance is irrespective of the right to partition. When the family property is impartible an adult son is entitled to maintenance, since that is the only mode in which he can obtain any benefit from the ancestral estate: *Mayne, Hindu Law*, para. 454 (8th. Edn. p. 626).

"Son" and "issue" include three direct descents in the male line: *idem* para. 108 (p. 133) and para. 540 (p. 754): so that what is said of the son extends to the grandson also.

Their Lordships' judgment was delivered by

LORD DUNEDIN.—The plaintiff is the son of an adopted son of the late Rajah of Pittapur, and he sues the defendant, the present Rajah of Pittapur, for maintenance. At the time that the suit was raised the father of the plaintiff was alive, but pending the suit he died. The Raj of Pittapur is an impartible zemindari, and was devised by will to the defendant, who was described in the will as the *aurasa* son of the late Rajah born of one of his wives, three years after the adoption of the plaintiff's father. The plaintiff's father contested the right of the defendant to the raj, and alleged that he was not the legitimate son of the late Rajah. In that suit the Subordinate Judge decided that the defendant was not legitimate and that the raj was inalienable. The judgment was reversed and the case decided in favour of the defendant by the Court of Appeal and by this Board, who, without deciding as to the legitimacy of the defendant, held that in accordance with what had been laid down by this Board in the case of *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1), the zemindari of Pittapur, being impartible, there was no right in the plaintiff to quarrel with the alienation made by the will of the late Rajah.

The defendant in the present case resists the claim on the ground that no legal basis for the claim is alleged. The plaintiff did not attempt to prove that there was any custom affecting this particular zemindari which enjoined the making of grants of maintenance to any persons, nor did he put his case on any claim resting on relationship, a relationship which, following his father's allegation, he did not allow existed, but he rested his case on what he alleged was the general law, *viz.*, that by birth he had a right to maintenance out of the property constituting the raj, which right followed the property into the hands of a third party. The learned Judge

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of the Subordinate Court gave judgment in favour of the plaintiff for maintenance and arrears. This judgment was reversed by the Court of Appeal, who dismissed the case. The ground on which the learned Subordinate Judge proceeded was shortly this :—He considered that the zemindari was joint family property, only with the peculiar quality that it was impartible. Being joint family property, the right which accrues to every junior member (and a grandson is such a junior member) in the case of the ordinary joint family under the Mitakshara law exists also in this case. The learned Judges of the Court of Appeal held that after the decisions in *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1) and *Sri Rajah Rao Venkata Mahipatri Rama Krishna Rao Bahadur v. Court of Wards and another* (2), it was impossible to base the plaintiff's right to maintenance on any right of co-parcenary accruing by birth, and that the case as put was based on no other ground.

It is beyond doubt that the decisions in the Madras Courts prior to the case of *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1), embodied the theory that there was joint property in an impartible zemindari, which only fell short of co-parcenary because, by custom, partition was inadmissible. It is needless to cite or examine the authorities, as their Lordships do not apprehend that there is any doubt as to this statement being correct. It will be sufficient to quote a fragment of the decision of the Court of Appeal in that case itself :—

"It must be conceded that the complete rights of ordinary co-parcenaryship in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in—or perhaps, to use a more correct term, subordinated to—the title of the individual member to the incumbency of the estate but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

But the decision of the Board, which binds their Lordships made that view no longer tenable. It settled that in an impartible zemindari there is no co-parcenary, and consequently no person existed who as co-parcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very *raj* in the *Pittapur case* (3). The import of these decisions was, in their Lordships' view, correctly stated by SIR L. JENKINS in the case of *Bachoo v. Mankorebai* (3). "It has now been definitely decided that in impartible properties there is no co-parcenary."

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a co-parcenary interest accruing by birth in the ancestral property ; that this

(1) [1888] 15 I. A., 51.

(2) [1899] 26 I. A., 83.

(3) I. L. R., 29 Bom., p. 58.

co-parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of co-parcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management. As it is expressed by the late Mr. Mayne in his work :—“ Those who would be entitled to share in the bulk of the property are entitled to have all their necessary expenses paid out of its income.” It follows that the right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

There are, however, certain persons who, as is explained by express texts of the Mitakshara, while not entitled to succeed as co-owners, are given rights of maintenance. There is the category of persons who by reason of personal disqualification are not allowed to inherit. Such are the idiot, the blind from birth, the madman, &c. Such persons are debarred from the rights of co-parcenary but are given maintenance in lieu. That this is owing not to a denial of their birth status, but to a personal disqualification preventing enjoyment, is clear by the fact that the children of such persons, being within the allowed degrees and not themselves stigmatised with the personal defect, get by their birth the full status of co-parcenary.

There must also be added another class, equally the subject of special texts. The right of this class to maintenance lies in personal relationship but is limited to the widow, the parent, and the infant child. It does not include the grandson. It is obvious that so far as certain individuals are concerned this category overlaps the first. But it is an obligation which is independent of the fact of there being ancestral or joint family property. It is an obligation attaching to the individual. These categories exhaust the classes of persons who have such a right to maintenance under the Mitakshara law.

Their Lordships will now revert to the position of an impartible zemindari as it has been fixed by the decisions before referred to. An impartible zemindari is the creature of custom, and it is of its essence that no co-parcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zemindari were not impartible, would be entitled as of right to maintenance. There is no claim based on personal relationship.

This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to mainten-

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ance in the case of an impartible zemindari. Just as the impartibility is the creature of custom so custom may and does affirm a right to maintenance in certain members of the family. No attempt has been, as already stated, made by the plaintiff to prove any special custom in this zemindari. That by itself in the case of some claims would not be fatal. When a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the courts of a country, the courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end truly a matter of process and pleading. Analogy may be found in instances in the law merchant or in certain customs in copy-hold tenure. In the matter in hand their Lordships do not doubt that the right of sons to maintenance in an impartible zemindari has been so often recognised that it would not be necessary to prove the custom in each case. It is this which will explain the reference to rights of maintenance in cases decided subsequent to the decision in the case of *Rani Sartaj Kuari v. Rani Deoraj Kuari* (1) For example, in the case of *Raja Yarlagadda Mallikarjuna Prasada Nayudu v. Raja Yarlagadda Durga Prasada Nayudu* (2), the judgment says:—

“As to the zemindari estate, the Board held that it was impartible, and the consequence is that the plaintiffs as the younger brothers of the zemindar retain such right and interest in respect of maintenance as belong to the junior members of a raj or other impartible estate descendible to a single heir.”

But their Lordships may agree here with what was said by the court in the case of *Nilmony Singh Deo v. Hingoo Lall Singh Deo* (3),

“We can find no invariable or certain custom that any below the first generation from the last Raja can claim maintenance as of right.”

Apart from custom, what is left? The matter is tersely put by SANKARAN NAIR, J., in the Court of Appeal:—

“The plaintiff does not advance any claim based on relationship. He refuses to admit any relationship. . . . As there was no community of interest the property is not burdened with his claim in the hands of a donee.”

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

John Josselyn.—Solicitor for the appellant.

Douglas Grant.—Solicitor for the respondent.

A. P. P.

Appeal dismissed.

(1) [1888] 15 I. A., 51.

(2) [1900] 27 I. A., 157.

(3) [1879] I. L. R., 5 Cal., at p. 259.

HIGH COURT.

NAIMUL HAQ (*Plaintiff*)
versus

MOHAMMAD SUBHAN-UL-LAH (*Defendant*)*.

Mohammedan Law—Waqf—Deed providing for support of grantor's family and descendants—Nominal dedication for charitable purposes—Waqf illusory—Musalmans Waqf Validating Act (VI of 1913), whether retrospective.

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PIGGOTT, J.
WALSH, J.

Neither section 3 nor section 4 of the Musalmans *Waqf* Validating Act is retrospective in its operation ; consequently if a *waqf* created before the passing of that Act was illusory, and therefore invalid in the eye of the Mohammedan Law, it would not be validated by reason of any retrospective operation of that Act.

A Mohammedan executed three documents purporting to make a *waqf*. By the first of these he made no substantial and effective dedication of the property nor did he specify the objects of the endowment ; there was no effective alienation of the rights of ownership ; by the second of these instruments he provided that on his death the defendant, a minor, who was a son of a son of his, would be the *mutwalli* under the guardianship of the plaintiff ; it referred to his will as laying down the manner in which the income of the property was to be spent or invested. The third document was the "will" and under it provision was made for religious and charitable purposes ; but reading it as a whole the manifest intention of the testator was to dedicate the income of the property estimated at Rs. 20,000 per annum to the advancement of the members of his family, to tie up the property against the possibility of waste, to make such investments after defraying all expenses that the estate would go on augmenting steadily ; while the provision in regard to the charitable and religious purposes was ten per cent of the total income :—

Held that having regard to the course of rulings of the Privy Council and of the High Courts prior to the passing of Act No. VI of 1913, no valid *waqf* was created.

FIRST APPEAL from an order of BABU LAL GOPAL MUKERJI, Subordinate Judge of Gorakhpur.

The plaintiff was the daughter's son, and the defendant the son's son, of Maulvi Habibullah Khan who died in 1891. The plaintiff

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alleged that Habib-ul-lah Khan had made a *waqf* of nearly the whole of his property "in favour of his children, relations and dependents, as well as for charitable purposes," and that the defendant was in possession of the *waqf* property as *mutwalli* but was misconducting himself in various ways. The plaintiff sued as a beneficiary under the *waqf* and claimed a declaration that certain property specified in the plaint was *waqf* property, and also the removal of the defendant from *mutwalliship* and the appointment of a new *mutwalli*. The defendant filed a written statement admitting the *waqf* but resisting the suit on other grounds, one of which was that the suit contravened the provisions of section 92 of the Code of Civil Procedure. Subsequently, with the leave of the court, he amended his pleadings and denied that there was a 'valid *waqf* "according to the Mohammedan Law and statutory enactments."

Habib-ul-lah Khan had executed from time to time three documents relating to the *waqf*. The principal features of those documents are summarized in the judgment; briefly outlined, they were as follows:—The first, dated 30th January, 1885, purported to make a *waqf*, but there was neither a substantial and effective dedication of the property nor any specification of the objects of the endowment; there was no effective alienation of the rights of ownership. The second document was dated 10th June, 1889; it provided that after the death of Habib-ul-lah Khan the defendant, who was then a minor, was to be the *mutwalli* under the guardianship and tutelage of the plaintiff; and it referred to the will as laying down the manner in which the income of the property was to be spent or invested. The third document was the will, written up from time to time between 1st June, and 19th October, 1889. In it there was undoubtedly some provision made for religious or charitable purposes; but in its essence it was a family settlement in perpetuity. The primary object appeared to be to provide for his lineal descendants in the male and female line, forever; and to tie up the estate against all possibility of waste on their part and in such a manner that the estate would go on increasing steadily for ever. whereas the prescribed expenditure on religious and charitable objects would bear an ever decreasing proportion to the total income. The expenditure for purposes of a religious and charitable nature was less than 10 per cent of the testator's estimate of the income of the property, and this percentage would be a continually decreasing one. A small amount was to be spent in connection with the performance of *fateha* and *urs* ceremonies. In the event of the family becoming wholly extinct, both in the male and the female lines of descent, the whole of the income was to be spent on religious and charitable purposes set out in the will.

The court of first instance held that there was no duly created *waqf* and no dedication; and that the *waqf* was illusory and a mere cloak for family aggrandisement. The court also held that Act VI

of 1913 had no retrospective effect and did not apply to the present case. On these grounds the suit was dismissed ; the plaintiff appealed to the High Court.

Iqbal Ahmad, for the appellant, submitted that Act VI of 1913 had a retrospective effect and applied, therefore, to the *waqf* in question ; so that even if that *waqf* were virtually in favour of the descendants and family of the *waqif*, it would be a valid *waqf* under that Act. The whole scheme of the Act and its provisions left no room for doubt that the Legislature did intend the Act to have retrospective effect, and that it did sufficiently express that intention.

The Mussalmans *Waqf* Validating Act, Act VI of 1913, was passed expressly "to declare the rights of Mussalmans to make settlements of property by way of *waqf* in favour of their families, children and descendants;" and an Act which was, in its nature, a declaratory Act should be presumed, in the absence of a contrary indication, to have a retrospective effect. Reliance was placed on the case of

Attorney-General v. Theobald, [1890] 24 Q. B. D., 557.

The Act did not profess to confer for the first time certain rights on Mussalmans which they did not have before ; it merely declared and made certain and unambiguous the existence of those rights. Certain judicial pronouncements of the Privy Council having cast doubts on those rights, the Act was passed merely to remove those doubts and to re-affirm the rights. Such an Act would naturally have retrospective, as well as future effect.

In fact, *waqfs* in favour of the family and descendants of the *waqif* were universally recognized as valid, but in the case of

Mohammad Ahsanulla Chowdhry v. Amarchand Kundu, [1889] I. L. R., 17 Cal., 498. P. C.,

their Lordships of the Privy Council held a contrary view, and since then in a series of cases such *waqfs* had been held to be invalid. Act VI of 1913 was passed, as the preamble showed, to remove the doubts which had been created by these decisions as to the validity of such *waqfs*. The preamble distinctly referred to *waqfs* "created," that is, *waqfs* which has already come into existence. The Act was not confining itself only to those *waqfs* which might be created in future. Proceeding to a consideration of the sections of the Act, it was clear that while section 3 provided for *waqfs* which were to be created in the future, section 4 was enacted for the purpose of providing for *waqfs* already created ; the object of section 4 being to remove, in the case of such *waqfs*, all doubts regarding their validity.

The word "such" in section 4 referred to *waqfs* of the kind mentioned in the preamble and in section 3. Any other interpretation would render the provisions of section 4 redundant. On

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these grounds it was submitted that Act VI of 1913 was applicable to the *wagf* in question, and that under that Act the *wagf* was clearly a valid one.

In the cases of

Rahimunissa Bibi v. Sheikh Manik Jan, [1914] 19 C. W. N., 76 ;

Amir Bibi v. Asisa Bibi, [1914] 26 I. O., 906 s.o. 16 Bom. L. R., 977.
(Bom.) ;

Mohammad Bukh Majumdar v. Dewan Ajman Reja, [1915] I. L. R.,
43 Cal., 158 ;

the contrary view had been taken and it had been held that Act VI of 1913 had no retrospective effect ; but it was submitted that those cases had not been rightly decided. There was not a word in the judgments of those cases to suggest that any argument based upon section 4 of the Act had been addressed to the learned Judges, or that the provisions of the said section had been taken into consideration.

[*Tej Bahadur Sapru*, for the respondent, cited the case of

Mutu K. A. Ramanadan v. Vava Levvai, [1916] 15 A. L. J. R., 139 ;
s. o. 44 I. A., 21. P. O.]

The question whether the Act had a retrospective effect was neither argued before, nor decided by, their Lordships of the Privy Council in that case. The respondent's argument in that case was that there was a substantial dedication to charity, and as such the *wagf* was valid irrespective of the provisions of the Act. It was not necessary for him to invoke the Act in his aid, nor did he do so.

Secondly, even apart from any aid derived from Act VI of 1913, the *wagf* was a legitimate and valid *wagf* and would stand the test laid down in the various cases. The leading cases on the subject were :

Mohammad Ahsanulla Chowdhry v. Amarchand Kundu, [1889] I. L. R., 17 Cal., 498. P. O.

Rasamaya Dhur Chowdhry v. Abul Fata Mohammad, [1891] I. L. R., 18 Cal., 899.

Abul Fata Mohammad v. Rasamaya Dhur Chowdhry, [1894] I. L. R., 22 Cal., 619. P. O.

Mujib-un-nissa v. Abdur Rahim, [1900] I. L. R., 23 All., 233. P. O.

Mohammad Munawar Ali v. Rasia Bibi, [1905] I. L. R., 27 All., 820.
P. O.

Fazlur Rahim v. Mohammad Obedul Asim, [1908] I. L. R., 80 Cal., 666.

Mutu K. A. Ramanadan v. Vava Levvai, [1916] 15 A. L. J. R., 139 ;
s. o. I. L. R., 40 Mad., 116. P. O.

And the rule deducible from them was that a *waqf* would not be invalid by reason of its being in favour of the *waqif's* family and descendants, provided that there was at the same time a substantial dedication for charitable and religious purposes.

He then read and discussed the terms of the three deeds executed by the *waqif* and submitted that there was a substantial, and not merely illusory, dedication for religious and charitable purposes.

Further, the *waqf* had been acted upon for a period of 30 years, and the conduct of the parties during that period did not leave it open to the defendant to call the validity of the *waqf* in question now. Having regard to certain acts and transactions between the parties subsequent to the creation of the *waqf*, as well as to the whole course of conduct on the part of the defendant in relation to the *waqf* and the *waqf* property, the defendant was estopped from denying the creation and existence of a valid *waqf*.

Tej Bahadur Sapru, (with him *S. M. Sulaiman*), for the respondent, submitted that prior to the passing of Act VI of 1913 it had been definitely ruled by the Privy Council in a series of cases that where a *waqf* was nominally for charity but in truth and fact for the aggrandisement of the family, or where it sought to create a perpetuity for the benefit of the *waqif's* descendants, the *waqf* was invalid. In order that a *waqf* might be valid it was necessary that the dedication to charity should be substantial and not illusory. A gift might be to charity, and yet wholly colourable; as, for instance, in the present case, where from the terms of the instrument of *waqf* it was clear that the *waqif* intended to reserve and did reserve to himself uncontrolled dominion over the property, with power of disposition as he chose and power to appropriate the income according to his discretion. In the deed of 1885 there was no effective and genuine dedication of the property; on the other hand the intention manifestly was to tie up the property in perpetuity for the family; no religious or charitable objects were indicated therein. That deed was followed by the Book of Wills, in the opening portion of which the testator gave a long history of his family. It was evident that he took great pride in his ancestry and was anxious that his descendants should not go through those vicissitudes through which his immediate ancestor had gone. The whole object was, manifestly, so to tie up the property and its income, under colour of a *waqf*, as to secure its preservation and increase for all time for the aggrandisement of the family. The expenses, which were regulated with the greatest detail, were divided into two classes, 'compulsory' and 'optional'; and a comparison of the amount and nature of the two classes of expenses made that object clearer.

A consideration of the terms and tenor of the three deeds showed that the real purpose was the aggrandisement of the family

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and descendants in perpetuity, and that the dedication to religious and charitable objects was a mere sham. He submitted, therefore, that the *wagf* was wholly bad, as being illusory and colourable. He referred to and discussed the following cases :

Mahomed Ahsanulla Chowdhry v. Amarchand Kundu, [1889] I. L. R., 17 Cal., 498. P. O.

Rasamaya Dhur Chowdhuri v. Abul Fata Mahomed, [1891] I L R., 18 Cal., 399.

Abul Fata Mahomed v. Rasamaya Dhur Chowdhuri, [1894] I. L. R., 22 Cal., 619. P. O.

Abdul Gafur v. Nizam-ud-din, [1892] I. L. R., 17 Bom., 1. P. O.

Meer Mahomed Israil v. Sashki Churn Ghose, [1892] I. L. R., 19 Cal., 412 ;

Bikani Mia v. Shukh Lal Poddar, [1892] I. L. R., 20 Cal., 116. P. O.;

Mujib-un-nissa v. Abdur Rahim, [1900] I. L. R., 23 All., 233. P. O.;

Muhammad Munawar Ali v. Rasulan Bibi, [1899] I. L. R., 21 All., 329 ;

Muhammad Munawar Ali v. Razia Bibi, [1905] I. L. R., 27 All., 320. P. O.;

Phul Chand v. Akbar Yar Khan, [1896] I. L. R., 19 All., 211

He next contended that there were certain provisions in the will which could not be upheld. The provisions with regard to *Fateha* were bad, as the performance of *Fateha* ceremonies in respect of private tombs was not a valid object of a *wagf*. He relied on.

Kaleloola Sahib v. Nuseer-ud-din Sahib, [1894] I. L. R., 18 Mad., 201, and upon the judgment of KARAMAT HUSAIN, J. in

Fakhr-ud-din Shah v. Kifayat-ul-lah, [1910] 7 A. L., J. R., 1095, and upon the judgment of STANLEY, C. J., in

Mazhar Husain Khan v. Abdul Hadi Khan, [1911] I. L. R., 33 All., 400.

Next, as to estoppel, there was nothing to show that the appellant had been induced, in consequence of any representation on the part of the defendant, to alter his position to his detriment. So, there was no estoppel as against the defendant. On the contrary, certain acts and conduct of the plaintiff himself showed that he did not regard the *wagf* seriously but recognized the defendant as the real proprietor of the property.

Then, as regards Act VI of 1913, there was nothing in the preamble to show that it was intended to apply retrospectively. Although the Act might be regarded as a declaratory Act, yet the entire language of its provisions excluded the suggestion that it was intended to apply retrospectively. Section 3 clearly referred to *wagfs* in the future; and the word "such" in section 4 referred to the *wagfs* mentioned in the preceding section 3. The meaning of the two sections was that if a *wagf* were created which provided for the benefit of the family and postponed charity until after the

extinction of the family, such long postponement of charity would not make the *wagf* invalid. There was nothing to show that section 4 was meant to apply to *wagfs* which had been created in the past. Section 3 legalised a *wagf* for the maintenance and support of the *wagif's* family and descendants, provided that the ultimate benefit was reserved for the poor; and section 4 explained that this ultimate benefit for the poor might even be postponed so as to come into operation only after the extinction of the family or descendants. Section 4 was, therefore, not redundant and there was no reason for holding that the Act operated retrospectively. He cited the following cases :

- Harding v. The Commissioners of Stamps*, [1898] A. C., 769; at p. 775;
Amirbibi v. Asirabibi, [1914] 26 I. C., 906; S. C., 16 Bom. L. R., 977;
Rahmunissa Bibi v. Shaikh Manik Jan, [1914] 19 C. W. N., 76;
Mahomed Bukh Majumdar v. Dewan Ajman, [1915] I. L. R., 43 Cal., 158;
Mutu K. A. Ramanadan v. Vara Levtai, [1916] 15 A. L. J. R., 139;
 S. C. I. L. R., 40 Mad., 1164, p. o.;
Jotiram Khan v. Jonaki Nath, [1914] 33 I. C., 54; at p. 56. (Cal.).

It was then urged that the suit was one to which section 92 Civil Procedure Code, applied. If the *wagf* in question was not a gift for the family but a gift to charity, then it was clear that it was a *wagf* within the purview of section 92, and the sanction of the proper authority should have been obtained for the institution of the suit. He referred to the case of

Budres Das Mukim v. Chooni Lal, [1906] I. L. R., 33 Cal., 789.

He further contended that relief (b) which asked for the removal of the defendant from *Mutwalliship* was one of those reliefs which could be claimed under section 92 alone. The mere fact that the plaintiff had added a relief asking for a declaration that the property was *wagf* property would not save the suit from the operation of section 92. The substance and not the form of the suit should be looked at.

Iqbal Ahmad, in reply, submitted that the defendant had attacked the validity of the *wagf* in question on the sole ground that the main object of the *wagf* was the aggrandisement of a private family and that there was not a substantial dedication for charitable or pious objects. It was not the defendant's case that the *wagf* was not otherwise valid in all respects according to the Mohammedan Law.

The objects of the *wagf* were specified by the *wagif* during his life-time. It was quite open to a Mohammedan to create a *wagf* and postpone the specification of objects to a future date. Moreover, a *wagf* even without specification of objects was valid. He referred to

Ameer Ali : Mohammedan Law, Vol. I; 4th Edn : pp. 218, 223, 224 ;

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The performance of *Fateha* and *urs* ceremonies was one of the proper objects for which a *wagf* could be created, and a *wagf* for those purposes was valid. In the case of

Fakhr-ud-din Shah v. Kifayat-ul-lah, [1910] 7 A. L. J. R., 1095,

which was cited by the respondent, the judgment of KARAMAT HUSAIN, J., was affirmed in Letters Patent Appeal on another ground. The appellant was fully supported by the case of

Biba Jan v. Kalb Husain, [1908] 6 A. L. J. R., 115,

and by the judgment of BANERJI, J., in

Makhar Husain Khan v. Abdul Hadi Khan, [1911] 8 A. L. J. R., 162.

He further contended that section 92 Civil Procedure Code did not apply to the facts and circumstances of the present suit. The plaintiff had a right of suit which existed independently of the provisions of that section. The respondent had not shown that section 92 applied either to the *wagf* in question or to the plaintiff's claim as brought.

The following judgments were delivered.

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PIGGOTT, J.—The plaintiff in this case is the daughter's son and the defendant the son's son of one Maulvi Habib-ul-lah Khan who died on April 3rd, 1891. The plaintiff's case is that the said Maulvi had, in his life-time, made a *wagf*, or dedication for religious and charitable purposes under the Mohammedan Law, of certain property specified at the foot of the plaint; that the defendant is in possession of the said property as *mutwalli*, or trustee of the endowment, but is misconducting himself in various ways, and principally by wasting and alienating the endowed property and by refusing to make payments which he is bound to make under the terms of the endowment. The plaintiff claims to be interested in the trust as a beneficiary under the same, and to be entitled to maintain the suit independently of the provisions of section 92 of the Code of Civil Procedure. The reliefs sought are a declaration that the property specified at the foot of the plaint is "the *wagf* property," the removal of the defendant from the post of *mutwalli*, or managing trustee of the endowed property, and the appointment of a new *mutwalli* to be selected by the court in its discretion from amongst the persons entitled to be so appointed under the terms of the alleged deed of endowment. A list of these persons, including the plaintiff himself, is appended to the plaint; but none of the other persons in the list has been impleaded as a party to the suit. In the defendant's written statement as originally filed the suit was resisted on a variety of grounds; but it was admitted that a valid endowment or *wagf* had been made by Maulvi Habib-ul-lah Khan of the property in suit. At a later stage the defendant applied to the trial court for permission to amend his pleadings in this respect, his case being that his admission above referred

to had been made upon defective legal advice and amounted to nothing more than an erroneous admission upon a point of law. He was allowed to file an amended pleading, in which he denied that Maulvi Habib-ul-lah Khan had ever made a valid *waqf* of any property, and pleaded more particularly that, on no possible view of the facts or the law, could it be held that there had ever been any dedication to religious or charitable purposes of the property specified in the lists (b) and (c) appended to the plaint. The case went to trial on issues framed upon the pleadings as thus amended, and the plaintiff has no valid ground for complaining of the exercise of a discretion undoubtedly inherent in the trial court. It may indeed be pointed out at once that it has had to be conceded in argument before us that no *waqf* was ever made of the property specified in list (b).

The court below framed a number of issues, but has dismissed the plaintiff's suit, in the main upon a finding that there was never any valid *waqf*, or dedication of any of the property in suit to religious or charitable purposes. The memorandum of appeal to this Court is a prolix and argumentative document; but in substance three points only are taken and have been argued before us.

(a) It is contended that the defendant is estopped from denying that there has been a valid *waqf* of the property in suit.

(b) It is claimed that a valid *waqf* under Mohammedan Law was created by three specified documents, admittedly executed by Maulvi Habib-ul-lah Khan; or in the alternative by the first two of these documents: or again in the alternative by the third document, which is the will of the said Habib-ul-lah Khan.

(c) It is pleaded that, even if the court should repel the second of the above contentions, in view of the law as laid down by sundry authoritative decisions prior to the passing of the Mussalmans *Waqf* Validating Act (No. VI of 1913), the said Act is retrospective in its effect and that the arrangement effected by the will of the deceased Maulvi Habib-ul-lah Khan amounts to a valid *waqf* under the provisions of this statute. On behalf of the respondent each of the above propositions is denied, and it is also sought to support the decision of the court below on a plea decided by that court against the defendant, namely,

(d) that the suit as brought, for the reliefs specified in the plaint, is one which a person claiming an interest in the alleged trust could only maintain under the provisions of section 92 of the Civil Procedure Code, so that the plaint ought to have been rejected as it stood, on the ground that it contravenes the provisions of that section and was filed without the consent of the prescribed authority.

Strictly speaking, the questions raised in the pleadings (a) and (d) above set forth are in their nature preliminary to the consider-

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ation of the appeal on its merits, as the questions raised in pleadings (b) and (c) could not arise if point (a) were decided in favour of the appellant or point (d) in favour of the respondent. The case has, however, been fully argued out before us; and I find it practically more convenient to proceed at once to the consideration of the main questions raised by the appeal.

According to the plaint the *wagf* was created by a deed dated January 30th, 1885, the other two deeds referred to in the plaintiff's pleadings being merely supplementary documents serving to supply omissions in, and to give directions required by, the actual deed of *wagf*. The plaintiff is no doubt entitled to ask that all three documents should be taken into consideration, and even that they should be read together in connection with his contention that the defendant as *mutwalli* has been acting in contravention of the conditions of the trust; but there are two questions which he cannot be allowed to confuse. His case in the court below was that Maulvi Habib-ul-lah Khan created the *wagf* in question in his life-time; he never set up a testamentary *wagf* intended to come into operation at the death of the testator. Had he done so certain questions would have been raised as to which there has been no inquiry in the court below; it has not been ascertained what heirs Maulvi Habib-ul-lah Khan left him surviving at the moment of his death, or whether the said heirs gave their consent to the *wagf* so as to make it binding in respect of more than one-third of the property of the testator. In the eye of the Mohammedan Law a *wagf* is a transfer of property whereby the transferor or *wagif* divests himself of the ownership of the same in favour of the Almighty: there is consequently a very wide difference between setting up a transfer effected by Maulvi Habib-ul-lah Khan on January 30th, 1885 and alleging a transfer by testamentary bequest, which took effect only on the death of the testator on April 3rd, 1891. If the result of the case turned upon it, which I do not think it does, I should entertain grave doubts as to whether it was open to this Court, in appeal, to find that there had been no *wagf* by Maulvi Habib-ul-lah Khan in his life-time but a valid testamentary *wagf* taking effect from the date of his death.

With regard to the principles of law applicable to the consideration of the three main documents in this case we were referred to the usual standard authorities, by which the law on the subject was settled prior to the passing of Act No. VI of 1913. I set then down here for convenience of reference.

Mahomed Ahsan-ul-lah Chowdhry v. Amarchand Kundu (1),
Rasamaya Dhur Chowdhuri v. Abul Fateh Mohammad Ishak (2),
Abul Fateh Mohamed Ishak v. Rasamaya Dhur Chowdhuri (3),

(1) [1889] I. L. R. 17 Cal., p. 498.

(2) [1891] I. L. R. 18 Cal., p. 399

(3) [1894] I. L. R. 22 Cal., p. 619.

Mujib-un-nissa v. Abdur Rahim (1), *Muhammad Munawwar Ali v. Razia Bibi* (2), *Abdul Gafur v. Nizam-ud-din* (3).

Another case of considerable interest, which may also be referred to in connection with the question of the retrospective effect of Act No. VI of 1913, is that of *Mutu Ramanadan Chettiar v. Vava Levvai Marakayar* (4). So far as the case now before us is concerned, I do not think I can state the effect of these decisions better than by quoting the words of a learned Judge of this Court in *Mazhar Husain Khan v. Abdul Hadi Khan* (5).

"A valid *waqf* is created if the owner of the property, the subject of the *waqf*, divests himself of it and appropriates it to charitable or religious purposes. . . . In order to constitute a valid *waqf* there must be a substantial dedication of the property to religious or charitable uses at sometime or other. . . . There must be a substantial and not merely a colourable dedication of the property; the religious or charitable purpose should not be so unsubstantial or illusory as to give to the settlement merely a colour of piety, the real object being the aggrandisement of the family.

Judged by these tests the "dedication" said to be effected by the deed of January 30th, 1885, will not bear examination for a moment. There is no substantial and effective alienation of the property; the transaction is "illusory" in the plainest sense of the word. The man who executed that document had no intention whatever of parting, in his own life-time, with the effective ownership of any property whatsoever. He makes a great parade of piety, learning and liberality, but he is at the utmost pains to take away with one hand all that he purports to give with the other. He specifies no objects for the endowment, appoints himself *mut-walli* for life, and quite explicitly covenants that:—"I shall during my life-time spend the profits of the property at my own discretion." This is bad enough; but what absolutely clinches the matter is that the pious executant reserves to himself "exclusive power to transfer" any of the property ostensibly dedicated. There is a vague suggestion that this will only be done "if I find that it causes loss in any way;" but the learned Maulvi is too careful of his own interests to be satisfied even with this. He goes on to provide in express terms that he is to be at liberty to exercise this power of alienation at his own absolute discretion, "if for some other reason I find it advisable to do so." Here again he makes a half-hearted attempt to keep up the attitude of the pious donor by stipulating that he will "purchase another property in lieu of it and make it

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(1) [1900] I. L. R., 23 All., p. 233. (2) [1905] I. L. R., 27 All., p. 320.

(3) [1892] I. L. R., 17 Bom., p. 1.

(4) [1916] 44 I. A., p. 21, I. L. R., 40 Mad., 1164

(5) [1911] 8 A. L. J. R., p. 162, at p. 171.

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part of the property endowed;" but even this limitation of his authority irks him, and he promptly adds that he may also, in the alternative, "spend the consideration for some pious purposes," of the piety of which he is himself of course the sole judge. A document so worded would not operate to transfer ownership in favour of any private individual, and why it should be supposed to do so in favour of the Almighty I cannot imagine. The document is a sham from first to last; it creates no endowment and "dedicates" no property to any purpose whatsoever.

The position is in no way improved by the deed of June 10th, 1889. By this time the Maulvi's schemes for a family settlement had been a good deal upset by the death of his only surviving son. The only possible successor he could think of to the office of *mutwalli* which he had reserved to himself under the first deed was the son of his other son, the present defendant, at that time a mere child. He accordingly supplements the deed of January 30th, 1885, by nominating this defendant to succeed him as *mutwalli*, by putting him under the guardianship of the present plaintiff and by laying down certain rules for his guidance. He is careful to reiterate the fact that he himself retains full control over the property for his own life-time, under no obligation to do anything but spend the money on "proper objects"; but he refers to his will, which he was then engaged in drawing up, for a statement of the purposes on which the income of the endowed property is to be spent hereafter by the *mutwalli* who shall succeed him. He also takes occasion to lay down directions as to what is to become of the property when "no descendant of mine, male or female, is left." I am quite clear that, if no *waqf* was created by the deed of 1885, none came into existence with the execution of this document on June 10th, 1889.

There remains for consideration the will of Maulvi Habib-ul-lah Khan, a portentous document, filling twenty eight printed pages of our record, commenced by him on June 1st, 1889 and finally executed on October 29th, 1889. The document requires to be considered as a whole. It does undoubtedly make provision for purposes which may fairly be classified as religious or charitable; but in its essence it is a family settlement in perpetuity. The mind of the testator is glaringly apparent from the very outset. He is going to provide for his lineal descendants, in the male and female line, for ever, so long as one of them is left; he is careful to tie up the property against all possibility of waste on their part and to keep it out of the reach of their creditors. What is more, he is going to provide them with a steadily increasing property. The present income of the estate which he thus "dedicates" to their advancement he estimates at Rs. 20,000 per annum, adding that with good management he believes that this "can be much increased." He limits the future *mutwalli* rigidly to a certain scale of expenditure; he

reckons that after the *mutwalli* has drawn his own comfortable remuneration, paid all the prescribed allowances to other members of the family, met all the household expenses and all the payments on account of charities or religious observances which he has laid down, "the expenses cannot exceed Rs. 10,000 or Rs. 11,000." The handsome (and of course steadily increasing) surplus is to be regularly invested by the *mutwalli* for the benefit of the endowment. The ingenious old gentleman has even hit upon a plan for stimulating the energies of future *mutwallis* in the matter. Whatever properties they acquire out of the annual surplus they may keep one-fourth of the income of the same to themselves, adding it to the prescribed remuneration for their services. The remaining three-fourths however of the income of the newly acquired properties must go to swell the endowment by an ever increasing series of fresh investments. In fact, if Maulvi Habib-ul-lah Khan can contrive it, this monstrous estate is to go on growing indefinitely, snowball fashion, the prescribed expenditure on religious and charitable objects bearing an ever decreasing proportion to the total income and the available surplus for re-investment increasing year by year, and the process is to continue so long as any descendant of the testator, in the male or female line, survives. The possible contingency that the number of his lineal descendants might increase until no adequate provision remained for their maintenance in the "compulsory" and "optional" expenses prescribed by the will does not seem to have been fairly faced by the testator. The one person who would be increasingly well off is the *mutwalli* for the time being, with his remuneration of 125 per cent of the income of the newly acquired properties. The object of the entire scheme is to create a perpetuity of the most poisonous kind, under which the endowment is to continue growing like some unwholesome excrescence on the body politic, for the benefit of no one in particular except the *mutwalli* for the time being, but for the honor and glory of the testator and of his family, from amongst whose members the *mutwalli* is always to be chosen. In the argument before us the parties were divided as to whether the total provision made for expenditure on objects which could, by any stretch of language, be described as "religious, pious or charitable" amounted to Rs. 1,476 or to Rs. 2,674 per annum. The truth probably lies between the two extremes; but the plaintiff has made up his total by including all the life annuities granted to old servants of the testator, such as any gentleman of position might reasonably and properly desire to make by his will. I should not be disposed to accept a terminable life-annuity of this sort as representing expenditure on a "charitable" object, in the sense in which the word is used even in the *Waqf* Validation Act of 1913. Many of the other items of expenditure claimed by the plaintiff as of a "religious" or "charitable" nature amount to no more than the incurring of such expenses as any Mohammedan gentleman of posi-

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tion would expect to meet in connection with the recurring festivals and observances of his religion. The one really substantial item is the annual expenditure on the up-keep of an Arabic School; and I note that one of the controverted points in the court below was whether this school had not been compulsorily closed for want of pupils. In any case it seems clear to me that the expenditure prescribed in the will for purposes of a religious and charitable nature was less than 10 per cent of the testator's estimate of the income of the endowed property, and that this percentage would necessarily be a continually decreasing one if the terms of the will were carried out. We were told in argument that this is just the kind of family settlement which we may expect under Act No. VI of 1913. I trust that the common sense of the Mohammedan community will protect them from the creation of many *wagfs* such as that purporting to be embodied in the document now in question; if not, I can only say that the statute will prove as injurious to the true interests of that community as to those of the country at large.

In any case I feel no hesitation in holding that the will of Maulvi Habib-ul-lah Khan, considered apart from the provisions of Act No. VI of 1913, does not constitute a valid *wagf*. The dedication of property to religious or charitable purposes is "unsubstantial and illusory." The real object of the testator is fully apparent from the terms of the document itself; it is "under a colour of piety" to effect "the aggrandisement of his family." I think that even this object is clumsily and somewhat ineffectively carried out, unless the expression above quoted be enlarged so as to read, "the aggrandisement of the family name," but the question of the testator's object requires to be considered apart from the question of the effectiveness of the methods by which he pursued it.

The evidence as to the subsequent conduct of the parties does not seem to me to carry the case much further. When Maulvi Habib-ul-lah Khan died the defendant was still a boy, apparently only about ten years of age. The plaintiff accordingly took possession of the property believed to be included in the *wagf* as guardian on behalf of the minor defendant, treating the latter as having succeeded to the *mutwalliship*. This record does not show what heirs of Habib-ul-lah Khan were in existence whose interests were adversely affected by this arrangement, what was the extent of that gentleman's property which he did not purport to include in the family settlement made by his will, or what was done about this other property. So far as the evidence in this case goes it would seem that the properties specified in list (b) appended to the plaint, which had devolved on Maulvi Habib-ul-lah Khan subsequently to the month of October 1889, were treated on the same footing as the rest of the alleged trust property, though it has had to be conceded in this Court that these properties were

never made the subject matter of any *waqf*. Under the terms of the will the plaintiff's guardianship was to continue until the defendant attained the age of twenty-one; but the parties took it on themselves to terminate the arrangement about a year earlier, by a deed of July 31st, 1901. It is worth noticing that under the plaintiff's management the endowed property had been increased in ten years by acquisitions bringing in an additional income of Rs. 5,000 a year. Under the terms of the will the plaintiff was entitled to one-fourth of this income; but he bargained with the defendant for the transfer to himself in proprietary right of certain landed property taken from out of the new acquisitions. He accepted this transfer in lieu of one-fourth of the income of the newly acquired properties and of another allowance to which he was entitled under the will. In this transaction both parties seem to have arrogated to themselves a freedom in the matter of dealing with the endowed properties not strictly consistent with the idea of a *waqf*; yet they profess in general terms to be acting under the dispositions effected by the will of their common grandfather. I can see nothing in the conduct of the defendant in this connection by which he can be said to have caused the plaintiff to alter his position to the disadvantage of the latter; there is therefore nothing to support the plea of estoppel. The defendant did no doubt enter into the possession of the property ostensibly as *mutwalli* of a *waqf*; but neither can it be said that he at any time made any representation to the plaintiff on the subject in consequence of which the latter changed his position to his own disadvantage, nor has either party consistently dealt with the property in suit as held under the alleged trust. The plaintiff had to admit that during his period of management he had incurred expenses (for instance Rs. 10,000 on the wedding of the defendant) not warranted by the terms of their grandfather's will; and the defendant has been raising money by hypothecation of portions of the property in suit in a manner very difficult to reconcile with any honest belief on his part that it had been made the subject of a valid *waqf*. It has been proved moreover that the largest loan thus raised was arranged with the help of the plaintiff, who signed the mortgage deed as an attesting witness.

On the first two points set down for determination my findings are that there is no estoppel against the defendant, and that no valid *waqf* was created by any of the deeds executed by Maulvi Habib-ul-lah Khan, whether considered singly or in combination.

I am also satisfied that no *waqf* came into existence with the passing of Act No. VI of 1913 in consequence of any retrospective action on the part of that statute. I have already pointed out that a *waqf* under the Mohammedan Law involves a transfer of the ownership of the property which is made the subject matter

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of the same; if the legislature intended to give validity as transfers of property to an unascertained number of past transactions which had no such effect at the time when they were executed, I should have expected it to do so in very clear terms and subject to various conditions and precautions. The utmost that can be said about the terms of the Act as passed is that they involve some ambiguity; and I find no provision made for the rights of *bona fide* transferees for value, and no period laid down within which the documents said to be thus validated must be propounded or claims on the same preferred. In examining the statute itself I find nothing decisive on the point in the wording of the preamble, or in the fact that there is no express provision as to the date from which the Act is to come into force. On the other hand the governing words seem to be found at the commencement of section 3—"It shall be lawful"—and these on the face of them imply a power to be exercised in future from the date of the passing of the Act, and repel the suggestion of retrospective action. A difficulty has been raised regarding the expression "shall be deemed to be invalid" in section 4; but the court below is certainly right in saying that this entire section is controlled by the opening words, "no such *wagf*." It would be unfortunate if the courts were driven to the conclusion that this one section of this short Act is retrospective, while the rest of the Act is not. I think this contingency can be avoided by interpreting the words "no such *wagf*" in section 4 as equivalent to "no *wagf* hereafter created under the provisions of section 3." I do not say that this is the only interpretation of which the words are capable; but it seems to me a possible and a fairly reasonable one, and it makes sense of the Act as a whole.

Such authority as has hitherto come into existence on the point is wholly against the appellant. The question has been touched upon in argument before the Privy Council in the last of the cases on the list given in an earlier part of this judgment (44 Indian Appeals, p. 21). It was the respondent in that appeal who stood to win if Act No. VI of 1913 has retrospective effect and counsel for the appellant repudiated this contention in advance. As it happened the respondent had a won case independently of the Validating Act, so the point was not pressed; but the words used by their Lordships in disposing of the appeal do not suggest to my mind that they would have looked favourably on the suggestion that the Act operated so as to validate past transactions. In the following cases the point has been considered and opinions have been expressed against the retrospective action of the statute:

Rahim-un-nissa Bibi v. Shaikh Manik Jan (1), *Mahomed Bukth Majumdar v. Dewan Ajman Raja* (2), and *Amirbibi v. Azizabibi* (3).

(1) [1914] 19 C. W. N., p. 76. (2) [1915] I. L. R., 43 Cal., p. 158.

(3) [1914] 16 Bom. L. R., p. 977.

In no one of these cases has the particular difficulty been dealt with which has been pressed upon us with regard to the wording of section 4 of the Act; and in the second case the opinion expressed on the point now in issue is of the nature of an *obiter dictum*. At any rate no High Court has yet ventured to interpret the Act in the sense desired by the present appellant.

There remains only the contention raised by the respondent as to the bearing on this suit of section 92 of the Code of Civil Procedure, and this it is not necessary for me to determine now in order to dispose of the appeal. I desire however to say a few words on the point. Some of the arguments addressed to us on behalf of the appellant overlooked the fact that there has been a substantial change in the law since the passing of the present Code of Civil Procedure Act No. V of 1908. Under the corresponding section 539 of the former Code there was a certain conflict of authority on the question whether the section had any restrictive effect in respect of any right of suit which might exist independently of its provisions. The addition of clause (2) to section 92 of Act No. V of 1908 makes it clear that the section is mandatory. A suit claiming any of the reliefs specified must be brought under and in conformity with its provisions, or not at all. If the plaintiff sets up a trust, "created for public purposes of a charitable or religious nature," and claims "as a person having an interest in the trust" any of the reliefs specified in the section, he must do so in accordance with its terms. One of the objects of the section is that the jurisdiction of our courts shall not be invoked to control and supervise the administration of public trusts unless and until a responsible officer of Government has satisfied himself that the matter is one which calls for interference in the public interests. In the present suit the main reliefs sought are those specified in clauses (a) and (b) of section 92 (1), Civil Procedure Code; the additional relief sought by way of declaration is probably not maintainable at all without a prayer for consequential relief, and is in any case the same relief in substance as is specified in clause (c), besides being included in clause (h) of the same sub-section. The present plaintiff therefore could only get round the prohibition laid down in section 92(2) aforesaid by contending that the religious and charitable purposes of the *waqf* which he desires to set up are not "public purposes" within the meaning of the section. An ultimate dedication of property for the benefit of the poor would, I take it, certainly be a "public" purpose. Under the Mussalman *Waqf* Validating Act (No. VI of 1913) the Mohammedan community has obtained legislative recognition of the claim that, under the religious law binding upon a member of that community, he is entitled to settle property in perpetuity on his "family, children, or descendants," provided only he keeps up at least the pretence that some purpose of a "public" nature is served by the endow-

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ment. I can only ask whether Mohammedan lawyers generally would be prepared, now that Act No. VI of 1913 is on the statute book, to turn round and say that in a "family *wagf*" under the said Act the ultimate dedication of the property to public purposes is after all such a mere pretence that trusts or endowments of this nature are not subject to the provisions of section 92 of the Code of Civil Procedure.

Having said this much, I think it fair to add, with reference to the facts of this particular case, that I am far from holding that a suit by the present plaintiff to recover the arrears of the allowance reserved to him under his grandfather's will, and not bargained away by him in the deed of July 31st, 1901, would not be maintainable. On the facts at present before us I think the defendant would find it hard to resist such a suit. If he has taken this property, or any of it, under the terms of his grandfather's will, he would seem to have taken it subject to a trust in favour of various persons, including the present plaintiff; and the liability could be enforced upon a suit properly framed.

The present suit has in my opinion been rightly dismissed by the learned Subordinate Judge, and I would dismiss this appeal with costs, including fees on the higher scale.

Walsh, J.

WALSH, J.—I entirely agree. I very much doubt whether the plaintiff could have maintained this suit in its present form, in any case, but the main contention that there was any genuine religious dedication at all has completely broken down. No doubt there are private trusts in the will the breach of which might form the ground for a claim for relief but this is not the plaintiff's case. Taking the view we do the retrospective operation of the Act of 1913 does not arise for decision but after hearing the point fully argued I agree with my brother's opinion about it.

B. K. M.

Appeal dismissed.

JAMNA PRASAD (*Defendant*)*versus*KARAN SINGH AND OTHERS (*Plaintiffs*)*

Revision—Ejectment suit under section 53, Agra Tenancy Act—Landlord and tenant—Appeal to District Judge dismissed—Power of High Court.

A suit for ejectment was filed in the Revenue Court. The defendant pleaded that no relationship of landlord and tenant existed between him and the plaintiff. The suit was decreed by that court. An appeal to the District Judge was dismissed on the ground that no appeal lay to him :—*Held*, in revision that no revision lay to the High Court.

Damber Singh v. Srikishan Das, [1909] 6 A. L. J. R., 552, followed.

CIVIL REVISION from an order of B. J. DALAL Esq., District Judge of Aligarh.

Khairati, an occupancy tenant, usufructuarily mortgaged his holding to Jamna Prashad prior to the passing of the present Tenancy Act. Some years later he executed a deed of relinquishment of his holding in favour of the zemindar, Karan Singh, who thereupon dispossessed Jamna Prasad. Jamna Prasad then brought a suit against Karan Singh and Khairati for cancellation of the deed of relinquishment and for recovery of possession. The final result of that litigation was that the suit was decreed and Jamna Prasad obtained possession. Thereupon the zemindar Karan Singh brought a suit in the Revenue Court against Jamna Prasad for ejectment under sections 58 and 63 of the Tenancy Act. The defence pleaded *inter alia* that the relationship of landlord and tenant did not subsist between the parties, and that the suit was not cognizable by the Revenue Court. Issues were framed embracing these two points among others. The Assistant Collector found that the relationship of landlord and tenant existed between the parties, and that “accordingly” Issue No. 3, relating to the question of jurisdiction, was decided against the defendant, as the suit was one for ejectment. The defendant appealed to the District Judge, who delivered the following judgment :—

“This Court has no jurisdiction to hear this appeal. No question of proprietary title is raised, because the defendant appellant does not profess to be a mortgagee of proprietary rights.....It was next urged that an appeal lay here under section 177 (f) on the ground that a question of jurisdiction had been decided. This plea appears strange

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in view of the defendant appellant's ground of appeal No. 7, where he complains that the lower court has not decided the point of jurisdiction. It is clear that no question of jurisdiction was decided by the lower court."

The memorandum of appeal was returned by the District Judge for presentation to the proper court. Against this order the defendant-appellant applied in revision to the High Court.

At the hearing, a preliminary objection was taken by

Surendra Nath Sen, for the opposite-party.—The application for revision does not lie. There is no provision of law under which a revision can lie to the High Court in cases coming up from Rent Courts. Section 115 of the Civil Procedure Code has no application to Rent Courts or to cases originating in those courts. To apply that section to such cases would be contrary to its policy as formulated in section 167 of the Act. The High Court is not a Court of Revenue, and therefore, under section 167, the High Court cannot take cognizance of a Revenue Court case "except in the way of appeal." Section 185 of the Tenancy Act provides for revisions in cases instituted under that Act, but it gives the power of revision to the Board of Revenue and not to the High Court. The fact that the language of section 185 is almost bodily taken from section 115, Civil Procedure Code, shows that the Legislature deliberately did not give the power of revision to the High Court.

The following authorities support my contention.

Damber Singh v. Sri Kishan Dass, [1909] 6 A. L. J. R., 552.

In that case the Assistant Collector had refused to execute a decree, and a revision was filed in the High Court against that order. The question was whether a revision could lie to the High Court at all; and it was decided, having regard to section 167, that no revision lay to the High Court. The circumstances under which the application for revision may arise are immaterial, so far as the competence of the revision is concerned.

Parbhu Narain Singh v. Harbans Lal, [1916] 14 A. L. J. R., 281.

In that case there were dissentient judgments on the question whether a revision lay. I rely on the judgment of PIGGOTT, J., at pp. 290, 291 of the report. The view that the decision of a District Judge in appeal from a Revenue Court is a decision of a Civil Court so as to be subject to revision under section 115, Civil Procedure Code is, it is submitted, not correct and does violence to the language and spirit of section 167 of the Tenancy Act.

Dhan Dei Kumwar v. Chotu Lal, [1916] 15 A. L. J. R., 227; S. C., I. L. R., 39 All., 245,

is the last case, and there are some observations in it which support me.

Lakshmi Narain, for the applicant.—It is significant that chapter XLVI of the Civil Procedure Code of 1882, in which section 622 relating to revisions occurred, is not excluded by section 193 of the Tenancy Act from application to Revenue Courts. It would have been easy enough for the Legislature to have excluded that section as it did others. Some meaning and effect must be attached to the fact that the Legislature deliberately made that section, corresponding to section 115 of the present Code, applicable to Revenue Courts.

The decision against which I have applied in revision is a decision of a Civil Court. It is nonetheless so because the matter had its inception in the Revenue Court. As the decision of a Civil Court subordinate to the High Court, it is amenable to the revisional jurisdiction conferred by section 115. I rely on the judgment of WALSH, J., in the case of

Parbhu Narain Singh v. Harbans Lal, [1916] 14 A. L. J. R., 281.

As for section 167, its function comes to an end when a Revenue Court case goes in appeal, under section 177 of the Tenancy Act, to the District Judge. When the District Judge has decided the appeal, that decision becomes subject to the revisional jurisdiction of section 115.

The case in 6 A. L. J. R., 552, relied on by the opposite party is clearly distinguishable. There the revision was filed against an order of an Assistant Collector and not against a decision of a District Judge. The court of an Assistant Collector could not by any manner of means be said to be a Civil Court subordinate to the High Court and section 155 was clearly inapplicable. It was not necessary to decide, nor was anything decided, more than that *prima facie* revision would not lie to the High Court from an order of a Revenue Court. Whether such an order, after it had gone through appeal in the District Judge's court, could be revised or not was not in question at all.

To entertain the present revision would not be going against the language or spirit of section 167 of the Tenancy Act. In this revision I am not asking the court to determine anything about the merits of the case. I am not asking the court to "take cognizance of any dispute or matter in respect of which" a Revenue Court suit might be brought. Nor is it sought to obtain a decision as to whether the Civil or the Revenue Court had jurisdiction in the suit. All that I ask the court is to set the District Judge right when he says that there was no appeal to him.

As for the judgment of PIGSOTT, J., in the case in 14 A. L. J. R., 281, which is relied on by the opposite party, it is to be noted that he really dismissed the application for revision on the ground that the District Judge had neither refused to exercise jurisdiction nor acted with material irregularity; *vide* p. 290 of the report.

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The present case may also be dealt with under the powers vested in this Court by section 107 of the Government of India Act of 1915. (5 and 6 Geo. 5, Ch. 61). Having regard to the denial of justice which has resulted from the undoubtedly illegal decision of the District Judge, this is a fit case which calls for the exercise of those powers.

The view taken by the Judge that no appeal lay to him is clearly erroneous. The appeal did lie to him under cl. (f) of section 177 of the Tenancy Act, as a question of jurisdiction had been decided. It is immaterial whether the question of jurisdiction was properly or improperly raised; it is enough that the question was raised and decided. The strength or weakness of the objection as to jurisdiction does not effect the applicability of section 177 (f).

Damodar Das v. Jhaog Singh, [1917] 15 A. L. J. R. 319.

Section 185 of the Tenancy Act is not exhaustive. It applies to suits other than those in which the decree is appealable to the District Judge. Revisional jurisdiction in the case of the last mentioned class of suits was provided for by the extension of section 622 of the Code of Civil Procedure of 1882 to Revenue Courts by section 193 of the Tenancy Act.

The District Judge has returned the memorandum of appeal, for presenting to the Commissioner. But the appeal does not lie to the Commissioner, nor can the District Judge confer jurisdiction where it does not exist. The decision of the Commissioner would be merely *ultra vires* and useless. Unless the High Court interferes in revision the result will be that the decision of the first court will stand and the defendant will be practically deprived of his right of appeal.

Supposing the District Judge returns all memorandums of appeal from Revenue Court decisions. If there be no remedy by way of revision to the High Court, the jurisdiction of the Civil Courts would be absolutely taken away in all Revenue matters.

Surendra Nath Sen, was not heard in reply.

The following judgment was delivered by

Abdul
 Raouf, J.

ABDUL RAOUF, J.—This was a suit brought under section 58/63 of Act No. II of 1901 for ejectment. One of the pleas raised in the court of first instance was that the relation of landlord and tenant did not subsist between the plaintiff and the defendant. There was also a plea that this suit for ejectment of the tenant was not cognizable by the Revenue Court. The court of first instance, the Assistant Collector, went into the question of the relation of landlord and tenant between the parties; fully examined the whole of the evidence given in the case and came to the conclusion that there was a relation of landlord and tenant between the parties. On the plea of jurisdiction the court found that as it

had already come to the conclusion that there was a relation of landlord and tenant between the parties, the question of jurisdiction was also involved in that issue and that the suit was cognizable by the Revenue Court. That court decreed the suit. From the decree and judgment of the Assistant Collector an appeal was filed by Jamna Prasad, and one of the grounds taken in the memorandum of appeal before that court was that the lower court had erred in law and fact in determining issues Nos. 3, 4 and 5. It did not record a finding on the point whether the suit was cognizable by the Revenue Court or not. When the appeal came up for decision before the learned District Judge, he was of opinion that as there was no decision on proprietary right and that there was no decision on the question of jurisdiction as the appellant before him himself had complained, in the memorandum of appeal, that the court of first instance had not decided the question of jurisdiction. He therefore held that no appeal lay to him and ordered that the petition of appeal should be returned to the appellant. From the order of the District Judge the present application for revision has been filed. Dr. Sen who appears for the opposite-party has raised a preliminary objection to the hearing of this application and has argued that in matters coming under the Tenancy Act the power of revision has not been given to this High Court. He has relied upon the decision reported in the case of *Damber Singh v. Sri Kishan Dass* (1), and also upon the judgment of Mr. JUSTICE PIGGOTT in the case of *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2). Mr. Lakshmi Narain argues in reply that this case is clearly distinguishable from the case of *Damber Singh v. Sri Kishan Dass* (1), because in that case a decision upon a revenue matter was challenged by way of revision in this Court and therefore having regard to the provisions of section 617 of the Tenancy Act, no revision could lie in that case, but whereas in this case, the sole question raised is that the learned District Judge was wrong in refusing to entertain the appeal a revision would lie, because in such a case the matter in dispute would not be brought forward and questioned on the merits. He also relies upon the judgment of Mr. JUSTICE WALSH in the case of *Parbhu Narain Singh, Kashi Naresh v. Harbans Lal* (2). I have heard the arguments on both sides but I do not see ground to distinguish this case from the case of *Damber Singh v. Sri Kishan Dass* (1). Having regard to the construction which the learned Judges put upon the provisions of section 167 of the Tenancy Act, I do not think there is any room for argument that power of revision to the High Court was given under the Tenancy Act. In this view I am bound to hold that the present application for revision does not lie. I, therefore, dismiss it with costs.

B. K. M.

Application dismissed.

(1) [1909] 6 A. L. J. R., 552.

(2) [1916] 14 A. L. J. R., 281.

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C. J.

TUDBALL, J.

CHIRANJI LAL AND ANOTHER (*Plaintiffs*)

versus

BEHARI LAL AND OTHERS (*Defendants*)*

Civil Procedure Code (Act V of 1908), section 110—Privy Council—Leave to appeal—Cross-Appeals to the High Court—No substantial question of law.

In a suit the court of first instance decreed it in part and dismissed it in part. There were cross-appeals to the High Court on behalf of the plaintiffs and the defendants. The High Court decreed the defendants' appeal reversing the judgment and decree of the court below. In the plaintiffs' appeal the High Court affirmed the first court's decree. The plaintiff applied for leave to appeal against the judgment of the High Court reversing the first court's decree and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first court's decree, *held* that that could not be granted inasmuch as there was no substantial question of law.

APPLICATION for leave to appeal to His Majesty in Council under section 109, Civil Procedure Code.

B. E. O'Connor, (with him *Tej Bahadur Sapru*), for the appellants.

S. M. Sulaiman, (with him *Baldev Ram Dave* and *Haribans Sahai*), for the respondents.

The judgment of the Court was delivered by

Richards,

C. J.

RICHARDS, C. J.—This is an application for leave to appeal to His Majesty in Council. It appears that the court below decided partly in favour of the plaintiff and partly against. Both parties appealed. In so far as the court below decided in favour of the plaintiff this Court set aside the decree of the court of first instance and dismissed the plaintiffs' suit. There has been an application to this Court for leave to appeal against this decree of the High Court and by our order this day delivered we have given the usual certificate. The present application is for leave to appeal to His Majesty in Council against the decree of this Court which affirmed the decision of the court below and dismissed the plaintiffs' suit. It has been argued that inasmuch as both the appeals arose out of the same suit and that this Court did not affirm in its entirety the decree of the court of first instance leave should be granted to appeal to His Majesty. It seems to us that inasmuch as the decree, which it is sought to appeal against, confirms the decision of the court immediately below this Court, we have no power to grant a certificate unless we can certify that the appeal involves some substantial question of law. In the present case we are unable to certify that any substantial question of law is involved and it was not contended that any such question was involved. The proposed respondents appear and oppose the application contending that they ought not to be put to the expense of a second appeal unless the plaintiff is entitled to appeal as a matter of right. For the reasons stated above we are unable to certify that the case fulfils the conditions prescribed by section 110 of the Code of Civil Procedure, and we reject the application with costs.

* P. C. A. No. 3 of 1918. *Application rejected.*

PRIVY COUNCIL.

PARVATI KUNWAR (*Defendant*)*versus*THE DEPUTY COMMISSIONER OF KHERI AND ANOTHER
(*Plaintiffs.*)*Oudh Rent Act (Act XXII of 1886), Ch. 7A—Land Law of Oudh—Thekadar—Enhancement of rent.*

Chapter 7A of the Oudh Rent Act, 1886 (Act XXII of 1886) applies to thekaders, and consequently a "favourable rent" payable by a thekadar or person to whom the collection of rents in a mauza has been leased is liable to be enhanced in the circumstances and subject to the condition therein provided.

APPEAL from a decree of the Board of Revenue for the United Provinces of Agra and Oudh, reversing a decree of the Commissioner of Lucknow.

The facts of the case are sufficiently stated in their Lordships' judgment. In the appeal the question for determination was whether the rent payable by the appellant under a lease therein set out was liable to enhancement under Ch. 7A of the Oudh Rent Act, 1886 (Act XXII of 1886). The Board of Revenue had held that it was.

De Gruyther, K. C., and *Amiend Jackson*, for the appellant, submitted that Ch. 7A of Act XXII of 1886 applied only to grants of land. The lease in suit was not a grant: it gave appellant no right of occupancy in the land. Appellant was a thekadar, not a tenant under section 3(10). Chapter 7A did not apply to her, and the rent payable by her was not liable to enhancement. Various sections of Act XXII of 1886 were discussed.

Sir Erle Richards, K. C., and *O'Gorman*, for the respondents.—Act XXII of 1886 applies to the case. Before that Act a grant like that in the lease was liable to resumption after the death of the grantor under section 52 of Act XVII of 1876. That liability was taken away by Ch. 7A, which was added to Act XXII of 1886 by U. P. Act IV of 1901, and the liability to enhancement of rent was substituted. There was thus no hardship to the thekadar. The policy of the Government was to put an end to grants of this class, as they affected the proprietor's ability to pay the Government revenue. Chapter 7A applies to all such grants whatever name is given to them.

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April, 16.

VISCOUNT
HALDANE,
LORD
DUNEDIN,
LORD
SUMNER,
SIR JOHN
EDGE,
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OF KHERI.*Sir John
Edge.**De Gruyther, K. C.*, replied.

Their Lordships' judgment was delivered by

SIR JOHN EDGE.—This is an appeal from a decree, dated the 2nd April, 1915, of the Board of Revenue for the United Provinces of Agra and Oudh, which set aside a decree, dated the 7th October, 1914, of the court of the Commissioner of Lucknow, and restored a decree or order, dated the 4th June, 1914, of the court of the Deputy Commissioner of Sitapur.

The suit in which this appeal has been brought was instituted in a Court of Revenue which alone had jurisdiction to entertain the suit, a Civil Court having no jurisdiction in the matter. In the suit the plaintiffs claimed a decree for the possession of the entire village mauza Bandhia Kalan, situate in pargana Nighasan, in the district of Kheri, by resumption of the *Muafi*, and in the alternative that the rent might be fixed at a proper amount under section 107G of Act XXII of 1886 (the Oudh Rent Act, 1886), and other reliefs which need not be referred to. The Deputy Commissioner of Sitapur, before whom the suit came for trial, did not grant a decree for resumption, but having found that the rent was liable to be enhanced under section 107G of Act XXII of 1886, by his decree declared that the defendant was a tenant of the mauza without any right of occupancy, and determined the rent to be payable at 2,000 rupees per annum. The only question to be considered in this appeal is whether the rent at which the mauza was held by the defendant of the plaintiffs at the date of suit was or was not liable to be enhanced, and that question depends upon the nature of the lease under which the mauza was held by the defendant.

Mauza Bandhia Kalan is part of the taluqdari estate of Majhgain. On the 13th November, 1882, Raja Milap Singh, in whom was then vested that estate, by his will devised mauza Bandhia Kalan to his wife Rani Dhan Kunwar, who on his death obtained possession of the mauza. Thereafter Rani Dhan Kunwar, in order to provide maintenance for her daughter, who is the defendant in this suit and the appellant in this appeal, and maintenance for that daughter's son, executed on the 23rd February, 1891, the following lease :—

"Lease in favour of Ohhoti Betia, i. e., Parbati, who is married at Malanpur, and also in favour of the grandson, i. e., the dear son of the said daughter, granted by Rani Dhan Kunwar, 'talukdar' of Majhgain and Bhur, pargana Nighasan.

"Mauza Bandhia Kalan, pargana and tahsil Nighasan, 'Hadbast' No. 61, owned and possessed by me, the executant, the revenue of which, along with that of the entire 'taluka,' is paid to Government, is leased to you from 1297 Fasli up to the term of your life and that of

your dear son, at a 'jama' of 584 rupees per annum. You should take possession of the said mauza from 1297 Fasli as a lessee for life and bring into your own use all sorts of receipts which include 'mal' and 'siwaj' and pay to me 584 rupees annual lease money, instalment by instalment, year by year, without objection, and all sorts of profits will belong to you and your dear son during your respective lives and after you and your dear son the lease of the mauza will end and it will, as before, revert to the possession of the holder of the 'ilaka' (estate). During your life and that of your dear son neither I nor any heir or representative of mine will have power to set aside the lease. If you do not pay the 'jama' reserved by the lease at the proper time, it will be duly recovered from you without interest by means of a suit in court. You should, during the period of your lease, fully carry out all orders issued by the authorities in respect of the village, so that no stigma of disobedience of orders might attach to you or to the 'taluka' (estate). You should keep the tenantry satisfied in every way, so that the population of the village might increase and the village might not become desolate. Under proper circumstances you are also authorised to eject the tenants so that you might eject them after issuing notice of ejectment. You should, however, see that they are not oppressed. You are authorised to enhance or reduce the rent of the tenants so far as it is just. You should carry on all the affairs of the village just as they have been hitherto conducted.

"These few presents have, therefore, been executed by way of a lease to stand as evidence.

Boundaries of mauza Bandhia Kalan:—

East.—Bandhia Khurd.

West.—Hamlet of Gangaband.

North.—Oudk forest.

South.—Gangaband.

Dated the 23rd February, 1891.

RANI DHAN KUNWAR."

Under that lease the defendant became the *thekadar* or person to whom the collection of rents in the mauza had been leased by Rani Dhan Kunwar, who was then the landlord. Rani Dhan Kunwar died in 1891. After her death the taluqa vested in Raghubar Singh, a plaintiff and one of the respondents, and in Raja Mangal Singh, represented in this suit and appeal by the Deputy Commissioner of Kheri as the special manager of the Court of Wards of the estate of Majhgain.

Land forming a mahal or part of a mahal which is under Ch. VII [A] of Act XXII of 1886 liable to be resumed by

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the proprietor or to have the rent payable in respect of it enhanced must be land held rent free or at a favourable rate of rent. By section 107I of the Act it is enacted that :—

“For the purposes of this Ch (Ch. VII[A]) a grant of land at a favourable rate of rent means a grant of land at a rent less than the aggregate of the revenue and local rates payable thereon.”

All three courts in India have found that the rent of 584 rupees, which was made payable by the lease of the 23rd February, 1891, was a favourable rate of rent within the meaning of Ch. VII[A]. But it has been contended on behalf of the appellant that Ch. VII[A] does not apply to persons holding land as *thekadars*. That contention is based on section 3, clause (10) of the Act, according to which a—

“tenant means any person, not being an under-proprietor, who is liable to pay rent; and in the following portions of this Act, namely, sections, 13, 14, 15, 17, 18, 29, 53, 54, 55, sub-sections (1) and (2), 56, 59, 60, 61, 62, 108, 126, and 138, but in no others, the expression ‘tenant’ shall be held to include a *thekadar* or person to whom the collection of rents in a village, or portion of a village has been leased by the landlord.”

Section 3 (10) which contains that definition was part of Act XXII of 1886 as it was passed in 1886. Ch. VII[A], which deals with the resumption and the enhancement of the rent of land held rent free or at a favourable rate of rent and contains section 107A to section 107K was added to Act XXII of 1886 in 1901 by an amending Act, U.P. Act IV of 1901, and consequently the specific enactments of Ch. VII [A] are not limited in their application by section 3 (10), which must be regarded as a mere glossary defining the terms “tenant” and “thekadar” as those terms are employed in the Act XXII of 1886 as it stood in 1886 when it was passed.

The object of enacting Ch. VII[A] which the Government of India had in view obviously was the protection of the Government revenue assessed upon agricultural lands, and as far as possible to maintain proprietors of lands in a position to enable them to pay the Government revenue and the local rates assessed upon their lands and thus to avoid losing their lands by making default in payment of the revenue due to the State. In some parts of India, in Oudh for instance, many proprietors of lands were in the habit of acting improvidently in making grants of lands, by lease or otherwise, rent free or at rents which did not enable them to pay the public revenue and local rates assessed upon their lands. As early as 1793 the Governor-General in Council passed Regulation XIX of 1793, with a similar object of protecting the Government revenue derivable from lands. In section 1 of that Regulation it is stated :—“By the ancient law of the country, the ruling power is entitled to a certain pro-

portion of the produce of every bigha of land (demandable in money or kind, according to local custom) unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter. As a necessary consequence of this law, if a zemindar made a grant of any part of his lands to be held exempt from payment of revenue, it was considered void from being an alienation of the dues of Government without its sanction. Had the validity of such grants been admitted, it is obvious that the revenue of Government would have been liable to gradual diminution." That Regulation was applied to Oudh after the annexation of that province.

By section 52 of Act XVII of 1876 (the Oudh Land Revenue Act, 1876), it was enacted :—

" 52. All grants (whether in writing or otherwise) by proprietors, or the persons whom they represent, of land to be held exempt from the payment of rent or at a favourable rate of rent are hereby declared to be liable to resumption, unless such grants have been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner.

Provided that, if such grants are held under a written instrument (whether executed before or after the passing of this Act) by which the grantor expressly agrees that the grant shall not be resumed, they shall be held valid against him (but not as against his representatives after his death) during the continuance of the settlement of the district in which the land is situate which was current at the date of the grant."

Section 52 was subject to the procedure and exemptions contained in sections 53, 54 and 55 of that Act :

Section 52 of Act XVII of 1876 was wide enough to apply to grants to *thekadars* of land in Oudh exempt from the payment of rent or held at a favourable rate of rent, and it authorised the resumption of such grants when they had not been sanctioned or confirmed by the Governor-General in Council or the Chief Commissioner of Oudh. Sections 52, 53, 54 and 55 of Act XVII of 1876 continued in force until Act IV of 1901 was passed. By section 107E, which by Act IV of 1901 was added to Act XXII of 1886 it was enacted as follows :—

" 107E. Land held rent free or at a favourable rate shall be liable to resumption, only when by the terms of the grant or by local custom it is held.—

(a) At the pleasure of the grantor ;

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(b) For the performance of specific service, religious or secular, which the proprietor no longer requires ;

(c) Conditionally or for a term, and the conditions are broken or the term expires."

* * * * *

That section limited the lands which might otherwise have been resumed if section 52 of Act XVII of 1876 had remained in force, and in that respect was more favourable to the grantees of such lands than section 52 of Act XVII of 1876 had been.

By section 107A, which was one of the sections which were added to Act XXII of 1886, the proprietor of a mahal or part of a mahal was, amongst other rights of suit, given a right to sue to enhance the rent of any land held at a favourable rate of rent, whether so held by grant in writing or otherwise. And by section 107B all land in Oudh held at a favourable rate of rent was made liable to enhancement of rent unless the holder establishes certain specified facts which have not been established in this case. That section is subject to the following proviso :—" Provided that no land held under a written instrument, whether executed before or after the 1st day of January, 1902, by which the grantor expressly agrees that the grant shall not be resumed, shall be liable to resumption or assessment or enhancement of rent until the grantor dies, or the term of the current settlement of the local area in which the grant is situated expires, whichever event first occurs." In the present case not only did the grantor of the lease die before suit, but the term of the settlement current at the date of the lease, of the local area in which mauza Bandhia Kalan is situate expired before the suit was brought.

By section 107G, which is one of the sections which in 1901 were added to Act XXII of 1886, it is enacted as follows :—

" 107 G (1). Land not liable to resumption under section 107K and to which the provisions of section 107H do not apply shall be liable to assessment or enhancement of rent as the case may be.

(2). When a grant held rent-free or at a favourable rate is found to be liable to have rent assessed or enhanced thereon, the grantee shall be deemed to be a tenant without a right of occupancy under sections 36 and 33 of this Act, and the rent shall be determined at such rate as the court may consider fair and equitable, having regard to the rents paid for land of similar quality and with similar advantages in the neighbourhood.

(3). The period of seven years for which he (the grantee) shall be entitled to retain the holding shall begin from the first day of July next following the date of the institution of the suit."

Mauza Bandhia Kalan was not liable to resumption under section 107E, as the term for which the lease was granted has not expired, and it is not proved that any condition contained in the

lease has been broken. The provisions of section 107H do not apply in this case, and consequently section 107G does apply as the lease of the 23rd February, 1891, was a grant of land at a favourable rate of rent, and mauza Bandhia Kalan was land held by the defendant at a favourable rate of rent within the meaning of Ch. VII[A] of Act XXII of 1886. The decree of the Board of Revenue which set aside the decree of the Commissioner of Lucknow and restored the decree or order of the Deputy Commissioner of Sitapur enhancing the rent to 2,000 rupees per annum was right.

Their Lordships will humbly advise His Majesty that the decree of the Board of Revenue should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

T. L. Wilson & Co :—Solicitors for the appellant.

The Solicitor, India Office :—Solicitors for the respondents.

A. P. P.

HIGH COURT.

PAHLADI LAL (*Plaintiff*)

versus

MUSAMMAT LARAITI AND OTHERS (*Defendants*)*

Registration (Act XVI of 1908), section 28—Registration—Validity—Jurisdiction of registering officer—Property included in mortgage-deed within jurisdiction of registering officer—Vendor having no title to it—Fraud.

Where in a mortgage-deed certain immovable property was included which actually existed within the jurisdiction of the registering officer but the mortgagor had no title thereto, and the deed was duly registered, held that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and mortgagee.

Brojo Gopal v. Abhilash, [1909] 14 O. W. N., 532, followed; *Harsh-dra Lal v. Haridasi*, I. L. R., [1914] 41 Cal., 972, distinguished.

FIRST APPEAL from a decree of BABU KSHIROD GOPAL BANERJI, Subordinate Judge of Budaun.

B. E. O'Connor and Iqbal Ahmad, for the appellant.

Tej Bahadur Sapru and Gulzari Lal, for the respondents.

The judgment of the Court was delivered by

WALSH, J.—We have come to the conclusion that this appeal must be allowed and the suit sent back for re-trial. The suit is brought upon two simple mortgage bonds by the plaintiff against

*F. A. No. 91 of 1916.

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the widow of one Bijai Singh. Bijai Singh borrowed two sums—one of Rs. 6,000 and the other of Rs. 1,000 in the month of August, 1902, and by two documents executed respectively on the 26th and 27th of August hypothecated in respect of those loans certain property set out in the schedule to the bonds. He was in urgent need of money on the 29th or 30th of August for the purpose of lodging it in court in respect of a decree which he had obtained in a pre-emption suit. He had been a member of a joint Hindu family who had partitioned their property by means of an award in the year 1896. That award was carried out by a decree in the same year. The father, Sher Singh, had died in 1897. By the award the property was partitioned between his four sons Bijai Singh, the mortgagor in question, Niranjan Singh, his brother who is still living, Shib Singh, a brother who is dead, and Dirgpal Singh, who is still living and who was at that time a minor. The property hypothecated by Bijai Singh, in these two documents in substance consisted of the property which he was awarded under that partition although it is not clear that it did not include some other property as well and also included 2½ biswas in a certain mauza named Kaachaura which had in fact been awarded in the decree to the minor Dirgpal Singh. *Prima facie* it would therefore appear to be established, at any rate for the purpose of our decision to-day, that Bijai Singh had no title to this property and could not hypothecate it to the plaintiff. It is this which has given rise to all the difficulty in the case. If this property had not been included in the bonds the registration office at Budaun would not have been the proper place under the Registration Act for the registration of the bonds. If on the other hand this property was included, then Budaun was the proper place for the registration of the bonds which were in fact registered at Budaun. The learned Subordinate Judge has dismissed the suit on the ground that the registration was invalid purporting to follow the decision of the Privy Council in *Harendra Lal Roy Chaudhri v. Haridasi Debi* (1). We say purporting to follow that decision because it is difficult to say what exactly the learned Subordinate Judge meant to find as a question of fact in his judgment. The question which we have to decide as a matter of law is this whether when property is admitted to be in existence and has been included in a mortgage-deed but is shown not to have been the property of the mortgagor the fact that the document has been registered in the district to which that property belongs is sufficient to invalidate the registration when that property is the only property hypothecated within the registration district. *A priori* on reading section 28 of the Indian Registration Act No. XVI of 1908 there would appear to be no ground for this contention. The section provides that "the document shall be presented for registration in the office of a Sub-Registrar within

(1) [1914] I. L. R., 41 Cal., 972.

whose sub-district, the whole or some portion of the property to which such document relates is situate." Whether or not the mortgagor had a good title to this piece of property does not affect the question whether this property is situated in the district where registration took place and whether the document relates to it. It would be a strange result if it were the law that upon proof that the mortgagee had obtained no title to a small portion of property on account of which the place of registration was selected that he should lose not only the benefit of his security over that small portion but the entire benefit of the hypothecated property, particularly when, as might happen in many cases he had been deceived by the mortgagor. This is the view which has been taken by a two Judge Bench in Calcutta in the case of *Brojo Gopal Mukerji v. Abhilash Chandra Biswas* (1), which is not reported in any authorised report but which is to be found in 14 C. W. N., 532. We think that decision might be reported in the authorised reports. The Judges refer to a decision of the Privy Council many years ago in which it was held that a small portion of the property covered by the deed was sufficient to give the Sub-Registrar jurisdiction in whose sub-district that portion was situate. We agree with the decision of the Calcutta Bench and it therefore becomes a question of fact and it is really a question of fact in every case whether, as the Privy Council says in its judgment in 41 Calcutta, the parties have intentionally by a mutual collusive arrangement inserted in the deed property either which does not in fact exist or which, while in existence, is not intended by either of them to be a part of the security. Where the parties are colluding for the express purpose of evading the registration law, in such case, applying the Privy Council decision to the section, the result would be that the deed in question does not "relate" to the property inasmuch as neither party had any intention of dealing with the property. On the other hand where the real fact is that the parties intended to deal with the property, the condition of the mortgagor's title does not affect the question of registration. Applying these principles which we think are clear and well settled, the question which we have to determine in this case is whether it is proved that the mortgagee was aware of the defect in the mortgagor's title and expressly consented to the inclusion of this property in the deed for the purpose merely of complying with the Registration Law. In our view nothing short of a finding to that extent would be sufficient and the finding if arrived at must be supported by clear evidence. It is suggested in this case that there is in the first place evidence of the fact. That is undoubtedly true; but the evidence on this point is far from satisfactory. On the one hand the plaintiff himself did not go into the box and has exposed himself to just criticisms on that account; but it is difficult to see what more he could have

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said than the documents which were presented on behalf of Bijai Singh unless he was prepared to admit what the defendants allege. Now the documents, the *khewat* and the revenue records, generally, were such as to justify the acceptance by any purchaser or mortgagee, of Bijai Singh's title to this piece of property. For reasons of their own, possibly not unconnected with a scheme of this kind, the family had deliberately entered Bijai Singh's name as being in possession of this property although it had been awarded to his minor brother. A witness named Sham Lal was called on behalf of the plaintiff. He deposed that Bijai Singh came to the house of the plaintiff with his brother Niranjana Singh and when asked with reference to this property referred the plaintiff to the *khewat*, and that the plaintiff saw the *khewat* and next day asked his servant Pandit Guman Lal to inspect the registers of the Registration Office. That evidence although not supported by the testimony of the plaintiff himself might have been contradicted by Niranjana Singh and was not. A pleader who has been practising since 1880 and has acted for the defendants for many years and is now indebted to them in an amount of Rs. 800 or Rs. 900 was called by the defendants although he had been summoned by the plaintiff, and it is upon his evidence and his evidence alone that it is suggested that it is proved that the plaintiff knew quite well that this was a fictitious entry in the deed. He attested both the documents and identified Bijai Singh at the time of the registration. He knew the actual ownership of the property perfectly well and was under the impression according to him that this fictitious inclusion of the minor's property in the deed was done to avoid the journey to Dataganj where registration would otherwise have taken place and to enable Bijai Singh to borrow money for the satisfaction of the pre-emption decree. Whatever the profession may have thought before the Privy Council decision, we are of opinion that an act of this kind on the part of a professional gentleman who is said to be a gentleman of respectability was highly questionable. However that may be, we have to consider whether his evidence really proves anything against the plaintiff. He says that all of them including himself, Bijai Singh and the plaintiff, knew that the property did not belong to Bijai Singh. We do not think that this is evidence that the plaintiff knew. It is merely an expression of opinion on the part of the witness. He does not tell us how the plaintiff is supposed to have known or how he came to know that the plaintiff knew. Nothing would have been easier if there was any substance in the allegation than for the witness to have stated in unequivocal terms to the court how the plaintiff became acquainted with the true state of the facts. In the presence of the document which absolutely contradicted the witness we think there was no evidence that the plaintiff knew, and therefore no evidence that he was a conscious

party to the fictitious entry in the deed. Inasmuch as it was admitted that the property was in existence and was supposed to be in the possession of the mortgagor the *onus* was on the defendants to show that both parties intended the entry to be fictitious. We do not think the court below really found that the plaintiff knew. It was prepared to accept the pleader's evidence but it does not expressly find any knowledge at all on the part of the plaintiff. On the other hand it is said in the judgment that the question is whether the plaintiff should not have made more careful inquiries at the time. This question would be quite irrelevant if the court below held that the plaintiff knew the real truth. It appears to us that the decision has gone against the plaintiff merely on the finding that the plaintiff ought to have known under all the circumstances that Bijai Singh had no power to transfer mauza Kachaura and that therefore he was not acting in good faith. This is not sufficient. The appeal must be allowed with costs and the case remanded to the court below to be tried out on the merits.

Appeal allowed, cause remanded.

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SYED ALI RAZA (*Plaintiff*)

versus

SANWAL DAS AND OTHERS (*Defendants*) *

Mohammedan Law—Shia—Waqf created by trust-deed—Ownership in property not divested from date of execution of deed—Validity of waqf.

Where a Mohammedan and his wife, *Shias* by persuasion, purported to create a *waqf* by means of a trust-deed, but the deed did not divest the ownership of the executants from the date of execution, held that the *waqf* was invalid.

FIRST APPEAL from a decree of J. B. MUNDLE, Esq., Subordinate Judge of Jaunpur.

Syed Maqsud Ali Khan, a Mohammedan of the Shia sect, and his wife executed in 1863 a deed of "*supurdnama*" in respect of their property. The plaintiff, who was their daughter's daughter's son, alleged that the deed of 1863 created a *waqf* of the said property in favour of the *waqif's* children and descendants, that the property had since been managed as *waqf* property, but that certain creditors were recently taking proceedings to bring it to sale in execution of their decrees. The plaintiff, therefore, claimed a declaration that the property was *waqf* property and not saleable in execution

* F. A. No. 146 of 1916.

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of the said decrees. The main plea in defence was that no valid *wagf* had been created by the deed of 1863. It was found by the court of first instance that the deed created only a perpetual settlement in favour of the family and descendants, that there was no endowment at all for any religious or charitable objects, not even in the event of the family becoming extinct, and that the *wagifs* had not divested themselves of their ownership or power of alienation in respect of the property. On these findings the court held that the deed of 1863 did not constitute a valid *wagf*, and dismissed the suit. The plaintiff appealed to the High Court.

S. M. Sulaiman, (with *S. A. Haidar*), for the appellant.—This is a case of a Shia *wagf* in favour of the *wagifs* family and descendants. All doubts about the validity of such *wagfs* have been removed by Act VI of 1913. That Act is a “declaratory” Act and not a “remedial” Act. It is in respect of remedial Acts only that the question from what date the Act is to take effect can arise. A declaratory Act simply declares what the law is, and whenever the point arises the court has to accept and apply that law.

Even if it be held that the new Act cannot be invoked in my aid and I am obliged to fall back on the Shia Law as interpreted prior to the Act, the *wagf* is valid. The Privy Council decisions do not touch the present case. For, there was never any case of *wagf* under the Shia law which went up to the Privy Council; so, the Privy Council has never held that under the Shia law there should be a substantial dedication for charitable purposes before a *wagf* can be regarded as valid. In fact the Shia law lays down no such condition, and under it a *wagf* in favour of the family or descendants is perfectly valid. I am supported by

Ameer Ali: Mohammedan Law: 4th Edition: Vol. I, pp. 508, 514, 520 etc.,

and by certain passages and extracts from “*Shara Luma*,” “*Jama-ul-Maqasid*,” “*Sarair*,” “*Jawahir-ul-Kalam*” and “*Masalik*”:—

I.—Shara Luma, printed at Teheran page 103.

And (if he says, “I entailed, dedicated, consecrated and allotted for charitable purpose” the general context shall prove the *wagf* *e. g.*, perpetuity, prohibition of selling, making gift or inheritance. Then it (the *wagf*) shall be clear. It is also held that the first two (restrictions) are clear enough (to prove the *wagf*) without any addition.

II.—Jawahir-ul-Kalam printed at Teheran.

If he said “I make *wagf* for my children and their progeny” and the children die without progeny it will go to the poor.

III.—Sarair by Ibne Idris, printed at Teheran page 376.

And when a man makes *wagf* in favour of his offspring and the children of his offspring or in favour of his offspring only and does not say that it is for his progeny, the children of his offspring shall be included amongst them, that is the issues of daughters as well as sons because all our doctors are unanimous about it and because the word “issue” is used for all of them in language as well as in religion.

IV.—*Sarair by Ibn Idris, printed at Teheran, page 524.*

And if he says that it is in favour of his progeny, offspring or descendants all the grand children who are the issues of sons and daughters shall be included, for the words progeny, offspring or descendants are used for all of them.

V.—*Jawahir-ul-Kalam, printed at Teheran.*

When a man makes *waqf* in favour of his progeny, brothers or relations, the extension of the term shall include males and females and near and remote relations.

VI.—*Shara Luma, printed at Teheran page 106.*

And the principle is non-preference unless a man gives preference either in plain words or by saying "according to the book of God" etc.

VII.—*Jamia-ul-Maqasid, printed at Teheran page 517.*

And if he makes the condition (in *waqf*) of some order (of succession) or preference or distinction it would be binding, for instance, if he imposes the condition of an order, (of succession) among his, near or remote relations or between the relations of first group and second group or he gives the near relations a preference over the more remote or he makes some other distinction, it is incumbent to fulfil the condition. For such a condition is not against the meaning of *waqf* and it is incumbent to fulfil it.

VIII.—*Sarair Ibn Idris, printed at Teheran page 357.*

I have said that when a man makes a *waqf* in favour of his children the males and the females shall get equally unless he makes a condition to give some of them preference over the others. For if he says this *waqf* is in favour of them according to the Book of the great God" it shall be in favour of them in this way that the male's share shall be equal to the shares of two females.

IX.—*Jawahir-ul-Kalam.*

And the saying of Askafi that, the males shall get double of the females in *waqf* for children and descendants, is a mis-application (of the verse) unless the *waqf* is made for them according to inheritance. But the express omission of conditions shall (prove) equality in sharers which is evident.

X.—*Masalik, printed at Teheran page 276.*

And the principle (of *waqf*) requires equality (of shares) except when it is removed by some explicit mention like inheritance or distinction just as a man makes a condition to give preference to some over others.

The lower court has relied on two cases, arising under the Shia law, of this High Court; namely,

Murtasai Bibi v. Jumna Bibi, [1890] I. L. R., 13 All., 261;

Hamid Ali v. Mujawar Husain Khan, [1902] I. L. R., 24 All., 257.

But those cases are distinguishable. They were cases of *waqf* by bequest, which under the law as then interpreted was regarded as invalid. But now the Privy Council has held that a *waqf* can be validly created by will, according to the Shia law.

Baqar Ali Khan v. Anjuman Ara Begam, [1903] I. L. R., 25 All. 256. F. C.

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Surendra Nath Sen and *Gokul Prasad*, for the respondents, were not called on.

The judgment of the Court was delivered by

PIGGOTT, J.—The question in issue in this appeal, as it was in the court below, is whether a valid *wagf* is created by a certain *Sipurdnamah*, or trust deed, of the 27th of December, 1863, executed by a *Shia* gentleman of the name of Syed Maqsud Ali Khan and his wife, Alwah Bibi. We have been taken through the document in question. It does not divest the executants *in presenti* of their ownership or power of alienation in respect of the property therein dealt with. It is true that it contains a recital to the effect that Saiyed Moazzam Ali, the eldest son of Saiyed Maqsud Ali Khan has already been entrusted with the management of the landed properties belonging to the executants and that this management is to continue under the deed. But a mere power of management may be revoked at any time by the owners of the property. The document also contains provisions as to what is to happen on the death of the executants, but those provisions do not operate so as to divest the executants of their ownership from the date of execution of the deed. The other points taken in the memorandum of appeal are covered by the authorities relied on by the trial court. *Murtazai Bibi v. Jumna Bibi* (1), and *Hamid Ali v. Mujawar Husain Khan* (2). It is true that a certain portion of the reasoning on which the decision of the learned Chief Justice of this Court in the latter of these two cases proceeds is invalidated by a subsequent decision of their Lordships of the Privy Council in *Baqar Ali Khan v. Anjuman Ara Begam* (3), by which the right of a *Shia* to create a *wagf* by will was recognized, assuming of course that the testamentary disposition of the property amounted in other respects to a valid *wagf* under the Mohammedan Law. This, however, does not seriously affect the weight of the decisions above referred to. We do not feel at all disposed to re-consider at this time of the day the question of law disposed of by the two decisions above referred to. The effect of the *Musalman Wagf Validating Act* of 1913 can be considered hereafter when the court has before it a document executed in virtue of the power recognized by that enactment. We are content to say that, so far as this appeal is concerned, the pleas taken in the memorandum of appeal either depend upon the construction of the deed of 1863, on which point our decision is against the appellant, or are concluded by authorities of this Court which we are in no way disposed to re-consider. We, therefore, dismiss the appeal with costs.

B. K. M.

Appeal dismissed.

(1) [1890] I. L. R., 13 All., 261. (2) [1902] I. L. R., 24 All., 257.

(3) [1908] I. L. R., 25 All., 236.

SURAJBALI SINGH AND OTHERS (*Defendants*)*versus*MOHAMMAD NASIR AND OTHERS (*Plaintiffs*)*

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RICHARDS,
C. J.
TUDBALL, J.*Pre-emption—Wajib-ul-arz—Custom or contract—Interpretation of document.*

When considering the existence or non-existence of a custom of pre-emption the language of the particular *wajib-ul-arz* ought to be taken into consideration.

Consequently, where the only evidence in proof of a custom of pre-emption was the *wajib-ul-arz* which recorded that when property was bought or mortgaged by a stranger, the co-sharers were entitled to take it in the event of sale at sixteen years' purchase and in that of a mortgage at eight, and it then recorded a statement that a person had a right to redeem a mortgage in which he had no interest :—*Held* that the entry in the *wajib-ul-arz* on the very face of it disproved the existence of a custom.

SECOND APPEAL from a decree of BABU BANKE BEHARI LAL, District Judge of Azamgarh, confirming a decree of Pandit Suraj Narain Majju, Subordinate Judge.

Pre-emption suit.

Tej Bahadur Sapru, for the appellants.

S. A. Haidar and *Syed Raza Ali*, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit for pre-emption. The plaintiff alleges that a custom of pre-emption prevailed and adduced in evidence an extract from the *wajib-ul-arz* of 1872. This is the only evidence adduced on behalf of the plaintiff of the existence of the custom. One has only to peruse the entry to come to the conclusion that it was almost impossible that this could have been a record of a custom. It provides amongst other things that as soon as a stranger has bought or mortgaged the property the co-sharers in a certain order are entitled to take the property in the case of a sale at sixteen years' purchase and in the case of a mortgage at eight. It further goes on to record a right of a person to redeem a mortgage in which he has no interest whatever. As against this piece of evidence (if it can be so called), the defendant vendee adduced a decree of the year 1878. In that litigation the plaintiff who now seeks pre-emption had purchased a share in the village as a stranger. A suit was brought against him for pre-emption, the then plaintiff basing his claim upon this very entry in the *wajib-ul-arz*. The present plaintiff (then vendee)

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pleaded that there was no custom and that the record in the *wajib-ul-arz* was merely the record of a contract, which was not binding on his vendor, because it had not been verified by him. Reading the judgment in the previous litigation the then plaintiff and his advisers apparently hardly thought it possible to rely upon the entry in the *wajib-ul-arz* as the record of a custom. It was relied upon chiefly as the record of a contract. Had it been possible for the then plaintiff to rely upon it as a custom, it would have been greatly to his interest to do so, because he would have been saved from any real or supposed obligation to prove that the *wajib-ul-arz* had been verified by the then vendor. It may be mentioned in passing that the *wajib-ul-arz* was then only about six years old, and presumably many of the persons who had verified it were still living. The lower appellate court has found in favour of the plaintiff. In doing so the learned Judge has not discussed, or apparently considered, the language in the record in the *wajib-ul-arz*. The language of that document ought certainly to have been taken into consideration when considering the existence or non-existence of the custom. In dealing with the previous litigation the learned District Judge says "The only documentary evidence urged on behalf of the appellants is a copy of a judgment of the Subordinate Judge of Azamgarh, dated the 31st of May, 1878. It appears that the plaintiff to this suit was a vendee in that case and that it was dismissed on a finding that a contract or custom of pre-emption was not proved. I think a solitary judgment does not rebut the presumption raised by the record of custom of pre-emption in the *wajib-ul-arz*."

From these remarks it would appear that the learned District Judge completely lost sight of the significance of the fact that the person who was now seeking to get the property had actually pleaded in the year 1878 that there was no right of pre-emption founded either upon custom or contract and that he had been successful in this plea. In our opinion there was no trial of the issue by the lower appellate court on the evidence and we are entitled to deal with the evidence ourselves. As already pointed out the sole evidence in support of the existence of the custom was the entry in the *wajib-ul-arz* which (as we have already said) on the very face of it almost disproves that it is the record of a custom; while on the other hand we have the plaintiff coming to this village as a stranger in the year 1878 after pleading successfully that there was neither custom nor contract. In our opinion the evidence was wholly insufficient to establish the existence of a custom. We accordingly allow the appeal set aside the decrees of both the courts below and dismiss the plaintiff's suit with costs in all courts.

Appeal allowed.

NANNHU AND OTHERS (*Plaintiffs*)*versus*SRI THAKURJI MAHARAJ AND OTHERS (*Defendants*)**Agra Tenancy Act (II of 1901), sections 158, 167—Resumption of rent-free grant—Jurisdiction of Civil and Revenue Court—Revision to High Court.*

An application was made to the Revenue Court for partition. Certain persons objected that they had become proprietors of a certain share by reason of their having held it as a rent-free grant for more than fifty years and for two generations. The Revenue Court held that this was a question of proprietary title and referred the parties to the Civil Court. The latter thereupon brought a suit in the Civil Court for the declaration contended for by them. The court of first instance held that it was not a question of proprietary title and that the suit was cognizable by the Revenue Court. The plaint was accordingly returned for presentation to the proper court. The decision of the first court was affirmed by the District Judge in appeal:—*Held*, in revision, that having regard to section 167 of the Tenancy Act and to the fact that cases under section 158 of that Act are mentioned in the fourth schedule to it as cases cognizable by the Revenue Court, a suit for a declaration that *muafi* rights had ripened into proprietary rights could only be brought in the Revenue Court and not in the Civil Court. *Baldeo Singh v Mardan Singh*, [1910] 7 A. L. J. R., 818, followed.

CIVIL REVISION, from an order of PANDIT SOTI RAGHUVANSA LAL, District Judge of Farrukhabad.

The first defendant applied in the Revenue Court for partition of his share in certain zemindary property. The plaintiffs put in an objection claiming that they held proprietary rights in certain rent-free plots by reason of their having held the same for more than two generations and for a period of more than fifty years. The Revenue Court was of opinion that the objection was one raising a question of proprietary title, and referred the plaintiffs to the Civil Court. Accordingly, they filed a suit in the Civil Court for a declaration that they had acquired proprietary interest in the plots by reason of their having held rent-free for more than two generations and more than fifty years. The court of first instance held that the suit was cognizable exclusively by the Revenue Court, and ordered the plaint to be returned. The plaintiffs appealed to the District Judge, who upheld the decision of the first court. The plaintiffs applied in revision to the High Court.

* Civil Rev. No. 8 of 1918.

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June, 28

BANERJI, J.
PIGGOTT, J.

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Gulzari Lal, for the applicants, contended that the present suit for declaration of proprietary title was cognizable by the Civil Court. The lower courts had relied on item No. 38 of group (c) of the fourth schedule of the Tenancy Act, but the suit provided for therein was a suit "for the assessment to revenue of a rent-free grant." The present suit was clearly not such a suit. Moreover, the present suit was one by the holders of a rent-free grant, whereas the suits contemplated by chapter X of the Tenancy Act would appear to be suits by the zemindar alone as against the holders of rent-free grants.

Sections 150 and 158 of the Tenancy Act when read together made it clear that if a proprietor brought a suit of any of the descriptions mentioned in section 150, and if in that suit the circumstances mentioned in section 158 were proved, then the court would make the declaration that the holder had acquired proprietary rights. But it was only in a suit by the zemindar under section 150 that such a declaration could be made. The present suit was, therefore, quite different from suit No. 38 of group (c) of the fourth schedule. Nor was it a suit falling within the description of any other suit in the schedule. Suits for declaration were dealt with under No. 34 of the schedule, but they were limited to the matters specified in section 95. A rent-free grantee was not a tenant, and so a suit by him could not come under that section. For these reasons the suit was cognizable by the Civil Court. He relied on

Bachchi Lal v. Muhammad Majid-ul-lah, [1909] 6 A. L. J. R., 527.

Lastly, it was by the direction of the Revenue Court that the plaintiffs had come to the Civil Court; it was prayed that the High Court should point out the proper *forum* where they should go.

Surendra Nath Sen, for the opposite party, relied upon the case of

Baldeo Singh v. Mardan Singh, [1910] 7 A. L. J. R., 818,

and contended that section 167 of the Tenancy Act stood in the way of the Civil Court taking cognizance not only of the suits set forth in the fourth schedule but of any matter or dispute in respect of which such suit might be brought. Moreover, if the applicants' contention were right, the result would be that the declaratory suit in the Civil Court would be but a preliminary canter after which they would have to go to the Revenue Court to have the revenue assessed. The policy of the law being that a multiplicity of proceedings should be avoided, it was but just and proper that they should get the two things done in one and the same suit in the Revenue Court.

Gulzari Lal, replied.

The judgment of the Court was delivered by

BANERJI, J.—The facts out of which this case arises are these:—The first respondent applied to the Revenue Court for partition of his share in certain zemindari. The present applicants put in an objection claiming that they had acquired proprietary interest in certain plots of land which they were holding as rent-free grantees. The Revenue Court considered this objection to be an objection raising a question of proprietary title and referred the present plaintiffs to the Civil Court. Strictly speaking this order was not correct. The court holding the partition proceedings could very easily have disposed of the objection on the ground that no court had yet declared that the objectors had acquired proprietary title. However in accordance with the direction of the Revenue Court the plaintiffs instituted the present suit in the Civil Court claiming a declaration that by reason of their holding the rent-free grant for more than fifty years and for two generations they had acquired proprietary interest in the land in dispute. The court of first instance held that such a suit was not cognizable by the Civil Court and returned the plaint for presentation to the proper court. On appeal this order was affirmed by the lower appellate court. The present application is one for revision of the order of the appellate court and the contention is that the suit was cognizable by the Civil Court. We are of opinion that the view taken by the court below is right. Under the provisions of section 158 of the Agra Tenancy Act it is the Revenue Court alone which could make a declaration that the *muafi* rights had ripened into proprietary rights. Having regard to the provisions of section 167 and the fact that cases under section 158 are mentioned in the fourth schedule as cases cognizable by the Revenue Court, a suit like the present could only be brought in the Revenue Court and not in the Civil Court. The matter is concluded by the authority of the case of *Baldeo Singh v. Mardan Singh* (1). Following that ruling we hold that the present suit was not cognizable by the Civil Court and the only court in which the plaintiff could have claimed the declaration which he sought was the Revenue Court. We accordingly dismiss the application with costs.

B. K. M.

Application dismissed.

(1) [1910] 7 A. L. J. R., 818.

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MATHURA AND OTHERS

versus

EMPEROR *

Criminal Procedure Code (Act V of 1898), sections 15, 350—Rules framed by Local Government, validity of—Honorary Magistrates—Absence of member—Hearing of case by one Bench and judgment pronounced by another.

The Local Government by virtue of the power conferred on it by section 15 of the Criminal Procedure Code, appointed three persons as Honorary Magistrates, and also provided that two of them at one time might form a *quorum*. Certain persons were placed upon their trial under the Gambling Act, before a Bench consisting of two of such members. The case was heard by them but the delivery of the judgment was postponed. On the day on which judgment was pronounced one of the members who constituted the Bench on the former occasion was replaced by another of the members appointed and he had not heard the evidence *etc.*, in the case. Judgment was given convicting the accused:—*Held*, in revision (1) that the rule appointing three persons to constitute a Bench of Honorary Magistrates was not *ultra vires*, and that the *quorum* would be vested with all the powers conferred on the Bench; (2) that as one of the members on the second occasion when judgment was pronounced did not hear the evidence *etc.*, it was difficult to say that the accused were not prejudiced and consequently the trial was illegal.

CRIMINAL REVISION from an order of C. L. ALEXANDER, ESQ., District Magistrate of Farrukhabad.

Under the powers conferred by section 15 of the Code of Criminal Procedure the Local Government had appointed Jan Alam Khan, Nazir Ali Khan and Chaube Peare Lal to constitute a Bench of Honorary Magistrates at Kaimganj, district Farrukhabad. One of the rules framed under section 16 of the Code, and in force in the district of Farrukhabad, provided that when a Bench was composed of three members any two of them should “form a *quorum*.” And the next rule provided that if the Bench held an adjourned sitting for the disposal of a part heard case, and the members at the adjourned sessions were not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure would be held to apply to the case.

* Cr. Rev. No. 394 of 1918.

Certain accused persons were placed before the Bench for trial of an offence under the Gambling Act. On the first day of hearing, Jan Alam Khan and Nazir Ali Khan were the members present and on that day the evidence for the prosecution was recorded. At the next hearing of the case the members present were Jan Alam Khan and Chaube Peare Lal. The accused were asked whether they desired the Bench then sitting to commence the trial *de novo*, and they gave their consent in writing to the Bench proceeding with the case from the stage which it had already reached. On that date the prosecution witnesses were cross-examined, the defence witnesses were heard, the accused were examined and the arguments on both sides were heard. The case was adjourned for delivery of judgment. On the adjourned date judgment was delivered by Jan Alam Khan and Nazir Ali Khan, convicting and sentencing the accused to a fine. The accused applied in revision to the District Magistrate, and then to the Sessions Judge, on the ground that the judgment was illegal, as it was not pronounced by the same Magistrates who had heard the case on the second date. Both the District Magistrate and the Sessions Judge dismissed the application. The accused then applied to the High Court.

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Peary Lal Banerji, for the applicants.—When the accused consented to the trial proceeding before the two Magistrates who sat on the second day, the intention was that those two Magistrates should proceed with the case and go on to decide it. It was not merely a consent to a casual substitution of one member of the Bench for that day only.

Further, the whole of the defence evidence and the arguments were heard by the Magistrates who sat on the second day, and the accused were prejudiced by judgment being delivered by a member of the Bench who had sat on the first day but had not heard the rest of the case.

Under the rules framed by the Local Government the provisions of section 350 of the Code of Criminal Procedure had been made applicable to trials by a Bench of Magistrates; and according to that section the judgment was illegal.

The following cases were cited and discussed :

Hardwar Singh v. Khaga Ojha, [1893] I. L. R., 20 Cal., 870 ;

Queen-Empress v. Basappa, [1895] I. L. R., 18 Mad., 394 ;

Re Subramania Ayyar, [1913] I. L. R., 38 Mad., 304.

Finally, the case was of a trivial nature, and a re-trial should not be ordered; reference was made to the case of

Abdul Aziz v. Emperor, [1916] 15 A. L. J. R., 237.

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R. Malcomson, (Assistant Government Advocate) for the Crown.—The accused did not object to the constitution of the Bench on the third day of the hearing. Under section 350 of the Code of Criminal Procedure the accused had the option of raising such objection if they so desired; but they did not choose to exercise it, and the trial and conviction were legal.

The Local Government had framed rules which allowed only two Magistrates out of the three to form a *quorum*. A *quorum* was naturally vested with all the powers and jurisdiction of the complete Bench. There was no want of jurisdiction at any stage of the trial.

The Calcutta High Court had held in the case cited by the applicants that the rules framed by the Local Government were *ultra vires*; but that was not justified. The rules were within the competence of the Local Government.

Peary Lal Banerji, was heard in reply.

The following judgment was delivered by

Piggott, J.

PIGGOTT, J.—In this case the three applicants, Mathura, Gangadin and Jagannath, have been convicted of an offence under section 13 of the Gambling Act, No. III of 1867. The one and only question raised by this application is whether the trial of the applicants was or was not vitiated by any illegality or material irregularity in connection with the constitution of the court which tried them for this offence. The court in question was a Bench of Honorary Magistrates sitting at the town of Kaimganj. I find that the Local Government, in the exercise of the powers conferred upon it by section 15 of the Code of Criminal Procedure, had appointed three gentlemen, Mr. Jan Alam Khan, Mr. Nazir Ali Khan and Pandit Chaube Peare Lal, to be a Bench of Magistrates exercising jurisdiction in this particular place. It is not denied that the offence of which the applicants were tried was one within the jurisdiction of the aforesaid Bench, or that the sentence passed was one within the competence of the said court. The point taken is as follows.

There were three hearings of this case in the trial court. On December the 5th, 1917, the case was taken up by Mr. Nazir Ali Khan and Mr. Jan Alam Khan and the evidence for the prosecution was recorded. On the 16th of December, 1917, when the court resumed its sitting for the trial of this case, there were present on the Bench Mr. Jan Alam Khan and Pandit Chaube Peary Lal. The accused were asked to state whether they desired this Bench to re-commence the trial *de novo*, or rather, I should say, that they were asked whether they would like to have the trial adjourned until the same two Magistrates who had commenced the trial should find it convenient to sit together again. The precaution

was taken of obtaining from the accused a written petition, in which they stated that they had no objection to the hearing of the case proceeding before the Bench as then constituted and added that they particularly desired that there should be no delay in the disposal of the case. I understand that at the end of the hearing of December the 16th, 1917, the evidence had been completely taken; the accused had been examined and arguments had been heard. Nothing was left to be done except for the court to pronounce judgment. The record does not make it quite clear why, under these circumstances, an adjournment of five days was ordered, but I am inclined to suspect that this was done under a *bona fide* belief that the proceedings would be more regular if judgment in the case were pronounced by the same two members of the Bench of Magistrates who had commenced the trial. It is admitted that on the 21st of December, no objection was taken on behalf of the accused persons to the action of Mr. Nazir Ali Khan and Mr. Jan Alam Khan in proceeding to pass judgment. As bearing on the legality of these proceedings it requires to be noted further that, under section 16 of the Code of Criminal Procedure, the Local Government, or subject to the control of the Local Government, the District Magistrate, is empowered to make rules for the guidance of the Magistrates Benches in respect of various subjects, including amongst others the constitution of the Bench for conducting trials. The Local Government of these provinces has issued for general information a set of draft rules and these have been generally adopted under the authority of the Magistrates of various districts. It is not suggested that these rules are not in force in the district of Farrukhabad. Indeed I understand from the orders of the District Magistrate and of the learned Sessions Judge on this record that the said rules are undoubtedly in force. Now under the second of these rules, it is laid down in respect of a Bench consisting of not more than three members, that any two of these shall form a *quorum*. In the next rule it is provided that, if the Bench holds an adjourned sitting for the disposal of a part heard case, and the members at the adjourned sessions are not the same as sat at the first hearing of the case, the provisions of section 350 of the Code of Criminal Procedure will be held to apply to the case. The present applicants have brought the question of the legality of their trial to the notice of the District Magistrate in appeal and have also laid it before the Sessions Judge in revision. Both these courts have expressed the opinion that the proceedings of the Bench of Honorary Magistrates were justified under the rules above referred to and that the trial was, under the circumstances, a perfectly legal one. I have been referred to various decisions of the Calcutta and Madras High Courts, of which the most important is that of *Hardwar Singh v. Khaga Ojha* (1). In that case the learned Judges of the Calcutta

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High Court laid it down very broadly, that an Honorary Magistrate may not give judgment and pass sentence in a case unless he has been a member of the Bench during the whole of the hearing of the case. The attention of the Hon'ble Judges had been drawn to a rule framed by the Local Government of Bengal, purporting to make the provisions of section 350 of the Code of Criminal Procedure applicable to a case, like the one now in question, but they held that this rule was *ultra vires* not being justified by anything in the provisions of section 16 of the Code of Criminal Procedure. The Madras High Court has in two reported cases adopted the same principle. I have seen the rules framed by the Local Governments of Bengal and of Madras under section 16 aforesaid, and I may say at once that these rules differ in one material particular from those framed by the Local Government of these provinces. They contain nothing similar to the direction given by Rule 2 of the rules framed under the orders of our Local Government, by which any two members of a Bench of Honorary Magistrates consisting of three members shall form a *quorum*. As to the meaning of that expression there can I conceive be no room for doubt. In the case of any Board of Directors or other Committee, if there is a rule providing that so many members of the said Board or Committee shall form a *quorum*, the meaning of the rule is that, as soon as the requisite number of members is gathered together, the entire authority of the said Board or Committee vests in the *quorum* so assembled, and obviously this authority extends to the transaction of business adjourned from a previous meeting as well as to the taking up of fresh business. The first question then about which there must be a definite decision is whether a rule directing that any two members of a Bench of Honorary Magistrates consisting of not more than three members shall form a *quorum*, is one which the Local Government was entitled to make, or to cause to be made, under section 16 of the Code of Criminal Procedure. As a mere matter of judicial interpretation it seems to me that such a rule clearly falls under section 16, clause (c) of the Code of Criminal Procedure, being covered by the words:—"the constitution of the Bench for conducting trials." When the Local Government appointed the three gentlemen already mentioned to be a Bench of Honorary Magistrates exercising certain powers within the limits of the town of Kaimganj, the inference would be, in the absence of any rule or order to the contrary, that the Bench would not be properly constituted unless all three of the gentlemen named were present at each and all of its sittings. The Local Government regarded this as inconvenient and was of opinion that, for the convenience of the public, the work which it desired the Bench of Magistrates at Kaimganj to carry out could best be performed by appointing three Magistrates and then empowering any two of them to sit together as a complete court for the trial of cases or the transaction of other business. I repeat that in my opinion it was within the competence of the Local Government to pass orders to

this effect under the provisions of sections 15 and 16 of the Code of Criminal Procedure.

I have now to consider what would be the result if the Local Government had issued no further directions for the guidance of this Bench of Magistrates. In my opinion the consequence would be that any trial commenced before any two members of this Bench could lawfully be continued before any other two members. The learned Judges of the Calcutta and Madras High Courts had no such rule before them as that which I have quoted regarding the number of Magistrates necessary to form a *quorum*, and the decisions pronounced by them are therefore of no direct application to the present case. In saying this I do not wish to ignore the fact that on the principles laid down in the case of *Hardwar Singh v. Khaga Ojha* ⁽¹⁾, it would be difficult to accept the proposition that the Legislature intended to empower the Local Government to pass any orders the effect of which would be as above stated. I think that the learned Judges of the Calcutta High Court assumed, as a sort of major premise underlying the whole of their decision, that there was something repugnant to natural justice in the suggestion that the presiding officer of any court should pass any final decision in a criminal trial, except upon evidence the whole of which had been tendered in his presence and heard by himself personally. I can only say that this proposition seems to me a very arguable one, and that under the Indian system of Criminal Procedure the exceptions to this rule seem to me to outnumber the instances. I must admit therefore that I do not find myself able to approach the consideration of the question quite from the same point of view as that taken by the learned Judges of the Calcutta High Court. At the same time I have endeavoured to discuss, as a pure question of law, the question whether sections 15 and 16 of the Code of Criminal Procedure, read together, do or do not authorise the Local Government to make rules, the effect of which would be that any two Magistrates out of a Bench of three or more should constitute a *quorum* for the transaction of all business and the hearing of all cases lawfully coming before such Bench for disposal, including the further hearing of a criminal trial adjourned from a previous sitting. For the reasons stated I have come to the conclusion that the Local Government is so empowered and that the rules under which this Bench of Honorary Magistrates was constituted were perfectly legal. If I am right so far, then the question of the competence of the Local Government to make the further rule directing Magistrates' Benches, under specific circumstances, to be guided by the provisions of section 350 of the Code of Criminal Procedure, requires to be discussed on a wholly different basis from that adopted in the decisions of the Calcutta and Madras High Courts. It becomes an exception in favour of accused persons, engrafted by

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the Government rules upon the general direction that any two members of a Bench of three Magistrates shall, for all purposes, form a *quorum*. In practice it amounts to nothing more than this, that the Local Government directs the Bench of Magistrates in question, if it should find it is sitting to take up an adjourned trial with a Bench differently constituted from that which commenced the trial of the case, and exception is taken on behalf of the accused to the trial proceeding under such circumstances, then either to re-commence the trial *de novo*, or to adjourn it to a subsequent date on which it may be found convenient for the same two Magistrates to sit who had commenced the trial of the case. It is in fact a direction to Benches of Honorary Magistrates that, under certain circumstances, they are to refrain, at the request of the accused, from exercising a power which would otherwise be theirs. Looked at in this way I think that the rule was one within the competence of the Local Government. If I were to hold the contrary it certainly would not help the applicants in the present case. It is merely an exception engrafted by the Local Government upon the rule which it had previously made regarding the constitution of the Bench for conducting trials.

Having said this I now come to the consideration of what took place in this particular case. I have not the slightest hesitation in holding that the proceedings of the 16th of December, 1917, were regular and proper and within the competence of the Bench of Honorary Magistrates. Strictly speaking this proposition is not challenged by the petition in revision which lies before me for disposal. What the petitioners object to is the procedure followed on the 21st of December, 1917, when two Magistrates, one of whom had not heard the cross-examination of the prosecution witnesses or the defence evidence, proceeded to dispose of the case. To the contention of the applicants on this point the courts below have in substance replied that it was for the accused persons to object on the 21st of December, 1917, when Mr. Nazir Ali Khan and Mr. Jan Alam Khan took their seats upon the Bench to pass judgment in this case. Technically the opinion expressed by the District Magistrate and by the learned Sessions Judge on this point is in accordance with the wording of the first proviso to section 350, clause (1) of the Code of Criminal Procedure; but it is important that District Magistrates, and this Court also, should not overlook the second proviso to the same sub-section. It does not matter whether the accused did or did not object to the constitution of the Bench on the 21st of December, 1917; nor is it necessary for the court to consider whether they had a reasonable opportunity of doing so, whether they may not have been taken by surprise, whether judgment may not have been pronounced under such circumstances as left them no convenient opportunity of entering a protest. The real question is whether the accused persons were

prejudiced by the procedure adopted on the 21st of December, 1917. A question such as this is one which the court can only examine with reference to the general circumstances of each particular case. Ordinarily speaking one would be inclined to hold that it is prejudicial to an accused person that judgment should be passed against him by a Magistrate who has only heard the prosecution witnesses examined in chief, and was not present at their cross-examination or at the hearing of the defence evidence. So far as the record before me goes I cannot feel certain that Mr. Nazir Ali Khan had himself perused the entire record of the cross-examination of the prosecution witnesses and the depositions of the witnesses for the defence. He most probably did so; but he may have accepted his learned colleague's account of what had taken place at the sitting of December, the 16th. Moreover, although I am reluctant to refer to a matter of this sort, I cannot altogether shut my eyes to the fact that the accused persons are all Hindus, and that the case was one of such a nature that these accused persons may well feel that it was an advantage to them to have a Hindu gentleman present on the Bench when the matter was finally disposed of, specially when the question of sentence was being considered. I think therefore that the Honorary Magistrates in this case committed an error of judgment when they did not proceed to dispose of the case on the 16th of December, and I am not prepared to say that the accused may not have been prejudiced by the procedure followed at the final hearing of the case.

Under these circumstances the order which I pass is that the proceedings of the 21st of December, 1917, be set aside, the conviction and sentence be quashed, and that the case be returned to the same Bench of Honorary Magistrates to be disposed of from that stage at which, in my opinion, an error was committed. In effect my order is that the two Magistrates who presided at the hearing of December 16th, 1917, namely Mr. Jan Alam Khan and Pandit Chaube Peary Lal, do proceed to consider their decision in this case and to prepare a judgment and deliver the same in due course of law. The record is returned with the above directions.

B. K. M.

Record returned.

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July, 29.

RICHARDS,
O. J.
TUDBALL, J.HIRDEY NARAIN (*Judgment-debtor*)*versus*ALAM SINGH (*Decree-holder*)**Pre-emption—Extension of time fixed for payment—Decree becoming final.*

A decree in a pre-emption case in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed on the plaintiff have not been complied with, and no court has any power to alter the terms of the decree, when it has become final, so as to extend the time allowed for payment.

EXECUTION SECOND APPEAL from a decree of J. H. CUMMING Esq., District Judge of Saharanpur, reversing a decree of E. R. Neave Esq., Subordinate Judge of Dehra Dun.

In a suit for pre-emption a decree was passed, on 11th October, 1915, in favour of the plaintiff, directing him to deposit in court the sum of Rs. 2,000 within six months. The decree further provided that in the event of the plaintiff failing to do so the suit would stand dismissed with costs. The 11th of April, 1916, was a holiday. On the 12th of April, the plaintiff brought the money into court, and it was received by the Nazir. The tender was signed by the court on the 12th; but as the Treasury was closed on that day the money could not be deposited in the Treasury on the 12th. The Nazir attempted to deposit the money on the 13th but failed to do so as the Treasury had on that day been kept open for one hour only. The money was deposited in the Treasury on the 14th. Thereafter, on an application to execute the decree, the court of first instance held that the deposit had not been made in time and consequently the suit stood dismissed with costs. On appeal, the lower appellate court was of opinion that the principle of section 4 of the Limitation Act and of section 19 of the General Clauses Act should, equitably and analogically, be extended to such cases; and it held, accordingly, that the payment had been made within time, and that the decree stood in the plaintiff's favour. The defendant appealed to the High Court.

Nehal Chand, for the appellant—The right of pre-emption is a weak right and is not one which can ask for any stretching of the law, by analogy or otherwise, in its favour. The decree definitely fixed the period of six months as the time within which the plaintiff was to deposit the money, and the plaintiff failed to do so. To

* E. S. A. No. 1644 of 1917.

hold that the payment, which was made at least one day beyond the time fixed, was a payment made within time would in effect be extending the time fixed by the pre-emption decree. There is no provision of law authorising the court to extend such time. This was held in the case of

Suranjan Singh v. Rambahal Lal, [1913] 11 A. L. J. R., 950, F. B.

It is immaterial that the last day of the period fixed happened to be a holiday ; by the terms of the decree the right of the plaintiff was extinguished as soon as that period expired. Section 4 of the Limitation Act has no possible application to the present case ; nor has section 10 of the General Clauses Act.

Kailas Nath Katju, for the respondent, referred to section 4 of the Limitation Act and section 10 of the General Clauses Act, and submitted that on general principles of law recognized by the courts in this country as well as in England, a party who is given a fixed period to do a certain act in court and is prevented from performing it within the available period, not by reason of any act of his own but by some act of the court itself,—such as the fact of the court being closed—is entitled to get the benefit of the next opening day. The following cases were cited as supporting his contention.

Shooshee Bhushan v. Gobind Chander, [1890] I. L. R., 18 Cal., 231 ;

Mayer v. Harding, [1867] L. R., 2 Q. B., 410 ;

Sambasiva Chari v. Ramasami Reddi, [1898] I. L. R., 22 Mad., 179 ;

Munna Lal v. Radha Kishan, [1915] 13 A. L. J. R., 793.

By its decree the court had granted the plaintiff the period of six months within which he could deposit the money ; the court could not at the same time curtail that period, either by express order, or indirectly by an act of its own entirely beyond the control of the parties. The court could not give with the one hand and take away with the other.

Whether the right of pre-emption was a weak or a strong right was entirely irrelevant to the point in question. The fact remained that the decree gave the plaintiff six months to perform a certain act. He had a perfect right to perform it on the last day of the period, but was prevented by the court's own act. He took the next possible opportunity of performing it. To hold that it was not a due performance would be to cut down the period prescribed by the decree.

He then pointed out the possible hardship that would ensue in cases where the court closed shortly after the passing of the decree

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and remained closed until after the expiry of the period allowed by the decree.

Nehal Chand, was not heard in reply.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises under the following circumstances. The plaintiff in a pre-emption suit obtained a decree for pre-emption on the 11th of October, 1915. By this decree he was directed to lodge in court the pre-emption money within six months, and it further decreed that in the event of his failing to do so the suit would stand dismissed with costs. It will thus be seen that the decree was a decree in favour of the plaintiff on certain conditions. If those conditions were not fulfilled the decree became a decree in favour of the defendant vendee. The plaintiff did not deposit the money within six months. The last day which would have enabled the plaintiff to comply with the decree was the 11th of April, 1916. This was a holiday. It was alleged (and it has been found by the court below) that the money was brought to the Nazir on the 12th of April, a day on which the court was sitting. On that day he obtained a *chalan* which would have enabled him to have deposited the money in the Treasury provided the Treasury was sitting. It appears that the Treasury was not open on the 12th and was only open for an hour on the 13th and the result was that the deposit was not completed until the 14th. The court of first instance on an application to execute the decree held that the money had not been deposited in court within the time specified in the decree. On appeal the lower appellate court held that the money must be deemed to have been deposited within time applying (apparently by analogy) section 4 of the Limitation Act and section 10 of the General Clauses Act. This Court has held that in the case of a pre-emption decree, which has become final, no court has any power to alter the terms of the decree so as to extend the time allowed for payment. It must be remembered that the decree in its very terms becomes a decree in favour of the defendant vendee when the conditions imposed upon the plaintiff have not been complied with. In the present case the plaintiff pre-emptor appears not to have had his money ready until the period of six months had almost expired. In the end it was a money-lender who came with the money accompanied by the plaintiff's agent on the 12th of April, 1916. In our opinion section 4 of the Limitation Act and section 10 of the General Clauses Act only apply to the cases in which a period of limitation has been prescribed as mentioned in those sections, and do not apply to a condition prescribed in the decree itself. The respondent's learned *vakil* has referred to the cases of *Sambasiva Chari v. Ramasami Reddi* (1), *Shooshee Bhushan Rudro v. Gobind Chander Raj* (2) and

(1) [1898] I. L. R., 22 Mad., 179.

(2) [1890] I. L. R., 18 Cal., 281,

Munna Lal v. Radha Kishan (1). In our opinion none of these authorities apply to the circumstances of the case we have before us. We allow the appeal, set aside the order of the court below and restore the order of the court of first instance with costs in all courts.

B. K. M.

Appeal allowed.

(1) [1915] 13 A. L. J. R., 793.

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MAHADEO SINGH AND OTHERS

versus

EMPEROR *

CRIMINAL

1918

August, 8.

PIGGOTT, J.

Defence of India Act (IV of 1915), section 2—Rules framed under the Act—Conviction of accused under rules 23, 29—Revision—Irregularity, in initiation of proceedings—‘Dissuade or attempt to dissuade’ meaning of.

One M was a sub-tenant of two of the accused and worked as a ploughman of all of them. He was recruited in the Baudel corps for service in Mesopotamia and received an advance of Rs. 25. Subsequently the two accused whose sub-tenant he was sued him for arrears of rent amounting to Rs. 30-15-0. M made a statement before the District Magistrate of Mirzapur. This statement was not made on oath and was not signed by M. Then followed an order in the District Magistrate's hand and signed by him, directing warrants without bail to issue for the arrest of the four accused and an order for summoning certain witnesses. The District Magistrate took up the case himself, framed a charge and convicted the accused under Rule 29 of the rules framed in accordance with section 2 of the Defence of India Act (No. IV of 1915). The accused were alleged to have contravened Rule 23:—*Held*, in revision, (1) that the proceedings in the court of the District Magistrate were irregular in their initiation because the Magistrate had not given the accused the option of being tried by another court, as he was bound to do if he was taking cognizance of the offence upon information received under section 191 (c) of the Criminal Procedure Code, and if M's statement was a complaint the Magistrate ought to have taken from him a sworn declaration of its truth before issuing warrants; (2) that rule 23 did not apply inasmuch as no person could dissuade or attempt to dissuade another from doing something which the latter had already done.

CRIMINAL REVISION from an order of M. ABDUL HALIM Esq., Additional Sessions Judge of Allahabad at Mirzapur.

A. P. Dube, for the applicants.

R. Malcomson, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

PIGGOTT, J.—In this case Mahadeo Singh, Mahabir Singh, Harnarain Singh and Dipnarain Singh, Thakurs, residents of Jhimgurpatti in the district of Mirzapur, have been sentenced by the District Magistrate of Mirzapur to undergo imprisonment for a period of twenty months each under Rule 29 of the rules framed

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* Or, Rev. No. 446 of 1918.

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under section 2 of the Defence of India Act No. IV of 1915. The rule which they are alleged to have contravened is No. 23, which runs as follows :—"No person shall dissuade, or attempt to dissuade, any person from entering the Military or Police Service of His Majesty." The facts of the case which I find to be established beyond question are that Musai Pasi of Jhingurpatti is a sub-tenant of two of the accused persons, namely Mahadeo Singh and Harnarain Singh and that he has also worked as a ploughman for all the accused. On March the 4th, 1918, Musai was recruited in the Bandel corps for service in Mesopotamia and received an advance of Rs. 25. On April the 2nd, 1918, Mahadeo Singh and Harnarain Singh sued Musai, as their sub-tenant for arrears of rent for the year 1324 Fasli, amounting to Rs. 30-15-0 *plus* interest. On the 8th of April, 1918, Musai, having previously made some statement to the Recruiting Officer Mr. Branford, appeared before the District Magistrate of Mirzapur. The record of this case commences with a statement recorded in English by the District Magistrate as made to him by Musai on that date. The statement is not made on oath and is not signed by Musai. There follows an order in the District Magistrate's hand, and signed by him, directing warrants without bail to issue for the arrest of these four accused persons and an order for the summoning of certain witnesses. The District Magistrate took up the case himself on the 22nd of April, 1918. He framed a charge on the 13th of May and he convicted and sentenced the accused on the 15th of May, after having heard their defence witnesses. The conviction and sentence have been affirmed by the Additional Sessions Judge on appeal and the matter has been brought before this Court in the exercise of its revisional jurisdiction. The proceedings in the court of the District Magistrate were certainly irregular in their initiation. If the Magistrate conceived himself to be taking cognizance of this offence upon information received from Musai within the meaning of section 191(c) of the Criminal Procedure Code, he was bound to offer the accused persons the option of being tried by another court, as provided by section 191 of the same Code. If, on the other hand, the statement of Musai with which this record opens is the complaint in the case, upon which the District Magistrate proceeded to take cognizance, he was bound before issuing warrants, to take from Musai a sworn declaration that he had spoken the truth in the complaint made by him and to have obtained the signature of Musai to that sworn declaration. A further question has been raised as to the application in this case of Rule No. 30 of the rules in question. In view of the exceptional powers conferred upon the authorities by the statute, and by the rules under consideration, I think that the courts are entitled to require strict compliance with all the provisions introduced into the rules by way of safeguarding the liberty of the subject. The District Magistrate ought, strictly

speaking, as soon as he decided that action was called for on the information which Musai had given, to have recorded a formal proceeding, intimating his opinion that the initiation of a prosecution against the persons implicated in Musai's statement was advisable. If he had done this, and had also made up his mind definitely whether he was taking cognizance of the matter upon a complaint, or merely upon information received, he would probably have gone on to consider whether the interests of justice required that he should try the case himself. I do not say that I should necessarily have interfered in this matter if I had no other exception to take to the proceedings in the courts below than the irregularity of their initiation. As a matter of fact however, it seems to me that these proceedings have been misconceived in essential particulars. The rule under which the applicants have been convicted is not the rule applicable to the facts stated in the charge. Musai had enlisted, that is to say, had entered the Military Service of His Majesty, on March the 4th, 1918, and all the facts alleged in the charge are subsequent to that date. It is contrary to the genius of the English language to hold that one person can "dissuade or attempt to dissuade" another from doing something which the latter has already done. It is arguable that the courts below might have acted, or may have conceived themselves to be acting, upon a statement made by Musai, to the effect that threats had been addressed to him prior to his enlistment with a view to dissuading him from taking that course. It also seems to have been present to the mind of the District Magistrate, and of the Additional Sessions Judge, that the accused might be liable to conviction on the ground that they had dealt with Musai in a certain manner with the object, not of dissuading Musai himself from enlisting, but of discouraging other persons from following his example. Finally, it may be argued that the accused specified in the charge might under certain circumstances be held punishable under Rule 24, though not under Rule 23, if the court were satisfied that they had attempted to induce Musai to fail in his duty as a person in the Military Service of His Majesty by refusing to fulfil the engagement which he had taken upon himself at his enlistment. I mention these points to show that they have been considered by me before disposing of the case; but I think it sufficient to say that if the accused had been tried on charges suggested by any one of the three lines of argument above set forth, not only would the charge have required to be differently framed, but also the prosecution would have been faced with other and serious difficulties before any court could have felt justified in holding the suggested offences, or any of them, proved by the evidence on the record. It has of course been necessary for me to subject the entire record to a careful examination before I could form any final opinion about the merits of this application. I cannot help remarking that in the

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reasoning which has satisfied both the courts below that the evidence on the record, which is certainly scanty and is admittedly discrepant in some important particulars, was sufficient to prove certain facts against the accused persons, there seems to me one fairly obvious and somewhat serious flaw. Most of the points suggested in favour of the accused persons have been put aside in the courts below with the remark that there seems no adequate motive for Musai in bringing this accusation if it is not true, or at least founded on fact. I take it on myself to suggest that a very possible explanation of all the evidence on the record, and one which meets most of the difficulties suggested on both sides, would be that Mahadeo Singh and Harnarain Singh thought themselves justified in bringing pressure to bear upon Musai to pay up his arrears of rent before he left the country, and that Musai strongly resented their doing so. There is only one other point on which I think it fair to say a word or two. Both the courts below have taken it to be proved that the four accused persons first succeeded in obtaining by threats of violence from Musai's wife a sum of Rs. 25 on account of the arrears of rent due to them, and that subsequently Mahadeo Singh and Harnarain Singh sued Musai for arrears of rent without giving him any credit for this payment of Rs. 25. If this were proved by the evidence, the accused, or at least Mahadeo Singh and Harnarain Singh, would deserve to be prosecuted for an offence punishable under section 209 of the Indian Penal Code, and it might be my duty to go further into the matter from this point of view. It seems to me however that the evidence on which the courts below have found that Musai's wife actually handed over Rs. 25 to the accused persons is of the slenderest, and I have ascertained, by going a little outside the record, a fact which the accused persons should have taken the trouble to have brought upon this record, namely that Musai did not defend the suit for arrears of rent and made no attempt to prove that the major portion of the claim had been satisfied by a payment of Rs. 25 obtained by Mahadeo Singh and Harnarain Singh from his wife. In my opinion therefore it is useless to pursue this matter further. The conduct of the accused persons was not particularly creditable to them, and may have been worse than anything that appears to be clearly proved by the record, but they have undergone very nearly three months' rigorous imprisonment in consequence, and the District Magistrate may perhaps feel that, whatever order this Court may now pass, the proceedings instituted by him have served a useful purpose. I do not wish to say anything to deprive him of that satisfaction. On the contrary, I think it fair to say that I fully recognise the fact that he acted in all good faith in the public interests. The conclusion I come to is that the four applicants have been convicted on a charge which is not supported by the evidence on the record and which is in fact bad in law, inasmuch as the facts alleged therein did not amount to an offence punishable under the rule therein quoted. Any further

examination which I have made of the record, and any further comments which I have passed on the evidence, are merely directed towards the question of the propriety or otherwise of ordering further proceedings to be taken after setting aside this conviction. The remarks which I have made are I think sufficient to explain my reasons for contenting myself with quashing these proceedings, without passing any further order. The result is that I set aside the conviction and sentence in this case, acquit the four applicants of the offence charged, and direct that they be forthwith released.

Application allowed.

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Piggott, J.

NANHEY MAL (*Defendant*)

versus

CHAIT RAM AND ANOTHER (*Plaintiffs*)*

Negotiable Instruments Act (XXVI of 1881), sections 64, 76—Non-presentment by holder—Liability of drawer—Onus of proof.

N who had sold potatoes to *H* drew a *hundi* payable at sight on the latter which was in favour of *M*. *M* sold it to plaintiffs who sent it in an unregistered letter to their agent at Cawnpur. The letter miscarried, and the loss, owing to the carelessness of the plaintiffs was not discovered till after fourteen months of the loss. The plaintiffs did not present the bill to *N* but brought a suit on foot of the *hundi* against *N* and *H*. The suit was dismissed against *H* but decreed against *N*.—*Held* that *N* was not liable under the *hundi* inasmuch as the plaintiffs had not shown that *N* could not suffer loss by reason of non-presentment for payment.

SECOND APPEAL from a decree of SAIYED IFTIKHAR HUSAIN, Officiating Subordinate Judge of Farrukhabad, confirming a decree of Maulvi Mohammad Ali Ausat, Munsif.

Surendro Nath Sen, for the appellant.

Tej Bahadur Sapru, for the respondents.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit instituted on foot of a *hundi*. It appears that the appellant Nanhe Mal sent certain potatoes to Hari Kishore, a firm in Calcutta. Nanhe Mal drew a bill payable at sight on Hari Kishore at Calcutta. The bill was in favour of Mathra Das Mohan Lal, who sold it the very same day to the plaintiffs, that is, on the 2nd of April, 1913. The plaintiffs sent the *hundi* in an unregistered letter to their agent at Cawnpur. The letter and the bill appears to have miscarried in the post but owing to the carelessness of the plaintiffs the loss was not discovered for nearly fourteen months afterwards. Some negotiations proceeded between the plaintiffs and Nanhe Mal with a view to getting a duplicate. Exactly what form those negotiations took is not clear, but it would seem that if the plaintiffs had given satisfactory evidence of the loss and had offered an indemnity

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* S. A. No. 1415 of 1916.

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to Nanhe Mal, the latter might have been compelled by proper proceedings to give a duplicate. No such proceedings were in fact ever taken—but the present suit was instituted on the 14th of April, 1915. Hari Kishore was made a party as also was Nanhe Mal. Admittedly the bill of exchange was never presented either for acceptance or payment to Hari Kishore nor apparently was even a demand made from the latter. The court of first instance dismissed the suit as against Hari Kishore but gave a decree as against Nanhe Mal. The lower appellate court confirmed the decree. Nanhe Mal appeals. The other persons who were parties to the appeal in the court below are not parties to this appeal. The question is whether Nanhe Mal is liable under the circumstances. Section 64 of the Negotiable Instrument Act provides that a Bill of Exchange must be presented for payment in the manner mentioned in that and subsequent sections. Section 76 provides that no presentment for payment is necessary in certain circumstances. The section says “no presentment for payment is necessary and the instrument is dishonoured at the due date for presentment in any of the following circumstances.” Clause (d) says “as against a drawer if the drawer could not suffer damage from want of such presentment.” This Court has held that the *onus* of showing that the drawer could not suffer damage from want of presentment lies on the holder suing on the bill. Admittedly in the present case no such proof was given. As a matter of fact in the present case Hari Kishore received potatoes from Nanhe Mal for the value of the *hundi*, in other words it was the way in which Hari Kishore was paying for the potatoes. It is quite impossible to say under these circumstances that Nanhe Mal could not have suffered damage by reason of the non presentation for payment of the bill to Hari Kishore. The person in whose favour this bill was drawn has gone bankrupt and a similar fate conceivably might have happened to Hari Kishore. We allow the appeal, set aside the decrees of both the courts below and dismiss the suit as against the appellant with costs in all courts.

Appeal allowed.

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July, 26.
RICHARDS,
C. J.
TUDBALL, J.

HASAN ALI KHAN (*Plaintiff*)

versus

AZHARUL HASAN AND OTHERS (*Defendants*)*

Mortgage—Sale in execution of decree—Sale of sixteen annas zemindari—Whether groves comprised therein transferred by sale or not.

One A. M. owned an entire sixteen annas mahal. In execution of decrees against certain persons he purchased shares in certain groves. Subsequently he mortgaged his entire sixteen annas zemindari together with all appurtenances. In execution of the decree under the mortgage the entire sixteen annas were ordered to be sold and were purchased by the plaintiff :—*Held* that the sale was not exclusive of the shares in the groves.

SECOND APPEAL from a decree of BABU KUNWAR SEN, Subordinate Judge of Allahabad, reversing a decree of Babu Tirloki Nath, Second Additional Munsif.

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One Ali Mazhar was the sole proprietor of the entire 16 annas of a certain zemindary mahal. He obtained decrees against certain persons who held certain shares in three groves, and in execution thereof he purchased those shares, namely $\frac{7}{12}$ in groves numbered 231 and 344, and $\frac{2}{3}$ in grove No. 778. Subsequent to the purchase he executed two mortgages, by which he hypothecated "the entire 16 annas zemindari together with all appurtenances, without any exception or reservation." The mortgagee brought a suit for sale on the mortgages, and in execution of the decree for sale purchased the entire property herself. She then sold all her rights to the present plaintiff. The defendants, sons of Ali Mazhar, were entered in the revenue papers as tenants of the groves in question, and were in possession thereof. The plaintiff sued for possession of the groves. The plea raised in defence was that Ali Mazhar's rights as a grove-holder were separate from his zemindari and were not comprised in the mortgages and, consequently, had not passed by purchase to the plaintiff. The court of first instance decreed the suit but the lower appellate court sustained the defendants' plea and dismissed the suit. The plaintiff appealed to the High Court. The appeal coming on for hearing before a single Judge was referred by him to a Bench of two Judges.

Peary Lal Banerji, (with *B. E. O'Connor* and *S. A. Haidar*), for the appellant.—At the date of the mortgages by Ali Mazhar he was the sole zemindar, and consequently he could not at the same time also hold inferior rights in the same land. By his purchase he acquired the rights of the grove-holders, but those rights merged completely in his zemindari rights. If there had been other co-sharers in the zemindari then it would be possible that he could have possessed distinct grove-holder's rights as against the proprietary body. The case of

Har Lal v. Himmat Rai, [1885] A. W. N., 301, was discussed and distinguished. The mortgages were very comprehensive and expressly left no reservations of any rights whatsoever.

Nehal Chand (for *W. Wallach*; with him *Haribans Sahai*), for the respondents.—The mortgages were only of the zemindari rights, and Ali Mazhar intended to keep apart the rights of a grove-holder which he had acquired. Merger was a question of intention, and the lower appellate court had found that the intention of Ali Mazhar was to keep those rights separate. The case of

Amatoo v. Mukhsud Ali, [1914] 28 I. O., 314. (Cal.), was relied on. As was pointed out in the case mentioned by the appellant, a grove-holder's rights would not necessarily or ordinarily be included in the term zemindari property.

Peary Lal Banerji, was not heard in reply.

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HASAN ALI
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HASAN.

Richards,
C. J.

The judgment of the Court was delivered by

RICHARDS, C. J.—The facts connected with this appeal may be shortly stated as follows:—One Ali Mazhar having become the owner of the sixteen anna mahal mortgaged the same to the plaintiff's predecessor. The mortgage is most comprehensive in its terms, the mortgagor purporting to mortgage his entire interest without any sort of reservation. A decree was obtained on foot of this mortgage. The property was sold and purchased by the plaintiff or his predecessor. The present suit is brought to recover certain fractional shares in three groves. It appears that prior to the mortgage which we have mentioned above Ali Mazhar obtained decrees against certain persons who had certain rights as grove-holders. In execution of these decrees he put up to sale the interest (whatever it was) of the grove-holders and purchased it himself. The argument put forward on behalf of the defendants is that this interest was an interest separate altogether from the zamindari and it did not form portion of the mortgaged property, and consequently did not pass to the plaintiff when he purchased under the mortgage decree. It seems to us that this contention is not sound. We have already mentioned that the acquisition of the grove-holder's interest was prior to the mortgage and we have referred to the terms of the mortgage deed. There was no reason of any kind why the interest of the grove-holders should not merge in the inheritance. Ali Mazhar was the sole owner of the sixteen anna mahal. At that time there was no reason why it would in any way be for the benefit of Ali Mazhar to keep outstanding the interest of the grove-holders. It is absolutely clear under the circumstances of the present case that the interest of the grove-holders, purchased and acquired by Ali Mazhar, merged in his estate as zemindar. Furthermore the very terms of the mortgage deed are quite wide enough to include and comprehend every interest that he possessed at the date of the mortgage in the sixteen anna mahal which he sold. We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

B. K. M.

Appeal allowed.

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1918

July, 31.

RICHARDS,
C. J.
TUDBALL, J.

BHAGWATI

versus

EMPEROR*

Criminal Procedure Code (Act V of 1898), section 512—Evidence taken against an accused person who has absconded—Condition precedent to the use of such evidence.

The mere fact that a Magistrate did not recite in his order a finding that there was no immediate prospect of the arrest of the accused who, he clearly found had absconded, does not render the evidence taken by him, under section 512 of the Criminal Procedure Code, inadmissible against them when arrested. *Emperor v. Rustam*, [1915] I. L. R., 38 All, 29, distinguished.

* Cr. A. No. 459 of 1918,

CRIMINAL APPEAL from an order of MAULVI ABDUL HALIM, Additional Sessions Judge of Allahabad at Mirzapur.

C. R. Alston (with him *Peary Lal Banerji*), for the appellant.

R. Malcomson (Assistant Government Advocate), for the Crown.

The judgment of the Court was delivered by

RICHARDS, C. J.—The accused in this case has been found guilty of murder and sentenced to transportation for life. The alleged murder took place as far back as the 24th of June, 1904. A trial took place in respect of this murder in the year 1904 and one Khedu was convicted. He was sentenced in the first instance to transportation for life but that sentence was subsequently enhanced by the High Court to a sentence of death. The present accused was arrested on the 8th of February, 1918, at Madras. He was put upon his trial and convicted and sentenced to transportation for life. The depositions of three witnesses were used as evidence against him. All these three persons were dead. Mr. Ross Alston, on behalf of the appellant, has raised the point that these depositions were not admissible. The Magistrate in the year 1904 took the evidence of these witnesses having previously made the following order:—"I find that Mahabir and Bhagwati have absconded. The evidence which I am about to take will be regarded as taken under section 512 of the Code of Criminal Procedure as regards Mahabir and Bhagwati." The point raised by the learned counsel is that the omission in the order of an express finding that there was no immediate prospect of arresting the two persons renders the evidence inadmissible. In support of this contention the case of *King-Emperor v. Rustam* (1), has been quoted. In that case a person was put upon his trial sometime after an offence had been committed. The evidence of certain witnesses, who had been examined previously, was admitted at the trial. The evidence it seems purported to have been taken under section 512. At page 31 the learned Judges say:—"The learned counsel for the appellant contends that the said evidence is inadmissible inasmuch as no proof of the absconding of the accused had been formally received and recorded prior to the examination of the said witnesses. We think that this objection is valid and must prevail. In section 512 it is distinctly laid down that if it is proved that an accused person has absconded and there is no immediate prospect of arresting him, the court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. *It is clear from the language of the section that the court which records the proceedings under it, must first of all record an order that in its opinion it has been proved that the accused has absconded and that there is no immediate prospect of his arrest. No such finding appears on the file of 1897, in fact no evidence was taken in that year to show that the present appellant*

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Banerji, J.

was absconded and that there was no immediate prospect of his arrest. The evidence of 1897 being inadmissible the conviction of the appellant on the basis of such evidence cannot stand."

It would seem from this passage that when (*sic*) the learned Judges looked at the file of the previous trial and found that there was no evidence from which the Magistrate could draw the inference that the accused was absconding and that there was no immediate prospect of his arrest. In the present case we find that a witness was examined who proved that the accused were absconding and from his evidence the Magistrate might most reasonably have inferred that there was no immediate prospect of their arrest. In the evidence as recorded by the Magistrate the witness actually said that the accused had absconded and that there was no prospect of arresting them and that action under sections 87 and 88 had been taken by the court. In the passage we have quoted the learned Judge who delivered the judgment says:—"It is clear from the language of the section that the court which records the proceedings under it must first of all record an order that in its opinion it has been proved....."

The section nowhere says that the Magistrate must record a finding. We wish to make it quite clear that in our opinion a Magistrate before recording evidence under section 512 ought to be satisfied that the accused is absconding and that there is no immediate prospect of his arrest and it is certainly advisable that he should recite in his order that he finds this to be the case. However in this case we find that the Magistrate had clear evidence that the accused were absconding, and evidence from which the Magistrate might reasonably infer that there was no immediate prospect of their arrest. In his order he expressly states that he is taking the evidence under section 512. The presumption is that the Magistrate did his duty and did not record the evidence under section 512 unlawfully. In our opinion the mere fact that the learned Magistrate did not recite a finding that there was no immediate prospect of the arrest of the accused does not render the evidence inadmissible. In the present case neither of the accused were very promptly arrested. One was only arrested in the present year and the other is still absconding. We think that the evidence was clearly admissible. Once we decide this point we see no reason whatever to differ from the conclusion arrived at by the court below. The evidence was believed at the original trial and there is no reason to doubt it. We dismiss the appeal.

Appeal dismissed.

PRIVY COUNCIL.

BALLA MAL AND ANOTHER (*Plaintiffs*)

versus

AHAD SHAH AND ANOTHER (*Defendants*).

Contract Act, (Act IV of 1872), section 16—Undue influence—Unconscionable bargain—Expectant heir—English equitable rules inapplicable to India—Ultimate result of dealings not conclusive that they are unconscionable—Compounding of interest not necessarily oppressive—Illustrations to Indian Statutes, their legal effect.

Questions as to undue influence, unconscionable bargains, and dealings with expectant heirs, must be decided on the provisions of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899 and these alone. The principles on which English Courts of Equity deal with similar questions are entirely inapplicable.

Dhanipal Das v. Rani Maneshar Bakhsh Singh, [1906] 33 L. A., 118; *Rani Sundar Koor v. Rai Sham Kishen*, [1906] 34 L. A., 9, followed.

In money lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction unconscionable. It must also appear that there is something unconscionable, either in the original dealings, or in the subsequent stages of the transaction.

By making short term loans and insisting on capitalising the interest immediately it falls due, a money-lender may pile up compound interest at an oppressive and unconscionable rate. But there is nothing inherently wrong or oppressive in his securing interest upon interest after the interest has been due and unpaid for a considerable time.

Their Lordships in this case agreed with the lower courts that the Indian Contract Act throws upon the person dealing with an expectant heir and in a position to dominate the latter's will the burden of showing that he has not used his position to obtain an unfair advantage, but held it unnecessary to decide whether such a situation in fact arose here.

The illustrations to an Indian Statute are to be taken as part of the Statute.

APPEAL from a decree of the Chief Court of the Punjab, varying a decree of the District Judge of Amritsar.

The question in this appeal was whether certain loan transactions between plaintiffs and defendants were unconscionable

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bargains within the meaning of section 16 of the Indian Contract Act. The trial Judge held they were not, and decreed plaintiffs' claim in full: the Chief Court (REID, C. J., and KENSINGTON, J.,) considered they were, and modified the decree by allowing plaintiffs only the original principal and eighteen per cent simple interest. Plaintiffs appealed.

De Gruyther, K. C., and Colonel Arthur Grey, for the appellants.

Respondents did not appear.

De Gruyther, K. C., for the appellants.—The doctrines of the English Courts or Equity are not to be considered: section 16 of the Contract Act must be construed by itself.

Dhanipal Das v. Ram Maneshar Baksh Singh, [1906] 33 I. A., 118, 127;

Rani Sundar Koer v. Ram Sham Kishen, [1906] 24 I. A., 9, 16

The circumstances under which the section applies may be summed up as fraud or coercion; there is no proof of either here.

The lower courts have treated plaintiff as an expectant heir: he was only so in the sense in which every Mohammedan is an expectant heir, and when these transactions commenced he had no substantial expectations. To get relief defendant must show that there was undue influence in the period 1872—1897 over which the transactions of purchases and borrowing extended. There was nothing harsh or unconscionable either in the original bargains, or in any of the renewals, and one at least of these two things must be shown. The renewals were renewals at the old rates and at long periods.

[Reference was made to

Nevill v. Snelling, [1880] 15 Ch. Div., 679;

Beynon v. Cook, [1875] 10 Ch. App., 389.]

Their Lordships' judgment was delivered by

Lord
Atkinson.

LORD ATKINSON.—This is an appeal from a judgment and decree of the Chief Court of the Punjab, dated the 13th January, 1914, varying a decree of the District Judge of Amritsar, dated the 31st July, 1911, and decreeing in part the claim of the present appellants.

The plaintiff Balla Mal is the father of the plaintiff Ibhara Das. They carry on the business of sellers of gold lace in the city of Amritsar, and are in addition money-lenders. They are members of a joint Hindu family.

The deceased defendant was a Mohammedan. He was born in the year 1863, and was therefore in the year 1892, 29 years of age. At the latter date he had been employed for six years as permanent copying clerk in the office of the Divisional Judge of Amritsar at a salary of 40 rupees per mensem. The defendant's father was headman of the Kunjar or prostitute caste.

The action out of which this appeal arises was brought by the plaintiffs upon certain promissory notes admittedly drawn up and executed by the deceased defendant to recover the sum of 61,800 rupees alleged to be due for principal, and Rs. 40,489-3-0 alleged to be due for interest at the rate of 30 rupees per cent. per annum, according to the tenor of these notes. The plaint, which was filed on the 25th April, 1909, set forth the particulars of the several notes sued upon, which it is not disputed were respectively presented to the deceased defendant at maturity and payment demanded without effect.

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The deceased defendant on the 15th May, 1909, filed a written statement admitting the execution of the several promissory notes sued upon, but alleging:—

1. That he did not receive any consideration for the making of them.
2. That the notes sued upon and all promissory notes and acknowledgment made or given by him leading up to the making of the former were procured from him by the exercise by the plaintiffs of undue influence upon him; and,
3. That the whole transaction of which the promissory notes sued upon were the outcome was an unconscionable bargain made with him as an expectant heir, and therefore liable to cancellation.

It has been decided by this Board in two cases, namely, *Dhanipal Das v. Rani Maneshwar Bakhsh Singh* (1) and *Rani Sundar Koor v. Rai Sham Kishen* (2), that questions such as those raised by this written statement must be decided on the provisions of the Indian Contract Act of 1872, as amended by the Indian Contract Amendment Act of 1899, and on those alone. The principles upon which English Courts of Equity deal with similar questions are therefore entirely inapplicable.

The 16th section of the Contract Act of 1872, as amended by the later Act, runs as follows:—

“1. A contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

2. In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another:—

(a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) When he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(1) [1906] 83 I. A., 118, 127.

(2) [1906] 34 I. A., 9.

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3. Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

Four illustrations are given. These are to be taken as part of the statute. Two of them, namely, (c) and (d), appear to be applicable to the present case, (c) provides if "A, being in debt to B, the money-lender of the village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove the contract was not induced by undue influence." (d) Provides that if "A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan, except at a high rate of interest, A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence." Now both courts have held that the averment in the plaint that the deceased defendant did not receive any consideration for the making of the notes sued on was untrue, and that consideration in fact amounting to the sum of Rs. 4,471-5-9 was received by him for the making of them. The deceased defendant himself deposed that about 3,000 rupees of this sum represented money actually advanced to him by the plaintiffs.

The balance was proved to be the price of goods, such as gold lace, by the plaintiffs actually sold to him, or of clothing by them actually procured for him.

The District Judge, in delivering his judgment, most truly remarked that one "cannot avoid being struck by the fact that an original principal of Rs. 4,471-5-9 had expanded to a principal sum of no less than Rs. 61,800 . . . and that such a result certainly impressed one at first sight as distinctly harsh and unconscionable. "But" (he continues) "I doubt whether—

"on examination it can be held really to be so, for what we have to look at, primarily at any rate, are the circumstances existing at the time of the original dealings, and not the ultimate result of those dealings, unless the intermediate stages whereby that ultimate result has been arrived at have themselves been harsh or unconscionable. In other words the mere fact that the principal sum now claimed exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable. It must also appear that there was something unconscionable either in the original dealings, or in the subsequent stages of the transaction."—See I. L. R., 23 Calcutta, 15, and he then proceeds to examine the original dealings between the parties;

The learned Judge has, in their Lordships' view in this passage laid down the true principle upon which the extreme augmentation of the deceased defendant's indebtedness should be regarded and dealt with. It is not enough—indeed, it is misleading—to look at the result alone.

This is, in their Lordships' view, the error into which the Chief Court, have to some degree, apparently, fallen. A borrower who obtains a loan secured by a promissory note on quite reasonable terms, by neglecting to pay the note at maturity, further neglecting to pay the accruing interest for the several years following, and then giving a renewal note for the original debt *plus* the capitalised interest, could produce a result which might at first sight appear oppressive, and yet there would be nothing harsh or unconscionable in the creditor's demand, since the added interest only accumulated while he forebore to enforce the payment of the sums from time to time due to him.

On the other hand, it would be quite possible for a money-lender, by making loans for short periods on apparently fair terms, and then insisting on capitalising the interest immediately on its becoming payable, to pile up compound interest on the initial debt at such a rate as would make the result after a few years most oppressive and unconscionable. But there is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract. Bankers are, in fact, in this country in the habit; in the ordinary course of their business, of capitalising the interest accruing on overdrawn current accounts every six months, as long as a debit balance against the customer remains due, (1) *Yourell v. Hibernian Bank, Limited*.

The District Judge examined exhaustively and with the greatest care all the dealings which took place between the plaintiffs and the deceased defendant from their initiation in the year 1892 down to the making of the notes sued upon, tracing backwards from the latter to their first beginnings. And at the end of his judgment will be found under his hand a genealogical tree, as it were, of these several groups of *hundis*. The Chief Court did not suggest that there was any inaccuracy in the dates and figures so set out. It differed merely as to the conclusions to be drawn from them. The first transaction between the parties took place on the 18th November, 1892. On that day the deceased defendant purchased on credit in the shop of Balla Mal, from the Munib in charge, lace at the price of Rs. 252-10-9. The details of this purchase have been entered in the plaintiff's books by the deceased defendant, and by the latter signed. On the 29th of the same month he pur-

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chased from the plaintiffs goods of various character at the price of Rs. 627-15-0, which together with the earlier purchase brought his indebtedness to the plaintiffs up to the sum of Rs. 880-9-9.

As on the previous occasion the particulars of this transaction were entered by the purchaser in the appellants' books and the entries duly signed by him. From the 3rd to the 27th December, 1892, the deceased defendant purchased in the like manner from the plaintiffs clothes and other articles, raising his indebtedness to them to the sum of Rs. 1,653-14-3. This account is signed by him on the 28th January, 1893. No interest whatever appears up to this to have been charged upon it. On the 30th January, two days after the correctness of the account was thus acknowledged, two bonds were executed by the deceased defendant in favour of Lala Balla Mal. The first for a sum of Rs. 1,753-14-5, stated to be due under a *bahi* account entered in the deceased's hand-writing on leaves Nos. 215 to 281, commencing from the 18th November, 1892, to the 28th January, 1893, the deceased agreeing to pay this sum on the 1st August, following with interest at the rate of 2 rupees per cent. (per mensem presumably), and in default of payment on that date interest to be charged at Rs. 2-8-0 per mensem, i.e., 30 per cent. per annum.

The second bond contained a recital that the obligor had received from Lala Balla Mal 450 rupees in cash, and also a clause agreeing to pay this money with interest at the rate of Rs. 2-8-0 per cent. (per mensem presumably) on the 1st September then following. The bond then sets forth the fact that he had on that day executed another bond for Rs. 1,753-14-3, and provides that on the deceased's default in paying both bonds the creditor was authorised to recover in any way he liked the entire money due with interest from the obligor's personal property. In the plaintiffs' books under date the 30th January, 1892, appear two entries signed by deceased defendant setting forth accurately these two transactions.

There is not a particle of evidence in the case to show that the plaintiffs ever made any threat to or put any pressure upon the deceased defendant to induce him to execute these securities or either of them.

The deceased defendant himself never so stated, and Balla Mal, who was examined as a witness on his opponent's behalf, stated that he never made any complaint to the father of Nasir-ud-din; that the latter was in debt to him and had omitted to pay; that he, the witness, looked upon Nasir-ud-din as an honourable man; that the things the latter bought in his shops were for Nasir-ud-din's family purposes, as was also the cash he borrowed; that he, the witness, never practised any fraud or undue influence upon the deceased defendant; that every time the latter executed a

hundi he was in the habit of going through the accounts carefully; that all the *hundis* were in the deceased's own hand-writing; and that whenever a *hundi* was renewed Nasir-ud-din used to note on the back of the old one the fact of renewal, &c. The deceased defendant relied much in this action on his own dissolute and licentious habits, which were probably exaggerated to suit the case; but if this evidence of the plaintiff be true, and it is practically uncontradicted, he was one of the most careful, accurate, and business-like drunkards and debauchees that could be well imagined. The principal plaintiff frankly admitted that he refrained from pressing the deceased defendant for payment of the *hundis* given him from time to time by the latter in order that his interest might accumulate. If the deceased was solvent, or nearly solvent, and the payment of his debt was at all secure, it was a good investment of the plaintiffs' capital. There does not to their Lordships appear to have been anything rapacious or exacting in the plaintiffs procuring the execution of these bonds on the 30th January, 1893, to secure the re-payment of his shop debt and the sum of 450 rupees money advanced, unless it is to be found in the rate of interest, charged, 30 per cent. per annum, $2\frac{1}{2}$ rupees per mensem. Well, the interest allowed by the Chief Court in the decree is 18 rupees per cent. per annum, $1\frac{1}{2}$ rupees per mensem. It only exceeds that rate by 1 rupee per mensem; 2 rupees per mensem is by no means an unusual rate of interest in cases from India coming before this Board. And their Lordships think that Mr. De Gruyther was fully justified in contending that if a suit had been brought immediately or some months after the 30th January, 1893, to have these bonds of that date set aside on any of the grounds mentioned in the above-mentioned written statement it would have failed.

Now, as appears from the table at the end of the judgment of the District Judge and from the documents in the case, neither the principal nor interest secured by these bonds was ever paid; but on the 23rd May, 1896, two years and nine months after the day by it named for payment, the 1st August, 1893, the arrears of interest then due were capitalised, and a new bond as of that date for the sum of Rs. 362-9-3, bearing interest at the same rate, was executed by the deceased.

Similarly nothing was paid on foot of either the principal or interest secured by the second bond of the 30th January, 1893, till the 31st July, 1896. Two years and ten months after the day named for payment the interest then due, amounting to Rs. 472-8-0, was capitalised, added to the principal, and a new bond executed by Nasir-ud-din to the principal debt, 450 rupees and interest, making together Rs. 922-8-0, bearing interest at the same rate, Rs. 2-8-0 per cent. per mensem. This affords a fair illustration of the manner in which interest was capitalised and

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the debt augmented. The District Judge has found that taking the various groups of *hundi*s as he has grouped them, that after the initial *hundi*s for 1,000 rupees, dated the 24th January, 1897, due on a book account then, first renewal was not given till the 3rd May, 1900, three and a quarter years and the second renewal now in suit was not given till the 7th October, 1904, nearly four and a half years after its predecessor became due, when no doubt the overdue interest was capitalised.

The correctness of the table framed by the District Judge cannot be questioned. The documents in the case establish its correctness. It clearly shows that, so far from *hundi*s being renewed with undue frequency, they were frequently allowed to remain overdue for periods of from two and a half to four and a half years, before a renewal was taken and the overdue interest capitalised. In some instances the period of limitation of suits on *hundi*s was allowed to run out before any renewal was given, the debtor being thus in a position, if disposed, to refuse to renew. The District Judge having regard to these facts found that the numerous transactions which took place between the plaintiff and the deceased defendant, including the making of the notes sued on, were not on the face of them unconscionable contracts within the meaning of section 16, sub-section (3), of the Indian Contract Act of 1872 as amended. Their Lordships concur with the learned District Judge in that conclusion. In their opinion either the rate of interest reserved, 30 per cent. per annum, nor the capitalisation of overdue interest at intervals so lengthy as those proved by the dates of the securities themselves, nor the two combined, are sufficient to lead to a contrary conclusion.

They also concur with the learned District Judge in the second conclusion at which he has arrived, namely, that the evidence does not establish that these contracts were of an unconscionable character. The deceased defendant was undoubtedly a spendthrift of depraved and licentious habits. He undoubtedly became heavily indebted to several creditors during the years covered by the transactions dealt with in this appeal. It was legitimate to prove these facts in order to establish that he was a person of weak and debauched character, unable to resist the pressure of creditors if applied, or to resist the temptation to borrow money recklessly to gratify his lusts; but it was wholly illegitimate to give any evidence as to the terms on which he succeeded in compromising with creditors other than the plaintiffs. From what appears, it may well have been that these other creditors were rather tricked into making easy settlements by their belief in the representations made that the father of the deceased was either a less wealthy man than, in fact, he was, or that he had disposed of his property, as he was entitled to do, by gift *inter vivos*. The plaintiff, Balla Mal, heard that the defendant's father had done this, but he considered that

it was a mere fictitious thing, done to defraud creditors, and paid no attention to it.

It has already been pointed out that there is no evidence whatever that the plaintiffs ever sought, by threat or otherwise, to induce or coerce the deceased defendant to give them any of the securities which he actually gave. Nor is there any satisfactory proof that, though the deceased defendant may have been extravagant and have spent more than he should have done, he was in necessitous circumstances when he commenced dealing with the plaintiff Balla Mal, or that he was in pecuniary distress in consequence of the importunities or pressure of creditors, or that it was to meet the claims of such creditors he borrowed money or bought goods on credit from the plaintiff. On the contrary, it would rather appear from the deceased defendant's own evidence that he borrowed this money from, and incurred these debts to, the plaintiff in order to procure the means of feeding his own vices.

The learned District Judge accordingly held that, even on the assumption that the plaintiff Balla Mal was in a position to dominate the will of the deceased defendant, he did not, to use the words of section 16 of the Contract Act as amended, use that position to obtain an unfair advantage over the deceased by extorting from him unconscionable bargains or otherwise, and that the deceased defendant had utterly failed to prove, as he was bound to do, that the plaintiff Balla Mal had in fact exercised undue influence upon him in any of the transactions out of which his liability for the debt sued for ultimately resulted.

Their Lordships concur with the learned District Judge as to all these conclusions, and therefore it is for the purpose of this appeal unnecessary for them to determine whether the plaintiff Balla Mal in fact occupied a position to dominate the will of the deceased defendant at all within the meaning of the statute. The District Judge did not hold that the plaintiff had acquired that position by reason of his being the latter's creditor to a large amount, holding various negotiable securities given by the defendant which almost at any time he might have put in suit. On the contrary, the learned Judge expressly held that there was nothing to suggest that the plaintiff Balla Mal and the deceased defendant as to all the aforesaid transactions did not in this regard contract with one another on perfectly equal terms, in which latter conclusion their Lordships concur. But the learned Judge went on to decide—

1. That the deceased defendant was in the position of an expectant heir within the meaning of the decision in *Chesterfield v. Janssen* (1), and the authorities following it;
2. That the said plaintiff dealt with him on the strength of that expectancy;

(1) 2 Ves. Sen., 124.

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3. That a person so doing would be in a position to dominate the will of the expectant heir within the meaning of section 16, sub-section 1, of the Indian Contract Act of 1872 as amended; and

4. As their Lordships understand his judgment, that the burden is by this statute thrown upon the person occupying this position to show that he has not used it to obtain an unfair advantage over the expectant heir with whom he so deals.

The Chief Court concur with the learned District Judge on each of these points. Where they differ from him is apparently in this: that while he holds that the plaintiff Balla Mal has discharged this burden, else he should have pronounced a decree against the plaintiff's claim instead of in its favour as he has done, the Chief Court hold that Balla Mal has failed to discharge the burden. That court, however, appears to base its decision mainly, if not entirely, on the high rate of the interest received by the notes, 30 per cent., coupled with the great augmentation of the deceased defendant's debt due to the capitalisation of interest. For the reasons already given, their Lordships disagree with the conclusion of the Chief Court on this latter point, and concur with the District Judge. So that whether their Lordships concur with the District Judge on these points (1), (2) and (3), or not, since they concur with him upon point (4), the result of the appeal would be the same.

On the whole, therefore, their Lordships are of opinion, for the reasons already given, that the judgment appealed from was erroneous, and should be reversed, that the judgment of the Judge of the District Court was right and should be restored, and that this appeal should be allowed, and they will humbly advise His Majesty accordingly. The respondents must pay the costs of the appellants in the Chief Court, and the costs of this appeal.

Appeal allowed.

Leevis and Yglesias :—Solicitors for the appellants.

A. P. P.

SHARF-UD-DIN AND ANOTHER (*Plaintiffs*)*versus*

SAMANTA RADHA CHURAN DAS AND ANOTHER

(*Defendants*)

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June, 18.

Bengal Land Revenue Sales Act, (Act XI of 1859), sections 3, 5, 6, 33—Sale for arrears of Government revenue—"Illegality" and "irregularity"—Distinction between them—"Official Gazette"—Publication in Vernacular Gazette unnecessary.

LORD SHAW,
SIR JOHN
EDGE,
MR. AMEER
ALI AND
SIR WALTER
PHILLIMORE.

Failure to notify in the Vernacular Government Gazette the sale of an estate the Government revenue of which exceeds Rs. 500 is not an illegality which *per se* vitiates the sale as having been made 'contrary to the provisions' of Act XI of 1859.

Semble, that it is a sufficient compliance with paragraph 2 of section 6 of that Statute if the sale has been notified in the Official Gazette published at Calcutta.

PLAINTIFFS were suing a trespasser to recover possession of their zemindari in the Balasore district of Orissa. Meanwhile there was default in payment of revenue, and the zemindari, the *sadrjama* (revenue) of which was Rs. 1,586, was put up for sale under Act XI of 1859 and purchased by defendants. Plaintiffs brought the present suit to set aside the sale on the ground that it had not been notified in the Urya Government Gazette (although notified in that published in Calcutta). Before 1895 it was the practice to notify such sales in both Gazettes, but from 1895 to 1911 publication in the Vernacular Gazette was discontinued under orders of the Local Government. The Subordinate Judge of Cuttack held that the Vernacular Gazette was included in the term "Official Gazette" in section 6 of Act XI of 1859, and that in view of the Full Bench ruling in

Lala Mobarak Lal v. Secretary of State, [1885] I. L. R., 11 Cal., 200,

the omission to notify the publication in such Vernacular Gazette was an illegality not cured by section 33.

He therefore set aside the sale.

On the question of substantial injury he observed—"Although the property was sold at a much lower than its fair price had it been sold at a private sale, it cannot be said that the price was

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inadequate when it was made at a revenue sale and when the purchaser knows that he would have to plunge into litigation before getting quiet possession." The Calcutta High Court, (RICHARDSON and NEWBOLD, JJ.), reversed this decision: they held that the Full Bench ruling relied on by the lower court had been practically over-ruled by the Privy Council decision in

Gobinda Lal v. Ramjanam Misir, [1893] 20 I. A., 165,

"the effect of which," they observed, "is to annul to a very great extent the distinction between illegalities and irregularities:" that publication in the Calcutta Gazette was a sufficient compliance with section 6 of the Act, but that even if it were not section 33 applied to the case and that the sale could not be set aside without proof of substantial injury by reason of the irregularity complained of.

Hence this appeal.

A. M. Dunne (*Ramsay* with him), for the appellants.—The case is outside section 33 of the Act, but even if that section applies, the plaintiffs have suffered substantial injury. As to this there are concurrent findings against us, but the first court has adopted a wrong test of what is a fair price. Our main ground however is that the Subordinate Judge was right in holding that the failure to notify the sale in the Urya Gazette was an illegality which in itself vitiated the sale. The Act should be construed generously in favour of those whose property is sold. "Gazette" in section 6 includes Gazettes: the Legislature did not mean one Gazette only in a language which nine-tenths of the people do not understand.

Lala Mobarak Lal v. Secretary of State, [1885] I. L. R., 11 Cal., 200, is an express authority in my favour: and

Gobinda Lal v. Ramjanam Misir, [1893] 20 I. A., 165,

though there are observations of the Board against me, was decided on an entirely different point, viz: that the ground of complaint had not been taken before the Commissioner.

Kenworthy Brown, who appeared for respondents, (Their Lordships intimated for that they did not desire to hear argument but would like a reference to any further authorities) referred to

Tasadduk Rasul Khan v. Ahmad Husain, [1893] 20 I. A., 176.

[LORD SHAW.—That is a complete negation of the Indian case cited].

Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a judgment and decree of the High Court at Calcutta, dated the 1st July, 1913. That decree reversed a judgment and decree of the Subordinate court of Cuttack, dated the 30th March, 1911.

The suit was one to set aside a sale for arrears of Government revenue. The sale had been conducted under the provisions of the leading statute, Act XI of the year 1859.

By section 33 of that statute it is provided that no such sale "shall be annulled by a court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of." The defect of procedure which is said not to be merely an irregularity but to amount to an illegality is this: that publication of the notification of sale was necessary in the Urya Vernacular Government "Gazette," circulating in the district. By order of the Lieutenant-Governor, manifestly made for purposes of public convenience, it was provided that a notification of sales should not appear in that publication. On the hypothesis which is by no means admitted, that non-publication in the "Urya Gazette" was an irregularity, the question for the Board is whether this was an illegality, so as to make the sale "contrary to the provisions" of the Act.

It is admitted by Mr. Dunne, with his usual candour, in the argument presented to the Board, that the main provisions applicable to the conduct of sales, namely, those of sections 3, 5 and 6 of the statute, have been, in all points, complied with. These sections provide, not only for notification in the Official Gazette, which is, on the proper interpretation of those sections, the Official Gazette published in Calcutta, but they also make provisions for a local mode of communication in the particular district, viz., "in the language of that district, in the office of the Collector," otherwise as set forth in section 3.

In these circumstances their Lordships are of opinion that no ground has been made out in the present case for the argument that this sale has been made by procedure contrary to the provisions of this Act.

There remains further the question of irregularity. Their Lordships are of opinion, not only that there has been no contravention of the provisions of the statute, but that, even if their view was that any irregularity had been committed, upon which it is not necessary to enter, there has been no proof offered that any substantial injury arose to the appellants in consequence of the irregularity complained of.

Their Lordships say no more upon the question, except that on the latter point all the courts below are agreed, that is to say, that it is not established that the appellants bring forward a case of any substantial injury attributable to the irregularity which they alleged. The essential conditions for setting aside the sale have accordingly not been satisfied.

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1918

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DINSAMANTA
RADHA
CHURAN DAS.

Lord Shaw.

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SHARF UD-
DIN
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BADHA
CHURAN DAS.

Lord Shaw.

In those circumstances their Lordships do not doubt that the High Court have come to a correct conclusion, and they will humbly advise His Majesty that this appeal be dismissed with costs.

Appeal dismissed.

T. L. Wilson & Co., :—Solicitors for the appellants.

Ranken, Ford & Chester :—Solicitors for the respondents.

A. P. P.

HIGH COURT.

DULLI

versus

EMPEROR *

CRIMINAL

1918

October, 23.

PIGGOTT, J.
WALSH, J.

Criminal Procedure Code (Act V of 1898), sections 423, 439—Power of High Court—Altering conviction and section—Robbery—Three persons attacking one—Death caused by blows inflicted by all three—All guilty of murder.

Where three persons attack one and strike him blows with *lathis* which result in his death, all the three are equally guilty of the offence of murder. An appeal against a conviction opens out the entire case, and an appellate court being empowered under section 423 (b) of the Criminal Procedure Code to alter the finding, may record a conviction for an offence of which the trial court has found the accused not guilty.

CRIMINAL APPEAL from an order of G. C. BADHWAR, Esq., Sessions Judge of Ghazipur.

The appellant was not represented.

Lalit Mohan Banerji, (Government Pleader), for the Crown.

The judgment of the Court was delivered by

Piggott, J.

PIGGOTT, J.—In this case Dulli Kurmi was tried upon a number of charges, one of which was a charge of robbery, incorrectly framed under section 397 of the Indian Penal Code, which section, as this Court has repeatedly remarked, does not in itself constitute any offence but merely conveys a direction to the court in the matter of sentence in respect of certain aggravated forms of robbery or dacoity, while there was also a charge of murder under section 302 of the Indian Penal Code. The facts deposed to by the prosecution witnesses are as follows :—The complainant Sehdu was sleeping in his field to watch over the crop which was ripe or ripening. Shortly before dawn, three men entered the field and proceeded to plunder it of its crop. Sehdu came upon them after they had cut a certain amount of the crop and had made it into bundles for convenience of removal. The thieves set upon him and he shouted for help. He himself received severe injuries from the *lathis* of the thieves and his neighbour Charittar, who

pluckily came to his rescue, was felled to the ground and received such injuries that he died on the spot. The medical evidence shows that Charittar's head had been terribly shattered by a number of blows, which the evidence proves must have been inflicted by the *lathis* of the thieves. Sehdu's evidence is corroborated by Muhammad Ali and Gopi; each of these men names the thieves who committed this offence and positively identifies the accused Dulli as having been one of them. There was practically no defence, beyond a bare denial and a plea of *alibi* wholly unsupported by evidence. Moreover Dulli was nowhere to be found when the police enquiry into this matter was taken up, and he has offered no reasonable or credible explanation of his absence from his home and from the neighbourhood for several months following the affray in which Charittar lost his life. He has appealed against his conviction by the Sessions Court, but his participation in the offence or offences committed under the circumstances above stated is established by overwhelming evidence. The learned Sessions Judge upon this evidence, which he accepted as true, came to the conclusion that the thieves could not be convicted of robbery, because the hurts caused to Sehdu and Charittar had not been inflicted in carrying away or in attempting to carry away the crop which had been cut from Sehdu's field. He may be justified in his opinion that when they inflicted these injuries the thieves were merely resisting their own arrest and had abandoned any intention of removing the stolen property, and in that case no connection of robbery can be recorded. Further, the learned Sessions Judge, by a somewhat involved process of reasoning into which it does not seem necessary for us to enter in detail, arrived at the conclusion that the men who inflicted these injuries upon Charittar neither intended to cause his death nor knew that they were likely to do so. He has accordingly acquitted Dulli of the charge under section 302 of the Indian Penal Code and has convicted him of offences punishable under sections 325 and 382 of the same Code. The sentences which he has passed are substantial; but nevertheless the learned Judge of this Court before whom his petition of appeal came up for consideration was of opinion that the order of acquittal on the charge of murder required to be considered by this Court in the exercise of its revisional jurisdiction. Notice has gone to Dulli to show cause and the whole matter is now before us. On the facts of the case we are unhesitatingly of opinion that Dulli was guilty of the murder of Charittar and liable to punishment under section 302 of the Indian Penal Code. The nature of the injuries observed at the *post mortem* examination puts it beyond doubt that the men who inflicted those injuries intended at the time to cause death, or such injury as they must have known to be likely to result in death. The mere fact that it was impossible for the witnesses to say which of the three robbers inflicted any particular injury on the person of

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the deceased is, under the circumstances of this case, wholly irrelevant. They were all three of them striking him with *lathis* and between them they caused his death in the manner already stated. They are all of them equally guilty of the offence of murder. We have had to consider one further question, namely the limitation imposed upon the revisional jurisdiction of this Court by the fourth clause of section 439 of the Code of Criminal Procedure. There is some difference of legal opinion on this point. There is no doubt whatever that, when a trial has ended in the complete acquittal of the accused person, it is not open to this Court in the exercise of its revisional jurisdiction to convict him of any offence. The utmost that this Court can do, in the absence of an appeal against the acquittal by the properly constituted authorities, is to order a new trial. It is however open to argument whether this clause is intended to apply to cases in which an accused, who has been tried upon more than one charge under the provisions of section 235 or 236 of the Code of Criminal Procedure, has been acquitted upon one charge but convicted upon another. In the present case this question does not arise for determination. We have before us an appeal by Dulli against his conviction, as well as the notice of enhancement issued by this Court. It is therefore open to us to exercise any of the powers conferred by section 423 (1) (b) of the Code of Criminal Procedure, as well as any of the powers specified under section 439 of the same Code. It has repeatedly been held by various High Courts that an appeal against the conviction opens out the entire case, and that the appellate court, being empowered to alter the finding by section 423 (1) (b) above referred to, may record a conviction in respect of an offence of which the trial court has found the accused not guilty. It is quite true that under this section, considered by itself, the finding can only be altered without enhancement of the sentence; but the power to enhance the sentence is separately conferred upon this Court by section 439 of the Code of Criminal Procedure. It follows that in the case now before us there can be no question that we have authority to record a conviction under section 302 of the Indian Penal Code and to pass an appropriate sentence. Accordingly we dismiss the appeal of Dulli. We alter the conviction of the said appellant from one under section 325 of the Indian Penal Code to one under section 302 of the same Code, and we enhance the sentence by passing upon Dulli the minimum sentence which the law authorises us to pass in respect of the offence of which we have found him guilty; that is to say, we sentence him to undergo transportation for life. This sentence will run concurrently with the sentence passed by the learned Sessions Judge on the conviction under section 382 of the Indian Penal Code.

Conviction altered.

RAM PRASAD

versus

EMPEROR*

Civil Procedure Code (Act V of 1908), section 115—Cantonment Magistrate exercising Small Cause Court powers—Prosecution ordered by—Civil case—Revision.

CRIMINAL

1918

Sep., 23.

TUDBALL, J.

A Cantonment Magistrate exercising the powers of a Small Cause Court ordered a decree-holder to deposit diet money for his judgment-debtor who was about to be arrested. The decree-holder complained to the Cantonment Magistrate that one Mul Ohand, Ahalmad of the Collector's court had refused to accept the money which he had tendered. There was a report by the Cantonment Magistrate to the Collector who reported that the decree-holder's statement was false and recommended his prosecution under section 182 of the Indian Penal Code. The Cantonment Magistrate thereupon sanctioned the prosecution: *Held* in revision, that the matter was of a civil nature and could not be brought up on the criminal side; and, treating it as a civil matter it was impossible under section 115 of the Civil Procedure Code to interfere.

CRIMINAL REVISION from an order of MAJOR D. G. PEART, Cantonment Magistrate of Meerut.

Satya Chandra Mukerji, for the applicant.

Lalit Mohan Banerji, (Government Pleader), for *R. Malcomson*, (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

TUDBALL, J.—The facts out of which this revision on the criminal side has arisen are as follows:—Pending in the court of the Cantonment Magistrate of Meerut in his capacity as a Small Cause Court was an execution case. The decree-holder was directed to deposit the diet money of his judgment-debtor who was about to be arrested. He was ordered to do so within three days and the order was passed on the 9th of July, 1918. The 10th, 11th and 12th of July, were holidays so that the only two days on which he could possibly deposit the money were the 9th and the 13th of the month. On the 15th of the month he made a complaint to the Cantonment Magistrate that although he had tendered the money to the Civil Ahlmad Mul Ohand the latter had refused to take it and had made it impossible for him, the decree-holder, to comply with the order. On the 15th of July the Cantonment Magistrate made the following report to the Collector for

Tudball, J.

*Cr. Rev. No. 557 of 1918.

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orders. "The Civil Ahlmad Mul Chand admits that the decree-holder tendered the fees but that he, Mul Chand, did not accept them at the instigation of the Chaprasi Sharfu who it appears is related to the defendant." Assuming that this report is correct and there is absolutely no reason to doubt it, on the 15th of July the Civil Ahlmad Mul Chand did admit to the Cantonment Magistrate that the money had been offered to him and that he had refused to take it. I gather that it was the Cantonment Magistrate's object in making this report to get the Ahlmad punished. On the 30th of July the Collector wrote an order which goes to show that Mul Chand at his departmental enquiry had not admitted that the money had been tendered to him. Though this is not really stated in the order it is a natural inference from the language of that order, for the Collector came to the conclusion that the charge made against Mul Chand was untrue and he sent the papers back to the Cantonment Magistrate with the following remarks. "If you agree with me I think that you should recommend the prosecution of the decree-holder under section 182 of the Indian Penal Code as reckless complaints of this kind are far too common, and I think that it is our duty to protect our subordinate officials from them." On receipt of this the Cantonment Magistrate passed his order of the 31st of July, 1918, which the applicant Ram Prasad now seeks to have revised in this Court. In that order the Cantonment Magistrate remarked as follows:—"In consequence I reported Mul Chand to the Collector, who has enquired into the case and finds that the complaint is a false one. I concur in the Collector's finding and I therefore sanction the prosecution of Ram Prasad under section 182 of the Indian Penal Code under the provisions of section 195 of the Code of Criminal Procedure." These are the facts as they stand before me. I have not the slightest hesitation in saying that if sitting as a Criminal Court I had power to revise this order I should at once set it aside in view of the Cantonment Magistrate's order of the 15th of July, 1918, mentioned above, but it seems to me that I have no authority or jurisdiction whatsoever sitting on the criminal side to interfere with this order. It amounts to a complaint made by a Civil Court against a certain person for having given to that court false information in regard to a certain matter. The order cannot be brought to this Court on the criminal side. At the utmost it could be brought up before this Court on the civil side and even in that aspect also it would be impossible to interfere under section 115 of the Code of Civil Procedure. The order I am afraid will stand not because I would not set it aside but because I am unable to do so. The application is rejected.

Application dismissed.

GAJADHAR
versus
 EMPEROR*

CRIMINAL

1918

Sanction for perjury—Sanction granted to a private individual—Theft committed by accused thirty-eight years ago—Whether sanction should be granted.

September, 7.

TUDBALL, J.

The accused was convicted of theft thirty years ago. Excepting this bare fact nothing more appeared, the record having been destroyed. The accused made a complaint against a certain person and in cross-examination he was asked about this conviction which he denied. Thereupon the opposite party applied for sanction to prosecute him for perjury which was granted and the order was affirmed in appeal by the District Magistrate :— *Held* that the sanction had been improperly granted under the circumstances.

CRIMINAL REVISION from an order of MUHAMMAD HADI, Esq., District Magistrate of Fatehpur.

E. A. Howard, for the applicant.

Lalit Mohan Banerji, (Government Pleader) for *R. Malcomson* (Assistant Government Advocate), for the Crown.

The following judgment was delivered by

TUDBALL, J.—The facts of this case are as follows :—Some thirty-eight years ago the applicant Gajadhar was convicted on a charge of under section 380 of the Indian Penal Code and was sentenced to three months' rigorous imprisonment and a fine of Rs. 5. In the current year he made a complaint against the opposite party Haribua Chamar. In cross-examination he was asked "whether he had been convicted in Khaki Baba's theft case and sentenced to three months' rigorous imprisonment. His reply was no." Haribua Chamar applied to the Magistrate for sanction to prosecute Gajadhar for perjury in that he had falsely stated that he had not been sentenced to three months' rigorous imprisonment in Khaki Baba's theft case. That sanction has been granted and it was upheld on appeal by the District Magistrate. Gajadhar has come to this Court on revision. It has been shown by the production of a public register that Gajadhar was convicted in "a" theft case some thirty-eight years ago and sentenced to three months' rigorous imprisonment and a fine. The record has been destroyed and there is apparently nothing to show who was the complainant in that case, and as the matter stands the register apparently does not prove that Gajadhar was sentenced to three months' rigorous imprisonment in Khaki Baba's theft case. Even supposing however that he did falsely deny this conviction, it is obvious that the Magistrate trying the case ought, in simple justice to have refused to allow such a question to be put to the witness. The fact that at the age of fourteen the man was convicted of petty theft, (while nothing has been shown against him in respect to the intervening

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years) was quite irrelevant to the trial before the Magistrate. Such a conviction would not be considered by any court even if Gajadhar had been upon his trial for a subsequent offence. Nor is it fair or just to throw into a man's teeth a petty theft committed by him when he was but a boy. It is difficult to understand how any Magistrate could grant sanction to a private person to prosecute another in circumstances like this and it is impossible for me to understand the frame of mind of the District Magistrate when he upheld such an order on appeal. It would be obviously persecution not prosecution to allow any such trial to go on. I allow the application. I set aside the order of the court below.

Application allowed.

CIVIL
 1918
 July, 30.
 RICHARDS,
 O. J.
 TUDBALL, J.

MUNNA SINGH (*Plaintiff*)

versus

AUSAN SINGH AND OTHERS (*Defendants*)*

Specific Relief Act (I of 1877), section 9—Possessory suit—Decree for land and crops thereon—Crops removed—Subsequent suit for price of crops—Question of title to land.

The plaintiff brought a suit for the possession of certain land with crops standing thereon under section 9 of the Specific Relief Act and got a decree. In executing his decree he could not get the crops which had been removed. The plaintiff brought the present suit for recovery of the price of the crops. The defendants denied his title to the land. The first court decreed the suit but reduced the amount of damages claimed. The lower appellate court remanded it for trial of the question of title:—*Held* that the defendants could not by cutting and removing the crops annul the effect of the possessory decree, and that the order of remand was bad.

FIRST APPEAL from an order of BABU BANKE BEHARI LAL, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore.

The plaintiff and the defendants were co-sharers in zemindary property. The plaintiff alleging that he had been in exclusive possession of certain plots of land as his *khudkasht*, and that the defendants had dispossessed him, brought a suit for possession, under section 9 of the Specific Relief Act, of those plots together with the standing crops. The court finding the fact of dispossession as alleged by the plaintiff decreed the suit in full. In execution of his decree the plaintiff obtained possession of the land, but not of the crops as they had in the meantime been cut and removed by the defendants. He then brought a suit for damages, on the ground that he was entitled to the crops which had been wrongfully removed by the defendants. One of the pleas raised in defence was a denial of the plaintiff's title to the land and, consequently, to the crops thereon. The court of first instance held that as the decree

in the suit under section 9 of the Specific Relief Act had awarded possession of the crops to the plaintiff the court could not go behind that decree and determine the question of title raised by the defendants. The suit was decreed for a part of the sum claimed. On appeal by the defendants the lower appellate court held that the defendants were entitled to raise and have determined the question of title. The suit was, accordingly, remanded for a decision on the merits. The plaintiff appealed to the High Court against the order of remand.

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Peary Lal Banerji, for the appellant.—No doubt, in the suit under section 9 of the Specific Relief Act the question of title to the land was not gone into; but whether the land belonged to the plaintiff or not, he was entitled to the particular crops under the decree; and the defendants who had cut and removed them were liable to pay their price. Although in the present suit the plaintiff set forth his title to the land on the ground of its being his *khudkashit*, yet so far as the crops were concerned the decree in the former suit awarding the crops to him was a sufficient title, and the defendants could not go behind it.

Narayan Prasad Asthana, for the respondents.—In the suit under section 9 the defendants were not, under the law, allowed to open the question of title, but in the present suit, which is not one under section 9, they should be allowed to do so. It was open to the plaintiff to treat the act of the defendants as a fresh dispossession, and to bring another suit under section 9, but he did not do so. Having elected to base his suit on the ground of title to the land he is bound to prove his title. The suit is not one for the price of the crops, but is framed as a suit for damages for dispossession. Further, the result of not allowing the question of title to be gone into in this suit would be to drive the defendants to another suit for possession and mesne profits, and multiplicity of suits should be avoided.

Peary Lal Banerji, was not heard in reply.

The judgment of the Court was delivered by

RICHARDS, C. J.—This and the connected appeal arise under the following circumstances. The plaintiff brought a suit against the defendants alleging that he was in separate possession of certain land situate in a mahal in which both he and the defendants were co-sharers, that there was a crop growing on this land which belonged to him and that he had been dispossessed by the defendants. He claimed possession of the land with the crops growing. His suit was under section 9 of the Specific Relief Act. The court finding that the plaintiff was in possession granted him a decree under that section granting him possession of both the crops and land. Before the decree could be executed the defendants took possession of the crops and cut and removed them. There-

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C. J.

upon the plaintiff brought the suit out of which this and the connected appeal arise. In this he claimed that he was entitled to damages for the crops. It seems to us to make no difference whether he called it damages or asked for the price of the crops which had been taken and removed as he alleged. The court of first instance granted the plaintiff a decree giving him Rs. 396 instead of Rs. 700 odd which he claimed. The first court was of opinion that it could not go behind the possessory decree given in the previous litigation, and this applied both to the crops and the land. Both parties appealed, the plaintiff contending that he should have got the amount claimed in respect of the crops, and the defendant that he should not get a decree at all and raising *inter alia* the question of title to the land. The lower appellate court remanded the case to the court of first instance being of opinion that the defendant was entitled to have the question of title tried. We think that this view was entirely wrong. We are clearly of opinion that the defendants could not by cutting and removing the crops annul the effect of the possessory decree. If the defendants are entitled to the land, they should assert that right by proper legal proceedings. It appears that some of the defendants actually did so but did not press their claim. The plaintiff sooner than prolong the litigation is ready to waive his right to have his appeal against the amount decreed him disposed of by the court below. We have read from the judgment of the court of first instance the manner in which it arrived at the conclusion as to the value of the crops and we are inclined to think that the first court took a very moderate view of the amount to which the plaintiff was entitled. We allow the appeal set aside the order of the court below and restore the decree of the court of first instance with costs in all courts.

B. K. M.

Appeal allowed.

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1918

September, 4.

TUDBALL, J.

HADIYAR KHAN

versus

EMPEROR *

Criminal Procedure Code (Act V of 1898), section 477, scope of—Perjury—Sessions Judge refusing adjournment to accused—Summary trial—No defence by accused owing to refusal of adjournment—Revision—Irregular exercise of jurisdiction.

Section 477 of the Code of Criminal Procedure gives to the court of Session power to charge a person for any offence referred to in section 196 and committed before it and also it gives that court power to try any person for the charge it has framed; but the section nowhere lays down that the trial is to be a summary one nor does it demand a decision which is to be more prompt and speedy than that of any ordinary trial.

Hence where a Magistrate charged a witness with having given false evidence before him in connection with a trial and at once proceeded with

* Cr. A. No. 588 of 1918.

the trial and refused to grant an adjournment prayed for by the accused for the purpose of taking legal advice to put in his defence, and in consequence the accused refrained from making any defence, *held* that the court in so acting had acted hastily and irregularly in the exercise of its jurisdiction and the trial and conviction were bad in law.

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CRIMINAL APPEAL from an order of L. JOHNSTON, Esq., Sessions Judge of Kumaun.

G. W. Dillon, for the appellant.

Lalit Mohan Banerji, (Government Pleader) for the Crown.

The following judgment was delivered by

TUDBALL, J.—The appellant Hadiyar Khan has been convicted of the offence of perjury and has been sentenced to four years' rigorous imprisonment including three months' solitary confinement by the learned Sessions Judge of the Naini Tal district. The circumstances under which the appellant was tried and convicted are somewhat unusual. Two men Aziz-ul-lah and Kifayat-ul-lah were upon their trial in the Court of Session at Pilibhit on a charge of attempted murder under section 307 of the Indian Penal Code. Hadiyar Khan was called as a witness for the defence to prove that Aziz-ul-lah was actually dining with him at the time the offence is said to have been committed. The trial of Aziz-ul-lah's and Kifayat-ul-lah's concluded on the 2nd of August, 1918 at about 5 p. m. and the Judge convicted them and sentenced them to ten years' rigorous imprisonment under section 307. On that very same date, namely the 2nd of August, 1918, the Judge passed an order issuing notice to the defence witnesses to show cause why they should not be prosecuted for the offence of perjury. Then the learned Sessions Judge changed his mind at once in respect to the present appellant Hadiyar Khan. As a perusal of his judgment will show his attention was called to the provisions of section 477 of the Code of Criminal Procedure and he there and then proceeded to try Hadiyar Khan under the powers granted by that section, for the offence of perjury which he charged against him. I have examined the record of the trial. Hadiyar Khan asked the Sessions Judge for time to enable him to appoint a lawyer and to consult him so as to enable him to put in his defence. The Sessions Judge declined to adjourn the case or to give him any further time, whereupon Hadiyar Khan refused to plead or to take any steps in his defence. As the Judge's judgment shows he began the case against Hadiyar Khan at 5 o'clock and Hadiyar Khan from the very beginning asked for a postponement. Postponement was refused. He therefore refused to cross-examine. He refused to make any attempt to defend himself. He asked repeatedly to be allowed to obtain legal advice. The Judge declined to give him any further time and on the evidence taken in the presence of the accused he convicted him and sentenced him as mentioned above. He remarks in his judgment:—"Section 477 demands a

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prompt and speedy decision which will bring home to the public generally the dangers a man runs in giving false evidence. I am not going to spoil the effect of section 477 by weakly granting a postponement, which would only mean that the accused would then be able to produce another lot of false witnesses leading to nothing." Section 477 grants a power which is very seldom exercised. It gives the power to a Court of Session to charge a person for any offence referred to in section 195 and committed before it. It further gives the Court of Session the power to commit for trial or to admit to bail and to try the person for the charge it has framed, but the section nowhere lays it down that the trial is to be a summary trial nor does the section anywhere demand a decision which should be more prompt and speedy than that of any ordinary trial. The very powers granted in that section to a Court of Session are so unusual that it seems to me it is the bounden duty of any court exercising them to be at pains to give the accused a fair and impartial trial, in view of the fact that the court has already had before it certain evidence upon which it may have already formed an opinion. I should have thought that a simple sense of justice would have shown to the court below that Hadiyar Khan was entitled to appoint a pleader, to consult with him and to defend himself just as any ordinary person in an ordinary criminal trial. The learned Sessions Judge has in his haste made it impossible for Hadiyar Khan to defend himself. He refused to grant postponement which he certainly ought to have granted whatever the result, and in my opinion in view of the expressions which he had already used in his judgment in the case against Aziz-ul-lah and Kifayat-ul-lah, it would have been fairer perhaps to have dealt with Hadiyar Khan in the same manner as that in which he had dealt with the remaining defence witnesses, that is of taking action against them under section 476. It is impossible to say that the learned Sessions Judge had not power to try the case. He certainly had the power to do so, but in the exercise of his jurisdiction he has, in my opinion, acted hastily and very irregularly and has not given the appellant a fair trial. In these circumstances without expressing any opinion as to the appellant's guilt, I set aside the conviction and sentence. The case must be re-tried but it is obvious that it cannot be re-tried in the same court. It must be transferred to a calmer atmosphere so as to enable an impartial trial to be held. I therefore direct that the case be re-tried in the Court of the Sessions Judge of Bareilly instead of in the Court of the Sessions Judge of Kumaun.

Retrial ordered.

MOHAN LAL (*Plaintiff*)*versus*TIKA RAM (*Defendant*)*

Limitation Act (IX of 1908), Sch. I, art. 75—Bond—Payable by instalments—Power to sue for whole amount on default of payment.

CIVIL

1918

July, 9.

ABDUL
RAOOF, J.

An instalment bond executed on February 23rd, 1909, was payable in five annual instalments. There was a provision that in default of payment of any instalment the creditor would have the power to sue for the entire amount in a lump sum. Nothing having been paid on account of the first two instalments, the creditor brought a suit for the recovery of the subsequent instalments. The Small Cause Court held that the suit was barred:—*Held* in revision, that the suit was within time. *Ajudhia v. Kunjal*, [1908] I. L. R., 30 All., 123, followed. *Amolak Chand v. Baijnath*, [1913] I. L. R., 35 All., 455, and *Chandan Singh v. Bidhya Dhar*, [1912] 15 I. C., 856, distinguished.

CIVIL REVISION from an order of BABU BAIJ NATH DAS, Judge of the Court of Small Causes of Bareilly.

An instalment bond was executed on 23rd February, 1909, providing for payment by equal annual instalments in five years. The bond provided that in case of default in payment of any one of the instalments the creditor would be entitled to sue for the entire amount in a lump sum together with interest at the rate of two per cent per mensem from the date of execution of the bond:—“*Daen mauusuf ko ikhtiar hai ki kul rupiya ek-musht ba-sharah sud fi sadi do rupiya mahwari tarikh tahrir tamassuk haza se ba-ijrai nalisth Adalat Diwani wasul kar lewe.*” Nothing was paid on the bond. The plaintiff brought a suit on the bond on 7th June, 1917, and stated in his plaint that as the first two instalments had become barred by time he was claiming to recover only the remaining three instalments with interest. The defence *inter alia*, was that the suit was barred by time under Article 75 of the Limitation Act; that the cause of action had accrued on the date of default in payment of the first instalment, and that the frame of the suit itself showed there was no waiver on the plaintiff's part. The Court of Small Causes which tried the suit sustained the plea of limitation and dismissed the suit. The plaintiff applied in revision to the High Court.

Sital Prasad Ghosh, for the applicant, contended that upon a true construction of the bond in suit the plaintiff had an option

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given to him either to sue for the entire money due under the bond on the occurrence of the first instalment or wait till after the expiration of the stipulated term. The present case was on all fours with that of

Ajudhia v. Kunjal, [1908] I. L. R., 30 All., 123,

and distinguishable from that of

Amolak Chand v. Baijnath, [1913] I. L. R., 35 All., 455,

upon which the lower court relied.

He then cited the case of

Chandan Singh v. Bidhya Dhar, [1912] 15 I. C., 856, (All.),

and submitted that that case laid down the principle upon which cases like the present ought to be decided.

P. N. Banerji, for the opposite party, contended that the court below had, from the plaint itself, found that there was no waiver on the plaintiff's part; and the High Court, in revision, must accept that finding of fact. The suit was, therefore, barred by limitation under Art. 75 of the Limitation Act. He submitted that the present case fell within the principle of the ruling in

Amolak Chand v. Baijnath, [1913] I. L. R., 35 All., 455.

The case in 15 I. C., 856, cited by the applicant was in the defendant's favour. In any case, this Court in the exercise of its revisional powers ought not to interfere with the decision of the lower court.

Sital Prasad Ghosh, was not heard in reply.

The following judgment was delivered by

Abdul
Raoof, J.

ABDUL RAOOF, J.—This was a suit brought upon an instalment bond in the court of the Judge of Small Causes. The bond was for Rs. 175, with interest and it was to be paid by five annual instalments of Rs. 35, each. The method provided for the payment of the instalments was in these words. As regards the payment of the money it is agreed that the said amount will be paid by instalments in 5 years. It was further provided that if there was any default in payment of any of the instalments, then the creditor would have the power to claim the entire amount in a lump sum:—“*Daen mausuf ko ikhtiar hai ki kul rupia ek-musht ba-sharah sud fi sadi do rupia mahwari tarikh tahrir tamassuk haza se baejrai nalish Adalat Diwani wasul kar lewe.*” The document was written on the 23rd of February, 1909. The first instalment would be payable according to this bond, at the end of February, 1910. It appears from the facts found by the court below, that nothing was paid on account of the first two instalments. The plaintiff then had a cause of action if he so chose to bring a suit at once for the recovery of the whole amount due under the bond. He however did not choose to sue then. He has brought this suit after the term provided in the bond and in paragraph 3 of his

plaint he states that as the claim for the first two instalments is barred by time he makes a claim only with regard to the remaining three instalments. The claim was resisted in the court below on the ground of limitation. The questions for consideration in the court below were whether under the terms of the instalment bond in suit the cause of action arose on the first default and whether the plaintiff ought then to have brought the suit and whether by reason of the fact that he allowed the limitation period to elapse his entire claim was barred by time and it was not open to him to sue for the remaining instalments as being within time.

The real question for decision however was whether under the terms of the bond the plaintiff had an option to waive his right to bring the suit at once on the happening of the first default and whether as a matter of fact he did exercise this right of waiver. On the face of the document there can be no possible doubt that he had such a right and his subsequent conduct shows that he did exercise it. The learned Judge of the court below has relied on the case of *Amolak Chand v. Baijnath* (1) and has held that the plaintiffs in the two cases were similar. The facts of that case however are clearly distinguishable from the facts of the present case. The facts of that case as stated at pages 457 and 458 were these:— The instalment bond was dated the 7th of July, 1904, the whole amount was repayable in 4½ years in equal instalments of Rs. 75 payable every six months. There was a condition in the bond that if any instalment remained unpaid on the due date, then the creditor would be entitled to recover the whole sum at once with interest or that he might sue for each instalment as it fell due and remained unpaid. The first two instalments were paid on the due dates, the third instalment was due on the 7th of January, 1906. Neither this nor any of the subsequent instalments were paid. On the 17th of August, 1912, i.e., six years and seven months after the 7th of January, 1906, the plaintiff brought the suit. An examination of the plaint showed that the plaintiff sued to recover the full amount which was due on the 7th of January, 1906, together with interest and which fell due by reason of the default of the 7th of January. In his plaint he distinctly stated that the cause of action for the suit accrued on the 7th of January, 1906. On these facts the learned Judges held that the plaintiff in that case had elected to take one of the two options given him by the bond *viz.*, that one which entitled him to recover the full amount of the debt due by reason of the default in one instalment. They went on to say, "It is perfectly clear from the plaint itself that the plaintiffs have not waived that right which entitled them to recover the whole of the balance due by reason of the default of the 7th of January, 1906. In fact they take their stand upon that provision and seek to enforce their right. The existence of a waiver is distinctly

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negatived, by the plaint which states that the right accrued on the 7th of January, 1906. To enforce that right they had six years from that date." In the present case the plaintiff in distinct terms states that his claim as to the first two instalments was barred by time and that his suit related only to the three remaining instalments. He does not base his cause of action on the default of payment of the first instalment. He does not claim the entire amount due under the bond. He has no doubt claimed interest on the amounts due with respect to the two first instalments. But having regard to the cause of action stated in the plaint he is not entitled to claim such interest. The learned Judges in the case mentioned above distinguish the case before them from the case of *Ajudhya v. Kunjal* (1), in these words :—"In regard to the ruling in *Ajudhya v. Kunjal*, an examination thereof shows clearly that it cannot apply to the facts of the present case. That suit was brought to recover the last three of the instalments that were due under that bond and not the whole amount by reason of a default in payment of an instalment. It appears to have been proved or assumed that the plaintiffs had forborne to sue, in other words had waived their rights in respect of the instalments that were due and had not been paid." These remarks make the case of *Ajudhya v. Kunjal* fully applicable to this case. The facts of the present case and those of *Ajudhya v. Kunjal*, are almost paralled.

The case of *Chandan Singh v. Bidhya Dhar* (2) is also distinguishable from the present case. MR. JUSTICE CHAMBER, distinguished the case before him from the case of *Ajudhya v. Kunjal* (1), upon the ground that the bond before him provided that in default of payment of any instalment, the debtor was bound to pay the whole amount at once. He held that that circumstance distinguished the case from *Ajudhya v. Kunjal* (1). The same reasoning is equally applicable in this case. In my opinion the learned Judge of the court below did not correctly appreciate the terms of the bond in suit. The suit was within time and it ought not to have been dismissed as being barred by time. I allow this application, set aside the judgment and decree of the court below and remand the case to that court to be restored to its original number on the file and to be disposed of on the merits. The costs to abide the event.

B. K. M.

Appeal allowed. Cause remanded.

(1) [1908] I L. R., 30 All., 123.

(2) [1912] 15 I. C., 856.

KISHORE SINGH AND OTHERS (*Defendants*)*versus*BAHADUR SINGH AND OTHERS (*Plaintiffs*)*

Agra Tenancy Act (No. II of 1901, Local), section 167—Ejectment suit in the Revenue Court—Defendant ejected as sub tenant—Suit in the Civil Court by defendant for declaration of title as co-tenant—Suit not maintainable.

Where a Revenue Court in a suit for ejectment decided that *B* was *A*'s sub-tenant and accordingly decreed *B*'s ejectment, held that a subsequent suit in the Civil Court by *B* for declaration that he was a co-tenant of *A* was not maintainable having regard to section 167 of the Agra Tenancy Act.

SECOND APPEAL from a decree of BABU KAMESHWAR NATH, Additional Subordinate Judge of Mainpuri, confirming a decree of Maulvi Owais Karney, Munsif of Etawah.

The appellants instituted a suit in the Revenue Court for the ejectment of the respondents on the ground that the latter were their sub-tenants in two plots of occupancy tenure. The respondents replied that they were not sub-tenants but co-tenants with the appellants. While that suit was pending the respondents brought a suit in the Civil Court for a declaration that they were co-tenants with the appellants in the aforesaid plots and in a certain *muafi* holding, and for joint possession of the same. The Revenue Court suit was decided first; that court held that the respondents were sub-tenants, and passed a decree for their ejectment. No appeal was preferred against this decision. Subsequently, in the Civil Court suit the court decided that the respondents were co-tenants and that they were in possession, and a decree was passed in their favour for declaration as prayed for. On appeal this decree was confirmed by the lower appellate court, and hence this second appeal.

Lakshmi Narain Tewari, (with *Haribans Sahai*), for the appellants.—The present suit is not maintainable in the Civil Court, and is further barred by the principle of *res judicata*. It has been decided between the parties by the Revenue Court that the respondents are the sub-tenants of the appellants. The Revenue Court was the court of competent authority having exclusive jurisdiction to decide this matter in the suit for ejectment under section 58 of the Tenancy Act. That decision has become final, and the parties cannot go behind it. The respondents cannot, by more

* S. A. No. 1286 of 1916.

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changing the frame of their suit, re open the same question. in the Civil Court, and the Civil Court has no jurisdiction to upset the decision of the Revenue Court on this matter. Regard should be had to the substance of the relief and not merely to the form of the suit.

A similar attempt to nullify the decision of a Revenue Court on a matter exclusively within its jurisdiction was made in the case of

Shiva Prakash v. Karna, [1913] 11 A. L. J. R., 671,

and I rely on the principle of the decision in that case. The Revenue Court having passed a decree for ejectment the Civil Court has no jurisdiction to entertain the suit, and further any decree passed by it would be nugatory.

I further rely on the following cases:

Ram Devi Kuari v. Bindsari Upadhyaya, [1911] 8 A. L. J. R., 940;

Narain Singh v. Govind Ram, [1911] 8 A. L. J. R., 431;

Ram Singh v. Girraj Singh, [1914] 12 A. L. J. R., 1252;

Maharaja Vizianagram v. Chhango Kurmi, [1910] 7 A. L. J. R., 555.

N. C. Vaish, for the respondents.—The present suit is triable by the Civil Court, and could not have been brought in the Revenue Court. Here the dispute is between rival claimants to a tenancy, and the question is one cognizable by the Civil Court and not within the jurisdiction of the Revenue Court. I am supported by the cases of

Jagannath v. Ajodhya Singh, [1912] 10 A. L. J. R., 408;

Kanhai Ram v. Durga Prasad, [1915] 13 A. L. J. R., 278.

In the latter case the suit in the Civil Court was brought by a party against whom the Revenue Court had already passed a decree for ejectment as being a sub-tenant, and it was held that the decision of the Revenue Court could not operate as *res judicata* in bar of the Civil Court suit, and further that the Civil Court had jurisdiction to entertain the suit notwithstanding the fact that its decision might be inconsistent with that of the Revenue Court. The present case is exactly similar.

The cases relied on by the appellants are distinguishable from the present case. In the case in 11 A. L. J. R., 671, it was not the case of the plaintiff in the Civil Court that the relationship of landlord and tenant did not exist between him and the other party. The dispute was one between a landlord and tenant, and the Revenue Court alone had jurisdiction. The case in 8 A. L. J. R., 940, was similar, and there PIGGOTT, J., did not exactly hold that the Civil Court had no jurisdiction to entertain the suit; on the other hand, he held that the suit was barred by the principle of *res judicata*, thus implying that the Civil Court had jurisdiction.

The decision in the case in 12 A. L. J. R., 1252, turned upon the question whether or not the plaintiff in the Civil Court could

have obtained the real relief sought by him, by bringing a suit in the Revenue Court; and it was held that he could have, under section 95 of the Tenancy Act. The Civil Court, therefore, had no jurisdiction in the matter. Similar remarks apply to the case in 7 A. L. J. R., 555. The present case is different; the present plaintiffs could not have obtained the relief, in form or in substance, by means of a suit under the Tenancy Act.

The judgment of the Court was delivered by

TUDBALL, J.—This appeal arises out of a suit brought by the plaintiffs respondents for a declaration that they were co-owners with the defendants, first in a *muafi* holding and secondly in an occupancy tenure. The court of first instance granted a declaration in favour of the plaintiffs. We may point out that though the plaintiffs asked for a decree for joint possession, the courts below held that they were in possession and so granted them a declaration only. The defendants have come to this Court on appeal and the appeal is pressed only in respect to two plots Nos. 238 and 245 which form portions of the alleged occupancy holding. It was the defendants appellants case in respect to these two numbers that the plaintiffs were their sub-tenants. It was the plaintiffs respondents case that they were co-owners with the defendants of the occupancy tenure. In respect to these two numbers there are certain facts which have to be set forth. The defendants appellants instituted a suit in the Revenue Court for the ejectment of the plaintiffs on the ground that the latter were their sub-tenants. To this suit the defendants replied that they were not sub-tenants but that they were co-tenants with the plaintiffs. That suit was instituted on the 14th of August, 1915. While it was pending the plaintiffs brought the present suit in the Civil Court. The Revenue Court was the first court to come to a decision in regard to Nos. 238 and 245. It held that the present plaintiffs respondents were the sub-tenants of the present appellants and were not the co-tenants. It therefore granted to the present appellants a decree for the ejectment of the present plaintiffs. Subsequent to that the Civil Court came to its decision and gave the plaintiffs a decree for joint possession of all the land including these two numbers. That decision was upheld on appeal in the Civil Court. From the decision of the Revenue Court no appeal whatsoever was preferred and that decision became final and binding between the parties. The result therefore is the absurdity that a *Revenue Court with competent and exclusive jurisdiction* has granted a decree for ejectment which can be enforced in respect to these two numbers. The Civil Court has given a decree for joint possession on the ground that the present plaintiffs are co-tenants and not sub-tenants. What the result is to be nobody can at present state. It is urged before us and with considerable force, specially in the face of a large number of rulings of this Court, that the decision of the Revenue Court as between the parties, to the

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effect that the plaintiffs are the sub-tenants in these two numbers of the defendants-appellants is the decision of a competent court with exclusive jurisdiction, that it is final and binding upon the parties and that the Civil Court has no jurisdiction whatsoever to upset or reverse that decision. Reliance has been placed upon the decision of this Court in *Shiva Prakash v. Karna* (1), wherein it is remarked that the Revenue Court having made a decree for ejectment and that decree having been carried into effect and the plaintiff having been ejected a suit in the Civil Court is not maintainable. The decree of the Revenue Court was binding upon the parties and any decree made by the Civil Court would be wholly nugatory. The point is covered by authority in the case of *Ram Devi Kuari v. Bindeshri Upadhia* (2). The judgment of the learned Judge who decided that case was affirmed on appeal under the Letters Patent. In this case while a suit in the Revenue Court for the ejectment of Karna was pending and before that case was decided, Karna brought a civil suit out of which that appeal arose. "It was a suit which was brought in such form as would ordinarily make it cognizable by a Civil Court. Its object was clearly to nullify the decree of the Revenue Court. That is also the case in the present suit. An ejectment suit in the Revenue Court had been brought and was pending and was about to conclude when this present civil suit was brought." It is true that the present civil suit was brought in the form in which a suit would be entertained only by the Civil Court, but in so far as these two numbers were concerned, the suit was clearly one brought with a view of possibly nullifying the decision of the Revenue Court. We think that the principle which was applied in *Ram Devi Kuari v. Bindeshri Upadhia* (2) applies equally to the present case before us. It was solely within the jurisdiction of the Revenue Court to hold that the present respondents were the sub-tenants of the present appellants and that as such they were liable to ejectment. Practically the same principle was applied in the case of *Ram Singh v. Girraj Singh* (3). There it was held that the Revenue Court in a case of ejectment had jurisdiction to go into a certain question and that decision was binding on the parties, and the court in the civil suit was bound to look to the substance of the relief and not merely to the form of the suit, and that the civil suit was not maintainable as it was more directly directed to the upsetting of the decision of the Revenue Court. In *Maharaja Vizianagram v. Chhango Kurmi* (4), a suit for ejectment of the defendant on the ground that he was a tenant-at-will was brought in the Revenue Court which decided that he was a tenant but not a tenant-at-will of the plaintiffs and subsequently a suit was brought in the Civil Court for the ejectment of the defendant on the ground that he was a trespasser; it was held that the Revenue Court having determined the nature of the defen-

(1) [1913] 11 A. L. J. R., 671. (2) [1911] 8 A. L. J. R., 940.

(3) [1914] 12 A. L. J. R., 1252. (4) [1910] 7 A. L. J. R., 555.

dant's tenancy and the class to which he belonged, a suit in the Civil Court could not be maintained. It was equally in the present case that the Revenue Court has determined the nature of the defendant's tenancy and he is clearly liable to ejectment. The present suit is an attempt as remarked in that judgment, to go behind the decision of the Revenue Court and ask the Civil Court to do that which under section 167, it is forbidden to do. On behalf of the opposite party, our attention has been called to two decisions of this Court, *Jagannath v. Ajodhya Singh* (1), and *Kanhai Ram v. Durga Prasad* (2). The former of these two cases may be distinguished from the present case. In that case there had been no decision by the Revenue Court on the question and Mr. Justice BANERJI in his judgment remarks as follows:—"It is true that the plaintiffs sued in the Revenue Court to eject the defendant on the allegation that the defendant was their sub-tenant. Had the Revenue Court decided that question and had held that the defendant was the tenant of the holding, there might have been some difficulty in the plaintiffs' way, but in this case as pointed out by the lower appellate court, the Commissioner did not determine the question whether the plaintiffs were the tenants of the holding, or the defendant was so." The case of *Kanhai Ram v. Durga Prasad* (2) is somewhat in favour of the respondent's contention. We would call attention to the opinion expressed by the late Sir SUNDAR LAL in his judgment on the point. He referred to Mr. Justice CHAMIER's decision in S. A. No. 1001 of 1911 and remarked:—"Like him I am inclined to think that the matter should be deemed to be *res judicata*." In that suit the defendant brought a suit in the Revenue Court seeking for the ejectment of the plaintiff on the ground that the latter was his sub-tenant. The Revenue Court ordered ejectment. The plaintiff brought a suit in the Civil Court for a declaration that he was the owner of certain occupancy holdings and claimed possession. He sued the opposite party on the ground that he was a trespasser. It has held in that case that the decision of the Revenue Court did not operate as *res judicata*. We do not propose to decide the present appeal on the question of *res judicata*. There have been a long series of rulings of this Court for a considerable length of time in which it has been consistently held that where a Revenue Court has exclusive jurisdiction to try certain question and it tries that question as between the parties, that that is a finding which is binding upon them and it is a finding which cannot be questioned in the Civil Court reference being made to section 167 of the Tenancy Act. We think that that is the principle which will govern the decision of the case before us. In so far as these two plots are concerned there is a final and binding decision between the parties. The present respondents are the sub-tenants of the present appellants and a decree for their ejectment has been passed.

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We do not think that a Civil Court is empowered to go behind that decision or to set it aside. We therefore allow the appeal in respect of these two numbers and in respect to them the plaintiffs' suit will stand dismissed with proportionate costs in all courts. The rest of the plaintiffs' claim is not contested before us and the decree of the court below will stand in respect thereto.

B. K. M.

Decree modified.

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October, 23.

RICHARDS,

C. J.

BANERJI, J.

MANNU LAL AND ANOTHER (*Defendants*)*versus*NELIN KUMAR MUKERJI AND OTHERS (*Plaintiffs*)*

Insolvency—Annulment of insolvency—Suit by Receivers commenced before annulment—Suit maintainable after annulment.

One *G. R.* started a firm in which he associated his two brothers and his father as partners without contribution of capital. Subsequently a brother of *G. R.* sued him for partition. Instead of fighting that suit *G. R.* made an application to be adjudged an insolvent and a composition was accepted by the creditors. Thereupon the insolvency was annulled. Before this, however, the Receivers had commenced a suit against the brothers of *G. R.* in respect of their liability to *G. R.*, in certain other concerns in which the brothers of *G. R.* had no interest. The suit was decreed and upon appeal to the High Court it was objected that the suit by the Receivers after annulment of the insolvency was not maintainable:—*Held* that the suit was maintainable.

FIRST APPEAL from a decree of BABU KAMESHWAR NATH, Subordinate Judge of Cawnpore.

B. E. O'Connor and *Surendro Nath Sen*, for the appellants.

Motilal Nehru and *Sital Prasad Ghosh*, for the respondents.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—The facts out of which this and the connected appeals arise are somewhat complicated but it is unnecessary to state them at any great length. It appears that there were three brothers, Ghasi Ram, Shankar Lal and Mannu Lal. There was also their father Fauji Lal. Ghasi Ram appears to have been a man of considerable business capacity and intelligence and to have started a number of business in various parts of the province, which were upto a certain period at least quite successful. He associated his father and brothers as partners in some of the concerns without any contribution of capital on their part. All went well until one of the brothers Mannu Lal started a suit for partition against his brother Ghasi Ram. Ghasi Ram instead of meeting this suit in a straightforward fashion and having all questions decided between

himself, Mannu Lal and the other members of the family got himself declared an insolvent. After a good deal of litigation, (out of which probably the legal profession alone gained anything) a scheme for composition was put forward and eventually accepted by the creditors and the Court. The bankruptcy was annulled. Before this happened however a suit had been commenced by the Receivers against Shankar Lal and Mannu Lal in respect of their alleged liability, as partners in some of the concerns, to Ghasi Ram and his son as the proprietors of certain other concerns in which Shankar Lal and Mannu Lal had no interest. Notwithstanding the fact that the declaration of insolvency was annulled the present suit was continued and the learned Subordinate Judge has made a decree in favour of the Receivers, plaintiffs in the suit.

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The first point argued on behalf of Shankar Lal and Mannu Lal, (the latter being represented by Mr. O'Connor, Barrister, and the former by Mr. Katju,) was that the annulment of the insolvency rendered the suit by the Receivers unmaintainable and that on this ground alone the suit ought to have been dismissed. In our opinion this contention has no force. The defendants are alleged to be the debtors of Ghasi Ram and the other late insolvents. Ghasi Ram makes no objection to the suit being maintained, (the objection that is raised is at the instance of the alleged debtors.) There can be no doubt that the suit was properly instituted originally. There can be no doubt that the suit could have been continued after the annulment in the name of the late insolvents, if not by the Receivers. It seems perfectly clear that if the debtors pay the amount found due either voluntarily or under stress of a decree, they will get a good discharge for their indebtedness to the late insolvents. We think under the circumstances that no injustice of any kind could be done to the defendants by the case being heard out on the merits.

The next point argued was that the suit should have been dismissed, because the suit as framed did not ask for an account of the transactions relating to a number of other concerns in which the parties were interested. Such pleas were raised in the court below on behalf of the defendants and the court admitted the equity of the defence by directing that the account should be taken in such a way that the liability if any of the defendants would be finally decided after giving them credit for any sums which might be due to them from Ghasi Ram on account of the other concerns. We think that having taken care to prevent the possibility of any injustice being done to the defendant on account of original frame of the suit, the court below was quite right in not dismissing the suit but directing that the accounts should be taken.

The next point that was urged was that the court below has assumed the correctness of the claim for Rs. 13,538-3 being due to the Cawnpore firm. It was contended that the court ought not

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to have assumed that this sum was actually due but should have gone further into the accounts, and it was vaguely hinted that fictitious entries might have been made by Ghasi Ram in the Lakhimpur and Gola accounts at the time the suit was brought for partition by Mannu Lal so as to inflate the indebtedness of these two concerns to the Cawnpore firm. It was urged that the learned Judge himself thought that there were fictitious entries in these accounts. We have carefully considered the point and we cannot see that the learned Judge thought anything of the kind. We have even seen the evidence that was given on this particular point. One item that was suggested as a fictitious entry was a sum of Rs. 1,300 or thereabouts damages which the Cawnpore house had paid to Ralli Brothers and had charged against Lakhimpur. It appears that witnesses were examined to show that a consignment of corn was sent by the Lakhimpur house to Ralli Brothers but that this was done in pursuance of a contract entered into between the Cawnpore house and Ralli Brothers. The contract being between these two firms the Cawnpore house had necessarily in the first instance to pay the damages for breach of contract but it was quite right that the Lakhimpur house should have been debited with the payment of the damages if (as between the Lakhimpur house and the Cawnpore house) the grain was to come from Lakhimpur. If this item is to be taken as a specimen of the items suggested as fictitious, we think that there is very little weight or force in the allegation put forward on behalf of the defendants as to fictitious entries. We think that the court below was justified in accepting the indebtedness as between the Cawnpore house and the Lakhimpur house and the Gola house of the sum mentioned above. It was argued that neither Shankar Lal nor Mannu Lal could be liable for any sum because according to the contract between them and their brother Ghasi Ram they were entitled to share in the profits but they were not to be bound to contribute to any loss. We are perfectly certain that there was no such contract, and we are quite certain that the learned Judge never intended to hold that such an absurd contract existed. No doubt Shankar Lal and Mannu Lal contributed no capital and the shares in the partnership given to them were in lieu of their services, but as partners they were entitled to profit and liable to loss in proportion to their shares.

The last point was that the rate of interest, namely nine per cent was not the rate agreed upon. On this point we see no reason to differ from the finding of the court below.

We think on the whole the case was carefully tried and justice done by the learned Subordinate Judge. We hope that the brothers may see their way to bring this litigation to a speedy determination without incurring further cost. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

LAKHPAT RAI AND OTHERS (*Plaintiffs*)
versus
 SRI KISHAN DAS AND OTHERS (*Defendants*)*

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May, 22.

PIGGOTT, J.
WALSH, J.

Patent—Novelty—Specification—Combination of old materials.

The plaintiffs patented a process of turning out *banslochan* (a medicinal powder manufactured by a calcining process from the interior of bamboo found in Singapore) of which the essential features were the treatment of the substance at a red heat, with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were (a) no iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) the retort or crucible was entirely closed from the time when the acid was added until the process of calcination was complete; the result being that the necessity of a chimney communicating with the retort for the purpose of carrying off the fumes was dispensed with. This process was one of a new combination of admittedly old materials:—*Held* that it was a good subject-matter for a patent.

FIRST APPEAL, from a decree of PANDIT SOTI RAGHUVANSA LAL, Additional Judge of Farrukhabad at Fatehgarh.

Remfry, (of the Calcutta Bar), (with him *B. E. O'Connor*, *Tej Bahadur Sayru* and *S. M. Sulaiman*), for the appellants.

Moti Lal Nehru, (with him *Surendro Nath Sen*), for the respondents.

The following judgments were delivered.

WALSH, J.—We have come to the conclusion that this appeal must succeed. There has been a very full discussion, upon somewhat unfamiliar lines in this Court; but we have no doubt as to the proper conclusion which ought to be reached. The appeal is brought by the plaintiffs, the registered patentees of a process of manufacture, the plaintiffs consisting of Lakhpat Rai, Sampat Rai, and Manful Narain, and carrying on business at No. 14, Mullick Street, Calcutta, against a judgment dismissing their suit brought against the defendants Srikishan Das, Bahal Rai and Bhoop Narain, carrying on business at Farrukhabad, for infringement of the patent. One Prag Narain who figures somewhat prominently in the case, is a member of the plaintiffs' firm but for reasons best known to the plaintiffs was not one of the applicants for the patent and is therefore not a necessary party

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to the suit. The ground upon which the suit was dismissed was a question of fact, namely that the process for which the plaintiffs had obtained their patent had been anticipated and was one of common use in the trade.

Speaking for myself I think it desirable to make one or two general observations. The patent law is a provision made by the Legislature for the encouragement of research, industry and progress. It rewards genuine discoveries by giving them a limited monopoly and thereby seeks to encourage commercial enterprise and development. A patent suit in which the validity of an alleged discovery is challenged is one in which the courts would seem to have a right to expect candour and honest dealing and genuine assistance in the often complex and difficult technical question of ascertaining whether the alleged new process is really a good subject matter for a patent. In this case the parties appear to be men of position in their own commercial circle; each has charged the other with the perpetration or attempted perpetration of a mean and contemptible fraud. There has obviously been a mass of hard swearing which has enormously increased the difficulties of the task thrown upon the court. We have had to do our best to sift the truth from a mass of untruth. Apart from this aspect of the case which must seriously have prolonged the litigation there is even a graver aspect. It is regrettable, and it is a matter to which those who are interested in the industrial development of this country might well direct their attention, that commercial disputes of this kind should be tainted by a mass of palpably dishonest evidence, unfair methods of competition, and conduct which decent people cannot but reprobate. Moreover the conduct of the case in court, (we are saying nothing about the learned gentlemen who appeared for either party before the Subordinate Judge who gave judgment in Farrukhabad, we refer particularly to some of the incidents when evidence was taken on commission) is characterised by a method of cross-examination in the case of independent and respectable professional witnesses, which is worthy of the worst tradition of the lowest forms of litigation and which is calculated, if indulged in as a practice in the way in which it was indulged in this case, to make our trial courts a terror to self-respecting men and to produce a state of things under which only those will care to come and give evidence who have no character to lose. We may say at once, as we are differing from the view of the facts taken by the lower court, that we find very little assistance in the Subordinate Judge's judgment. It consists of a considerable amount of painstaking criticisms some of which is difficult to follow, some of which we find ourselves unable to agree with, while some of the conclusions are so vague or so over-burdened with details that their weight is largely discounted. We therefore have to approach the consideration of the mass of conflicting evidence in this case unobscured by the existing decision and to form an

independent judgment of our own. In one respect we are not at a very serious disadvantage. It so happens that the majority of the principal witnesses in the case were examined either on commission or by the learned Subordinate Judge's predecessor and were therefore not seen or heard by the learned Judge any more than they have been by us. The controversy arises in this way. About the 23rd of June, 1915, the plaintiffs applied to the Patent Office in Calcutta for a patent, the claim for which and the specification for which is contained in the document before us, Specification No. 2191. The claim related to the manufacture of an ancient and well-known medicinal commodity called *bansloohan*. As a matter of interest we may quote here the chemical description of this article as found in Professor Thompson's Pharmacopoeia.

Percentage composition :

Silica (Sio 2, silicon dioxide) ...	...	90.50
Potash (KOH, Potassium hydroxide)...	...	1.10
Peroxide of Iron (Ferric iron Fe2O3)	...	0.90
Alumina (Aluminium Oxide Al2O3) ...	...	0.80
Carbon compounds and foreign matter	...	6.70
		100.00

The powder in question, which is manufactured by a calcining process from bamboo, is said to be a medicine for the home, and to possess certain restorative and invigorating qualities for the old as well as for the young which, if they do not entirely fulfil their promise, may at any rate account for their undoubted popularity. The powder is made from the interior of bamboo which is found in Singapore, by baking or calcining. According to the plaintiffs this process has up to, generally speaking, June, 1915, been carried out by means of iron-pans when the commodity is prepared in any substantial quantities. Of course they do not allege, and no sane person could allege that ordinary earthen-ware pans could not be and indeed were not in fact used from time to time by persons who wanted to prepare a small quantity for their own use without delay, but as a matter of trade use when the manufacturer is preparing the stuff in any quantity for the market according to the allegation of the plaintiffs, the ordinary known method was by the use of iron-pans in which the stuff was placed for the purpose of being cooked under great heat in a stove. According to them also the effects of the use of iron-pans were to produce a rapid and intense heat operating directly upon the material; to make the cost of the stove somewhat greater than if ordinary earthen-ware pans were used particularly because the tendency of the iron-pan was to wear out quickly and also to produce in the substance itself what has been called a brownish or reddish tint,

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specimens of which we have seen with our own eyes in bottles which have been exhibited in the case, and which is regarded in the market by those who know the stuff well without having a serious drawback as something which makes the article inferior to the best standard. According to the plaintiffs also they were constantly worrying and working by experiments of various kinds to arrive at some satisfactory process of heating which would be cheaper and more satisfactory than the old method; and in substance they claim by this patent to have achieved that result by a combination of earthen-ware vessels placed one upon the top of the other in the stove as described and delineated in the specification which method they say has the superior advantages of securing a slower heat, enabling the material to be treated (as it always is treated at some stage and in some form or another) with sulphuric acid at a red heat, of confining the fumes produced by the sulphuric acid within a closed crucible and of producing a better colour of pure white or bluish white. There is less risk of the brownish or reddish tint manifesting itself and the production is regarded in the market as superior in appearance and quality and costs less. Another feature according to their allegation which distinguishes the new process from the old is that in the latter stoves there was a chimney of greater or less height which carried away the fumes. The specification was ultimately accepted and was published to the world by a formal notice in the Gazette of India of the 16th of October, 1915, in the following terms; "Improvements in the manufacture of a medical preparation, Patent No. 2191" which we feel bound to say in passing cannot be regarded as a satisfactory mode of summarising the real claim which had been accepted by the office.

We now turn to certain other dates. On a date in July, 1915, by a coincidence which can only be described as remarkable, one Maharaj Narain paid a visit to Calcutta. This Maharaj Narain who gave evidence in the case for the defendants although not a member of the defendants' firm was their general attorney and apparently the moving spirit. We think that the object of this visit has not been satisfactorily explained. Maharaj Narain's reasons for it are two-fold. He says he was desirous to make arrangements or to ascertain how arrangements could be made for securing the raw materials of bamboo from Singapore, and also to take lessons from one Munna Lal in the construction of the stove which was in common use for the manufacture of *banslochān*. A railway journey from Farrukhabad to Calcutta strikes us as a somewhat expensive mode of communication by post with Singapore. And if, as the defendant's case is, it be the fact that the plaintiffs' process of manufacture was well-known throughout India and particularly in Farrukhabad and all that was necessary was for somebody on the spot to show the workmen in Farrukhabad how to build a stove, we do not see why it was necessary to go

to Calcutta at all. The process of imparting the knowledge which Munna Lal possessed to the mind of Maharaj Narain appears to have occupied a considerable period. Although the visit took place in July it is not suggested that the defendants began to build until September of the same year. The nature of the construction of the stove is such that the time occupied by instructing a competent workman how to make it and in fact producing one complete from top to bottom could not possibly amount to more than a week. Whether the course of lessons was more troublesome than had been anticipated or whether there was an unexpected delay in obtaining the raw materials from Singapore we do not know, but the next date which is important is the 18th of December, 1915, when the defendants wrote to a customer in Delhi in these terms. "Our compliments to you. We have started factory for manufacturing *banslochan*. All kinds of goods are in stock. The rates will be given below, please note them. The rates have fallen down on account of the opening of our factory; so you should send for goods from us, in order that you may derive benefit and our factory may receive help from you. We shall send goods of a very superior quality. Please send for a small quantity of goods as sample and see them. What more to add." And then follows a list of rates to which we shall refer in a moment. It is hardly to be wondered at having regard to the terms of that letter and to the fact that it is common ground that the process of manufacture referred to in that letter was precisely the same as the plaintiffs' patented process of manufacture, that the defendants have not seriously challenged the plaintiffs' contention, that the plaintiffs' process of manufacture if new is certainly an improvement. The defendants have not attempted to explain in any way consistent with the ordinary conduct of honest businessmen the sudden enthusiasm, worked up one may say to almost white heat, which they displayed for the manufacture of *banslochan* between June and December, 1915, but having regard to the fact that the rates per seer set out in their letter were a very substantial reduction upon the price then being charged by the plaintiffs, and that the plaintiffs were admittedly practically in sole possession of the market, we have not the slightest doubt that on the 18th of December when that letter was written and further back even when they determined to enter the market for the sale of this commodity, they knew perfectly well that whether it was a genuine discovery or not, the plaintiffs were coming upon the market with an alleged improved method of manufacturing this commodity which was likely to be a commercial success and that they had made up their minds by fair means or by foul to share the profits which they anticipated the plaintiffs were going to make if their invention were accepted by the public. On the 26th of January, 1916, an even more striking document came into existence. A telegram was sent to the defendants from Calcutta by another

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Maharaj Narain who appears upon the stage for a moment and subsequently is seen no more in connection with this case. The plaintiffs by an application made in the course of the suit not unnaturally showed considerable curiosity about this telegram and no doubt also as to what this Maharaj Narain was doing in Calcutta. That curiosity has never been satisfied as the defendants have not put this Maharaj Narain in the box. All we know about him is that he belongs to a younger generation, that he is the son of Bahal Rai one of the defendants and that he wired to the defendants in the following terms. "Lakhpat Rai doing registry of *banslochan* come immediately." It is to be observed that that telegram alleges, and it is quite possible that the plaintiffs themselves have alleged sometime or another, that this patent gave them the sole right of manufacture and sale of the commodity itself. It does not refer to the process. It is quite clear however that Maharaj Narain the general attorney of the defendants to whom it was sent and who that is to say Maharaj Narain in Farrukhabad, undoubtedly received and dealt with the telegram, knew quite well that the telegram referred to a process and not merely to the commodity. What exactly he did except a visit to Cawnpore to consult somebody is not quite clear. But on the 27th of January he sent a telegram to the Controller of Patents, Calcutta, in the following terms. "Application for patent process manufacture of bamboo camphor tendered by Lakhpat Rai, Sampat Rai or other party is for a process used by ourselves and several manufacturers, are forwarding representation." Two observations arise upon that document. Maharaj Narain would have us believe that the telegram which he had received from his name sake was the only information which he had upon the subject at all. We find it impossible to believe this statement. The telegram to the Controller of Patents shows that he knew perfectly well that the application dealt with the process of manufacture, no reference to which had been made in the telegram received from Calcutta, but more than that he alleged in the telegram sent within 24 hours of the news which he had received from Calcutta that the process for which application had been made was the same as that with which he was so familiar. It is impossible that he could have become aware of that fact, even if it were a fact, by means of the telegram from Calcutta. We are satisfied on these materials alone that the telegram was a disingenuous document sent expressly for some purpose of the defendants' own and that the conduct of Maharaj Narain and his perfectly hopeless attempts to get out of the difficulty are only evidence of the guilty conscience of a dishonest man. It does not however rest there. The telegram was followed up by a letter which it is necessary to examine very carefully having regard to the statements about it made by Maharaj Narain when he was very naturally asked in cross-examination to explain its language. It

is dated the 27th of January, 1916, from Farrukhabad. It is signed "Sri Kishen Das by the pen of Maharaj Narain." It is however said on behalf of the defendants respondents at the Bar before us, I think it was not very clearly said at the trial, to have been written by a scribe for Maharaj Narain when Maharaj Narain was in Cawnpore. It is in the following terms. "We are informed that Lakhpat Rai, Sampat Rai of 14 Mullick Street, Calcutta, have applied for permission to patent a process for the manufacture of bamboo camphor (*banslochan*). We have the honour to state that the same process has been in use by us for sometime past and others have been using it for a still longer period. The object of this applicant is apparently to place obstacles in the way of our doing business and although in our opinion there is nothing patentable in the process we deem it necessary to record the fact that the process which the applicants propose to patent is not new (so far the letter merely repeats what had been said in the telegram and then follow these significant words) "and is in common use by a number of manufacturers in this district." The defendants' case at the trial as we shall have occasion to point out in a moment was that this process of manufacture had been adopted for the most part by firms in Calcutta for many years although they had during the last decade been driven out of the market by the plaintiffs. Maharaj Narain was therefore asked to explain the language used in this letter. He first said "I wrote in the letter to the patent office that the said process for preparing *banslochan* was used by a number of manufacturers in the district because two factories were then using that process and several other factories in this district had formerly used that process." Now there can be no mistake about that sentence. He was confronted with the letter which he had written and he was asked by the cross-examiner perfectly naturally and fairly, "to what you were referring" and he pledges himself on a critical question in the dispute to the fact, although not a tittle of evidence has been called to support it, that in the district, that is to say, in Farrukhabad because the writer was at Farrukhabad there were two factories using that process and several other factories in the district had formerly used it. He could have had no doubt whatever as to the purport and meaning of the question which was put to him and as to the meaning of the answer which he gave. He was then reminded indirectly that his case at the trial was that it was mainly in use in Calcutta and the cross-examiner put this question. "Can you state any reason why you did not mention about Calcutta in it." He answered "I did not mention any place, but simply told him that several manufacturers used that process and I cannot say what he understood that he mentioned the words in this district." So that after swearing point blank that he used the words in this district with special reference to factories which were really in his mind, and realising the difficulty that he got himself into having

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regard to the real facts which he was able to prove he recanted and threw the blame on to the Babu to whom he was dictating the letter. We have dwelt upon this incident in the case because it is only by such tests (they are specially valuable where you get a contemporaneous document under the hand of a witness which he cannot deny) fairly applied by a proper cross-examination that you can prove the witnesses in a case of acute conflict of verbal testimony and see where the pinch comes. We have come to the conclusion that the conduct of Maharaj Narain with regard to the statements which he made in the documents themselves and the hopeless attempt to get out of the difficulty in which he found himself when challenged on oath in the witness box, shows that he was a dishonest witness, that he was labouring under a guilty conscience and that there is no explanation of his conduct except upon the hypothesis which the plaintiffs allege that he was the moving spirit in an attempt to steal and purloin the plaintiffs' process from them by unfair means.

Shortly after this incident and the telegram of protest to the Controller of Patents, it being too late for the defendants to challenge the registration of the patent, they continued the manufacture which it is admitted is practically the same process as the plaintiffs' and thereby forced the plaintiffs to bring this suit. The plaintiffs ask for an injunction and for damages. The defendants, while alleging generally that the alleged invention is not really a good subject-matter for a patent, for example they say in paragraph 6 of their defence that it was the original form of stove in common use for a long time in India, raise a somewhat broader issue of fact on which the trial in the court below and much of the discussion before us has really turned, namely they have committed themselves to this somewhat startling proposition that not only other traders mostly in Calcutta, but even the plaintiffs themselves, have all along manufactured *banslochan* by this method which the plaintiffs now seek to patent, that it is really the only method known to the trade, that it is incapable of improvement, and that the plaintiffs have themselves been doing business by this method for some 12 or 13 years, and that they really were endeavouring to impose upon the Controller of Patents and the general public not a thing in which they believed as a new discovery but a thing which they knew was well-known to others as well as to themselves and was an attempt to defraud the general public. Now that as we have said was a startling proposition which one would naturally require to be clearly and definitely established in fact. The defendants alleged in their answers to the interrogatories served upon them in the course of the suit by the plaintiffs the names of the firms relied upon by them as being those commonly using this process of manufacture :

1. Hulasi Rai, Calcutta.

2. Hanuman Sahai Rameshar, Calcutta.
3. Bhagwan Das Munna Lal, Calcutta.
4. Prag Narain, Calcutta. (Now one of the plaintiffs' firm).
5. Lakbpat Rai Chhote Lal, Calcutta. (The plaintiffs' firm).
6. Silchand Sadh, Calcutta.
7. Juggi Lal Bania, Farrukhabad.
8. Mathura Das Sat Narain, Cawnpore.

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Omitting from this list the two now connected with the plaintiffs' firm these persons appear to have ceased business altogether for periods varying from 40 years to 15. It is not suggested that any of them has manufactured *banslochan* during the last 14 years. Two of them or representatives of two of them appeared in the box. All of them were admittedly failures in business. At the trial Munna Lal, one of them, was called and he spoke of three, two of whom are additions to the list which I have read namely Karim Baksh and Gappu Lal. But inasmuch as neither of them appeared in person at the trial no further reference need be made to their business. Reference will have to be made to the two witnesses, Munna Lal and Rameshwar in a moment. But the striking fact and it is common ground between the parties in this case, is that the plaintiffs by ordinary competition and if the defendants' case is to be believed by the use of precisely the same process that the defendants themselves have been using and everybody else in the trade has been using, have succeeded during the last 12 or 13 years in securing a paramount position in the trade. All their rivals have been beaten out of the field and it is not suggested that during that period of 12 or 13 years the plaintiffs have enjoyed any superior advantage over their competitors and the theory is that in spite of that fact and although they have successfully carried on their business during that period almost unrivalled by the well-known process which was open to everybody they nonetheless thought it necessary so far as we can see for no possible object either of gain or of anything else to invent a story which could have been exposed and blown to pieces in five minutes by honest evidence namely that all this time they have been adopting a totally different method, that they have been experimenting in new methods and only just discovered and therefore went to the expense and trouble of obtaining a patent for this ancient method which was known to all. We think that theory has hopelessly broken down upon the evidence and that it is a hypothesis which would require overwhelming evidence for any court to accept as the real truth.

Turning to the oral evidence which it is necessary to examine in this case with the preface which we have already made, namely that there is on the written evidence and on the admitted facts

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serious reason for doubting the honesty of the defendants' case, a very strong attack was made by the Hon. Motilal Nehru for the respondents upon the plaintiffs for not, as he put it, going into the box. We think this comment is really not justified. They did go into the box in the true sense of the word. The District Judge, who originally was intended to try this case himself called Maharaj Narain for the defendants on the one side and Manful Narain one of the plaintiffs on the other side. Manful Narain gave his statement to the learned Judge describing in general language the present process, saying that in the old stove an iron tray had been used, that the present stove is closed above the trays while the other was not so, that in the old stove there used to be a chimney while in the new there is no chimney, that under the old stove the working had been going on in his factory in Calcutta for many years, that he had never seen an earthen-bowl being used in any other factory until they decided to use it and as far as he knew for 13 or 14 years nobody in Calcutta had been manufacturing this stuff at all. We do not know what more the plaintiffs could say, than this witness said, unless he was cross-examined in detail either by the court or by the other party. A sort of argument was suggested that Mr. Remfry who conducted the case for the plaintiffs in the court below, ought to have put the man into the box again. We cannot see the slightest reason why he should have done this. The witness had given a general account of his case consistent with the independent witnesses who were subsequently called to support it and if the defendants thought that they could get anything out of this particular witness of whom they now make a grievance as not having been called at all, nothing was easier than for them to apply to the learned Judge at the trial to re-call him for cross-examination. It is idle to suggest that the provision in the Code which enables a Judge to call one of the parties and put him on oath, does not make the witness just as much a witness and make the evidence just as relevant, as if he is called by his own representative. And why in the world when he has given satisfactory evidence his legal representative should go through the ceremony of putting him into the box again for examination-in-chief, we cannot for the life of us understand. But there is nothing in the point even if there were any technical grievance which could be founded upon it, because Prag Narain although not a plaintiff is to all intents and purposes the same as a plaintiff; and he gave evidence at considerable length and his story was much to the same effect. He had obviously been working on his own account and had in 1911 joined the present plaintiffs in partnership. He described in detail the present form of manufacture and the old form of manufacture. He explained that the acid was mixed formerly with the dry *banslochan* and that the mixture was put into the stove. He said that acid was used before putting *banslochan* into the stove, apparently referring to the pro-

cess of washing before baking. He described the chimney which was formerly in use. He described how for the last 18 months they had ceased to use iron-pans, and had used earthen-ware pans or *kholis* in their place. He said that the inventors were Lakhpat Rai, Sampat Rai and Manful Narain giving the three names of the plaintiffs excluding himself, which may mean that they all individually took part, or may mean nothing, namely that they were merely the owners and that somebody in their employ had lighted upon the idea. The only question is whether it was a real discovery, and he described the advantages of the new process in these terms:—"The new invention therein is this, three *kholis*, a *handi* and another *handi* to cover it and a *gamla* with a hole to cover it over which another *handi* is placed. This is the new invention. No stove of this kind was made before. Besides the above, there are four bricks inside the stove on which the three *kholis* rest and three bricks above to keep the *gamla* and the fact that fire affects *kholis* and *handis* from all sides. Besides this there is no new invention. By doing away with the chimney the benefit is that the fumes of acid formerly used to escape but now they materially affect the material and thoroughly clean it. This is the new invention in it." And he mentioned by the way that Dr. Hossack whom we shall have to refer to in a moment came and saw the process when iron-pans were used, that he remained standing below the platform and asked a few questions for a space of five minutes, that they showed him how they mixed the acid into the crude *banslochan* kept outside the stove by pushing it in with a ladle and that no acid was used in his presence when the stuff became red hot. He also said that Dr. Hossack must have been in error or must have been misunderstood when he was reported as saying that the acid was thrown into the stuff, as it never was. In connection with the evidence of this witness and of the conflict, if any, between him and Dr. Hossack it is not unimportant to refer to the evidence of Mr. Briggs, commonly called Bugs in the book. He was called by the plaintiffs and was examined on commission and described himself as an analytical consulting chemist. He seems to have had good training in England and to have worked under a gentleman of experience in India since 1898. He was not a witness to any fact but merely an expert upon the new process. Assuming the facts to be as alleged by the plaintiffs he said that he thought the new stove was better. He had been shown what was alleged to be the old process and therefore he believed the pans in it to be of iron, and upon that hypothesis he said that the new stove was better on account of its slow heat whereas the old stove being of iron must be a fast heat. He had never seen a stove like the plaintiff's before. But it does not appear that he had been in the way of seeing these stoves one way or the other in the past. But his opinion was that the effect of adding sulphuric acid to cold material would not be

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nearly so satisfactory as at a red heat, while on the other hand an attempt to add it at a white heat would be to lead to too rapid an evaporation, which might be dangerous, and in the former stove which he saw it would be impracticable. He said it was not an ordinary accepted theory that sulphuric acid should be added at a red heat. And he suggested that the iron-pan, (it was only a belief on his part but it is not without significance in its bearing upon the rest of the evidence), probably was the reason of the reddish or brownish appearance of *banslochan* which had been seen and objected to in the past, his theory being that the acid acting upon the iron-pan when hot would produce what he described as ferrous sulphate. He said that the furnace may be called a furnace on the reverberatory principle and he made also this important statement. Having seen the stove which was alleged to be new and the stove which was alleged to be old, he said the stoves did resemble one another in outward appearance although one was made of iron-pans and the other of earthen-vessels. The importance of that is (it is plain upon the evidence even if it is not plain to one's own intelligence) that you can only discover whether iron-pans or earthen-pans are used inside by some kind of physical or ocular test, and that you cannot possibly discover it by the naked eye when the place inside is a burning furnace. The next witness relied upon by the plaintiffs is Dr. Sandal. Dr. Sandal was a subordinate official in the Health Department in Calcutta, a kind of Inspector of nuisances, whose business it was to go round and visit factories under his superior officer, and he was subordinate at one time undoubtedly to the witness whom we shall refer to in a moment, Dr. Hossack. He gave a detailed account which it is not necessary to recite of the old system worked by the plaintiffs as he remembered it, and if his evidence is believed the truth of this dispute would clearly be on the side of the plaintiffs. A most violent attack, and in our opinion an entirely unjustifiable attack was made upon this witness and for certain reasons which are material to other parts of the case we propose to examine it in some detail. It is quite true that the witness was not a man of the highest academic qualifications and that he had bought, as other people have bought an American degree. The curious feature of the impertinent and virulent attack upon his intellectual and academical qualifications apart altogether from his personal character, was the fact that when he was asked a question as to whether the stove now used by the plaintiffs was an improvement, an objection was raised by the legal gentleman who subsequently cross-examined him about his intellectual qualifications, on the ground that he was not called as an expert, so that while the defendants objected to his answering a question as an expert they delivered a cold blooded and deliberate attack upon his educational qualifications. As a matter of fact he did not profess to be an expert in the real sense of the word and his answer, when he was allowed to

give it, shows what was uppermost in his mind, namely his duties as an Inspector of nuisance. He said "the present process that I have seen is far better and no nuisance is created either to the inmates of the house or to the neighbours and the material now is whiter and better than before." It is due to this gentleman to say that he was in the employment of the Municipal Corporation of Calcutta for about 25 years and that he retired after that period owing to ill-health with a pension. He was challenged with the opinion of his superior officer and he answered as only an honest witness could do, that he did not think that Dr. Hossack was ever at the factory for any great length of time but whatever he (Dr. Hossack) said he had seen he (the witness) could say nothing. He (the witness) was only there to speak to what he had seen. Having failed by throwing every sort of mud at this witness for a considerable time to make the slightest impression upon his evidence, the defendants then embarked upon a new and more desperate form of attack. They deliberately accused this witness, not in the presence, be it observed, of the court trying the case, but in the presence of a Commissioner of having offered to sell his evidence to them for Rs. 500 and they did this by the production in person of the two persons to whom the offer was supposed to have been made. Their names were Kunji Lal and Gappu Lal. It is impossible for us to shut our eyes to the fact that Gappu Lal is the name of the petitioner in an original suit which has been connected with this appeal and which has been heard by us although judgment has been reserved in which he, Gappu Lal, seeks to revoke this very patent, and that Gappu Lal and Kunji Lal, these two men, have given evidence before us in that suit testifying to their personal knowledge of the old process by which *banslochan* was manufactured. Mr. Moti Lal, for the respondents, contended, when we asked him why these two men to whom Dr. Sandal is alleged to have offered to sell his evidence were not called that the law did not permit him to put them into the box but that by another section of the Evidence Act he was bound by the answer of the witness. If that view is correct Dr. Sandal's evidence stands untainted and untouched by the attack upon him. But it is impossible for us not to ask ourselves the question why, if these two men were in a position to give evidence before us in another suit one of them being actually the petitioner and an alleged manufacturer and seller of the substance (*banslochan*) who alleges that he has suffered a grievance through this patent and could testify to the fact that one of the principal witnesses called by the plaintiffs had made an offer to them to sell his evidence to the defendants, they were not called as witnesses in this suit. To that question there has been no attempt of any kind to make any answer. The learned Judge undoubtedly rejected the evidence of Dr. Sandal. We are unable quite to understand the ground on which the learned Judge refused to treat him as an honest witness. It is true that Dr.

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Sandal admitted that he went for his own examination before the Commissioner on a date other than that on which he was really summoned having reason to believe that he would be wanted on that date, and the learned Judge accepts the explanation in his judgment, but nonetheless he comes to the conclusion that this matter which is satisfactorily explained coupled with the negotiations about the purchase of his evidence makes the matter suspicious. The view of the learned Judge is that the evidence of a witness should be rejected if only he is asked questions sufficiently offensive to arouse suspicion as to his character. We cannot agree that this is a sufficient reason, and we see none for throwing over Dr. Sandal's evidence. It may be that Sanitary Inspectors are not always absolutely reliable, but they must be shown, and not presumed, to be untrustworthy.

The next witness relied upon by the plaintiffs was Dr. Mitter. Here again we have been ourselves unable to accept the somewhat hyper criticism to which this gentleman's evidence has been submitted by the lower court. There does not seem to be anything extraordinary in Dr. Mitter's story that he being a doctor on a ship between Singapore and Calcutta made the acquaintance of one of the plaintiffs whose business was in both places and who was travelling backwards, and forwards and as the result of this friendship he went to stay with the plaintiffs and had medically treated one of them, and was wandering about their premises and became acquainted with the manufacture which was going on and out of which they were making their living. And why a doctor should not, assuming that he was there and interested himself on a holiday in the manufacture of the article by which his friends were making a livelihood, take the opportunity of looking into the stove out of curiosity and satisfying himself whether it contained an iron-pan or earthen-ware pan we do not quite see. However, the learned Judge seems to find something so uncommon in it that he regards it as not true at all, and in the course of his judgment he has come to the conclusion that none of the details of Dr. Mitter's story can be accepted. Being apparently dissatisfied in his own mind with that criticism he finally came to the conclusion that Dr. Mitter was not there at all. But we think that there is no material on which we can treat Dr. Mitter, otherwise than as an honest witness, who was desirous of giving the best assistance he could from his recollection. And again if Dr. Mitter's evidence is believed the fact that the plaintiffs were using iron-pans in the stove is clearly established. On the whole we think that the plaintiffs have made out a satisfactory case; that there is no reason for disbelieving the five witnesses to whom we have referred; that upon their evidence it is established that iron-pans were formerly used, that the earthen-ware pans were new; that the present combination is an improvement and that it has the

advantages claimed for it. We have, however, to consider further how far, the defendants' evidence makes a serious inroad upon this evidence. The defendants called a quantity of evidence. We have already given sufficient reason for distrusting the evidence of Maharaj Narain. The main features which the defendants otherwise rely upon are the evidence of Dr. Hossack, undoubtedly a scientific witness of high standing and respectability, Manna Lal who is alleged to have been in the trade, and to have taught Maharaj Narain, and further a contemporaneous report made by one Mr. Kundu, a subordinate in the Health Department and a kind of Inspector of nuisances subordinate to Dr. Hossack. We think that giving full weight to Dr. Hossack's evidence it really comes to very little. He was palpably an honest witness who frankly said that he was very hazy, and the more pressed he was upon details, the more he explained that his recollection was really a hazy one. It is but natural that a busy man like Dr. Hossack with important avocations should forget what he had seen long before, to which at the time he attached no importance, and in which he had no concern; and when reminded about it should come to court with a very hazy recollection of it. Whereas the case of a man like Dr. Mitter is quite different. Although he had no concern in the matter, being a friend of the plaintiffs he might very naturally spend his leisure time in looking into their stove; but Dr. Hossack was a busy man engaged in his profession, and therefore the plaintiffs' case may be perfectly true and everything that Dr. Hossack said may be perfectly honest, whereas it is impossible for the defendant's case to be true without convicting Dr. Sandal and Dr. Mitter of flagrant and deliberate perjury. This in itself is a reason for preferring the plaintiffs' story supported as it is by witnesses who relate facts which could only be wilfully untrue, if untrue at all; whereas in so doing we do not cast the slightest discredit upon Dr. Hossack's testimony. We do not think that he was really prepared to commit himself upon the question whether the interior of the stove was iron or not. It is plain from Dr. Brigg's evidence that he could not have examined it for himself at any rate with his eye, and he does not profess to have used any other means and it is quite clear from the report which he made on the 14th of October, 1909, that the process of calcining the bamboo camphor, in what he called a retort, with an addition of sulphuric acid occasionally, was being carried on in a stove which had a chimney—a fact wholly inconsistent with the defendants' case. In our opinion the evidence relied upon of Dr. Kundu, who is represented only by his report ought really as a matter of law to be rejected. Dr. Kundu's report is alleged to be a public document under section 35 of the Evidence Act. We think that it does not come within this category at all, certainly not for the purpose of proving a fact immaterial to the matter in respect of which he was making his report. But however that may be,

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Dr. Kundu is alive and available and was twice summoned by the defendants. The plaintiffs properly objected to the report. Their objection was over-ruled. They contend in one of their grounds of appeal that this report ought to have been rejected. We agree that it ought. On the other hand it has been referred to by both sides in the court below and before us, and even if it was improperly admitted, we think that it would make no difference to our decision in any way. It refers to the addition of strong sulphuric acid at a white heat, it refers also to the existence of a chimney, and although it does describe the stove as a "native reverberatory furnace" which according to the best understanding of that expression is inconsistent with the method of iron-pans which the plaintiffs say they were using, we are not satisfied that a gentleman who thinks that a high chimney is useful for diminishing the amount of heat generated in a stove, is a gentleman whom *a priori* we can accept as fully acquainted with the technical meaning of the term "reverberatory furnace." The witness Rameshar does not appeal to us as a satisfactory witness. He said he worked this process according to the plaintiff's method for 20 years. If he did he made an astonishing mess of it. He has not attempted to work it during the last 20 years. He became the owner of the factory, in which it was alleged he had formerly worked, by a deed of gift from his former employer, the result of which was that the concern was wound up within a year. He frankly says that there is no body now to be found in Calcutta who might have seen the stove which he had at that time, and when he was asked about the books relating to his business he made the astounding statement that a Mohammedan gentleman who lived in a bungalow wrote out the books but he is not now to be found. Another witness relied upon was a man named Ram Kumar who was a broker. If he is like most brokers he interests himself more in the commission to be earned from a manufactured article of this kind than in the process by which it is brought into existence. He has not been at work since 1904. He says that somebody or his clerk has been receiving profits for him, but he does not know how much. He admits having been hard hit by the plaintiffs who have been selling this stuff without an agent, and really all that he says is that he never saw iron-pans, but did see broken earthen-ware pans about the place where manufacture was going on, and that when he did see them he "sat down and talked." Nor can we attach much greater weight to the evidence of the gentleman, Govind Singh who visited Calcutta and stayed with the plaintiffs. His opportunity for seeing the internal construction of this stove was, according to his first impression, from a window some fifteen yards away where he was sleeping. When pressed he thought he got a better view of it from the enclosure where he went to relieve nature. This gentleman is under the impression that Howrah bridge is a kind of *kuchha* bridge of "pipas" covered with straw

and mud; and if that is the best account he can give of it after visiting Calcutta (we take judicial notice of the fact that Howrah bridge is at times not unlike London bridge in the middle of the day) if that is the best this gentleman can make of his impression of Howrah bridge, we do not think that any importance can be attached to his recollection of the internal construction of the stove. Dr. Srivastava's evidence really consisted of no more than the recitation of what he had read in the journals, "Indian Forester" and "The Commercial Products of India." We may say that the court below was mistaken in thinking that there was any legal ground for the admission of this witness's information of literature on the subject which was otherwise inadmissible; but it really contributes nothing to the case. The witnesses Chhedu and Sheoraj Narain, one of whom apparently is an old servant of the plaintiffs and the other, a relation of Manful Narain, one of the plaintiffs, is not on very friendly terms with them, sufficiently create doubt with regard to their power of observation in respect of the material drawn out from the fire. They say it was drawn out fifteen minutes after its treatment with the acid whereas Munna Lal says the interval is two or three minutes.

So much for the defendants' witnesses, as a whole, many of whom no doubt were doing their honest best to give an account of what they saw. This brings us to the consideration of Munna Lal and this is the evidence which from the defendants' side, causes us more difficulty than anything else in the case. He tells a story which on the face of it is clear and not open to much criticism and it has been accepted by the learned Judge who, by the bye it should be observed, did not see him as he was examined on commission. We think however that his connection with Maharaj Narain and with the defendants is very close, and that he is, if the expression may be used, tarred with the Maharaj Narain brush. We cannot accept as satisfactory, as we have already said, the story of Maharaj Narain's visit to Calcutta in July merely to take lessons from this witness and one sentence in his cross-examination casts doubt upon the whole of his story. He committed himself to the positive statement that the plaintiffs had been using this process in Calcutta to his knowledge for 12 or 13 years. We have come to the conclusion that this is not the fact. It therefore follows that Munna Lal, when he made that statement, stated that which he knew to be untrue. We have been much pressed, as the learned Judge in the court below was impressed by the contents of this man's books. We have seen them. They are not in a character, although my brother, MR. JUSTICE PIGGOTT, was able to read some of the figures, which was familiar either to the Commissioner who examined the witness or to the counsel who examined and cross-examined him or to most of us in this Court. Without going in detail through the extracts which have been

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laid before us it is true to say that they are not entries which by their sequence or by the way in which they occur amongst the other entries in the books absolutely recommend themselves. They do require some explanation but the witness was not cross-examined upon this basis. He was not asked to explain them and therefore no explanation was forthcoming and we are not prepared to say that they are untrustworthy in the sense that they do not represent actual contemporaneous entries; but after all they come to very little. It is true that he intended the court to believe that the *kholis* and other earthen-ware articles, entered in these books as expenses connected with the stove, did relate to similar earthen-ware pans to those in the plaintiffs' stove and were used in connection with what we have described as the plaintiffs' process of manufacture and were bought and entered in the books for that purpose. But the entries are anything but clear or convincing upon that point, for example in one place *kholi* or covering is entered at Rs. 4-14-3 in another three *kholis* are entered at Re. 2-4 in another three *kholis* are entered at Rs. 1-8 and in another three *kholis* are entered at Rs. 1-7 two *handis* at Rs. 3-9. These are not large or expensive or out of the way articles. They can be bought anywhere in the bazar according to measurement and therefore we ought not to be hyper critical about entries of this kind, but on the other hand it is obvious from the prices which we have mentioned that the sizes of these *kholis* were not all the same, and it is sufficient to say that while the entries are not inconsistent with the purchase of earthen-ware vessels such as are necessary for a stove like the plaintiffs', they are equally consistent with the ordinary use by persons interested in the manufacture of the article, of earthen-ware pans for mixing it or washing it, and having regard to the other evidence regarded as a whole and Manna Lal's close association with Maharaj Narain whom we unhesitatingly hold to be a dishonest witness we do not think that either he or his books are sufficient to destroy the case which the plaintiffs have established. For these reasons we have come to the conclusion that the plaintiffs' case is true, that iron-pans were used and that they themselves by experiment have discovered the better use by combination of the earthen-ware pans.

We find that the essential features of the process patented by the plaintiffs are the treatment of the substance at a red heat, with sulphuric acid inside a closed crucible or retort, made entirely of earthen-ware. The advantages involved are:—(a) No iron or other metal being used in the composition of the crucible there is no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) The retort or crucible is entirely closed from the time when the acid is added until the process of calcination is complete; this does away with the necessity of a chimney communicating with the retort by means of which the

fumes of the acid used to be carried off. The action of the acid on the crude material under these conditions appears to be more thorough and satisfactory while the possible nuisance from the escaping fumes of the acid is done away with. We think this combination as embodied in the plaintiffs' specification is new, that no one ever worked it out before, that it effects a useful purpose in reaching the point of heat at which the treatment of sulphuric acid can be most effectively applied and in eliminating the brownish tint or iron matter from the material, so as to produce a purer colour and a better quality.

The question of law which has been vigorously argued therefore arises; whether this has been properly claimed by the plaintiffs in this specification as a good subject-matter. The specification must be read as a whole and the claim interpreted by the body of the specification.

There seems to have been some difficulty in deciding in many cases of improvements how far the law casts upon the applicant the obligation of making it clear to the public or to the workman of ordinary intelligence in the trade which portion of the combination is new and which is old. We do not think anything is to be gained by discussing at length the interesting series of authorities to which we were referred by counsel on either side. We propose to apply the principle as laid down in *Harrison v. The Anderston Foundry Company* (1), to this case, which we hold to be one "of a new combination of admittedly old materials". The principle is enunciated in the following terms. The LORD CHANCELLOR at page 578 says:—"If there is a patent for a combination, the combination itself is, *ex-necessitate* the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence." LORD HATHERLEY while delivering his judgment in the same case says at page 583:—"Well, my Lords, that being the case, the Judges extended, as it appears to me, with great respect, the doctrine of *Foxwell v. Bostock* (2), in their application of it to this case. It was there held—and that, I think was all that was held—that it is not competent to a man to take a well-known existing machine and having made some small improvement, to place that before the public and say:—"I have made a better machine. There is the sewing machine invented by so and so; I have improved upon that. That is mine; it is a much better machine than his" That will not do: You must state clearly and distinctly what it is in which you say you have made an improvement. To use an illustration which was adopted, I think by LORD JUSTICE JAMES in another case, it will not do, if you have invented grid-iron pendulum, to say, "I have invented a better clock than any body else," not telling the public what you have done to make it better than any other

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(1) [1876] L. R., 1 A. C., 574.

(2) [1864] 4 De G. J. & S., 298; s. c., 46 E. R., 934.

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clock which is known. That principle was laid down in *Fowell v. Bostock*, and I do not think that anything further was intended to be determined in that case. It could not have been meant in that case to say that where that happens, which may well happen that a person, arranging his machinery in a totally different way from the way in which it has ever been before arranged, although every single particle of that machinery is a well-known implement, produces an improved effect by his new arrangement, that new arrangement cannot be the subject of a patent. It may be that the levers may be perfectly well-known in their mode of action, and it may be that all the other separate portions of the machinery to which the patent relates may be perfectly well-known; but if he says:—"I take all these well-known parts, and I adjust them in a manner totally different from that in which they have ever before been adjusted, I have found out just what it is that has made these parts, though they may have been used in machinery, fail to produce their proper effect and it is this, that they have not been properly arranged; I have therefore re-considered the whole matter, and put all these several parts together in a mode in which they never were before arranged, and have produced an improved effect by so doing." I apprehend it is competent to that man so to do, and that it would be perfectly impossible for him to say what is new and what is old, because *ex concessis* it is all old, nobody ever before used it in the manner in which he has used it. "His Lordship further says at page 586." That, my Lords, is what it appears to me the patentees have done by the claims which are contained at the end of the patent: 'Having thus particularly described the nature of our said invention, and the manner in which the same is or may be performed, we have to state that we do not restrict ourselves to the precise details herein described delineated, but what we believe to be novel and original, and therefore claim as the invention secured to us by the hereinbefore in part recited letters patent, is—First, the construction and arrangement of the parts of pattern mechanism and shuttle box moving and holding mechanism as herein distinguished generally.' That seems to me to be the one great claim for the whole. They say—We cannot tell you that this part or that part or the other part is in itself a new engine or a new machine, but we tell you that our combination of all those parts into a complete machine, affecting both the shuttle box moving apparatus and the pattern apparatus, is a new combination and we claim to be capable of carrying that out in an improved manner under the specification in our letters patent." And Lord PENZANCE in the same case at page 590 says:—"Having thus described what the novelty consisted in, were they bound to go further and state in what the novelty did not consist? In other words, to point out everything that in the several parts or the subordinate combinations of them might be old and had been previously used? I cannot think that they were, or

that there is any authority in law for this requirement. If such a task were attempted to be fulfilled in reference to a machine so old, so largely altered, and so greatly improved from time to time as the weaving loom it is not too much to say that it would be hardly possible to fulfil it without insufficiency or error. If the patentee accurately defines on the face of his specification his real invention, and the limits within which that which he claims as a novelty is confined he is not bound, as it seems to me, to go further and specify how it is, and why it is, that his invention is novel, or recapitulate all the particulars in which it differs from preceding arrangements."

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Applying the principles laid down in that case we think the specification in this case satisfies the legal requirements so far as the claim for combination and construction of the stove even of old materials is concerned. A difficulty has been raised with regard to the first part of the claim where the patentees state that they claim in the preparation of the said substance the treatment of the same when red hot with an acid. We have purposely refrained from referring in detail to the evidence with regard to the use of acid. We think it clearly establishes what the plaintiffs have not seriously denied, that in some form or another, and at some stage or another in the process of manufacture, acid has always been used for purifying the material. And there seemed at one time a difficulty with regard to this claim namely as to whether it was not either too wide, or too vague, or in itself old. Mr. Remfry, for the appellants, accepted the principle relied upon by Mr. Motilal Nehru, for the respondents, in the case of *Brunton v. Hawkes* (1), where it was held that a patent which consisted of more than one claim would be bad if it definitely and independently claimed something which was shown itself to be bad for want of novelty. But after all the attack made upon this part of the plaintiffs' claim raises an issue of fact, first, what is 'red heat' whether it is understood and recognised as describing a particular stage in the process of heating which all members of the trade know, and whether, assuming that to be the fact, it was in common use, that is to say, whether the application of sulphuric acid at that particular moment known and accepted by the trade as accurately described by the words "red heat" was in itself an old process of manufacture. We think that Mr. Remfry was well founded when he met this case by saying that there really was no dispute about that part of the case as a fact in the court below and that if the defendants wanted to raise the question that "red heat" was not understood in the trade, or that being understood, it was too vague and uncertain and too wide a margin of variation to be capable of a claim, that was a matter which ought to be dealt with above all things by evidence which could inform the mind of the court.

(1) [1821] 4 Barn. & Ald, 541; s. c., 106 E. R., 1034.

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The defendants, so far from adopting this attitude towards this part of the claim, accepted it, and embraced it, and said that they had always done it themselves, and that it was so well-known that it was accepted generally through the trade, and that nobody had any doubt what it meant. Having taken that attitude it does not lie in their mouth here and now to contend that it is impossible to say what is meant by the words "red heat." Therefore we must hold that it is established that the treatment of sulphuric acid at 'red heat' which is a defined stage in the process of heating, is well-known to the trade and perfectly intelligible and also new, as nobody in the case suggests that there was any defined or ascertained stage at which it was always done. It is to be borne in mind, and perhaps it is desirable that we should make it once more perfectly clear, that it is quite immaterial what one or more members of the plaintiffs' firm may have said about the rights which the patent really gives them. What they think about it cannot enlarge the rights which are actually conferred by the patent; and the patent does not confer upon the plaintiffs either the sole right to manufacture and sell the substance itself or even the sole right to apply sulphuric acid at red heat so that nobody may use it. What people cannot do is to manufacture an oven or stove substantially as described and illustrated in the specification for drying, heating, roasting and calcining the said substance, and to use such construction for the purpose of applying sulphuric acid in the process of preparing and heating the substance to a red heat in the stove. That is what the plaintiffs claim as patentees. That is what we think, the plaintiffs have established, and that is what they have a right to patent. Mr. Remfry referred us to the case of *Plimpton v. Spiller* (1). The passage which particularly seems applicable to this case is at page 428 in the judgment of LORD JUSTICE JAMES." It appears to me that in doing that he (His Lordship refers to Plimpton's claim) is claiming not a distinct and substantive invention but he is claiming it as one of the merits and advantages of the entire construction which he has before given, and he is not in any way pretending or claiming to enlarge his monopoly."

We think that language applies to this case. A suggestion was made by Mr. Remfry in the course of his argument that if there was any difficulty in this connection it was possible even at this stage for the plaintiffs to withdraw this claim (1) and apply for an amendment. In answer to this we have no hesitation in saying that in our opinion the authorities he quoted are not applicable, and cannot be applicable to an application made at the eleventh hour in a court of appeal by an unsuccessful litigant in the court below who made no application in that court, and who is actually suing for infringement. The plaintiffs are entitled to an injunction substantially in the form referred to in *Seton on Decrees*

(1) [1877] L. R., 6 Ch. D., 412.

at page 549 restraining the defendants, or their servants or agents, or any of them from building, constructing, selling, using, or in any way dealing with a stove manufactured in accordance with the plaintiffs' patent, and that the plaintiffs are entitled to a certificate under section 32 of the Act. With regard to damages, the matter is not free from difficulty. We have already expressed our view of the defendants' conduct. We think it is clear that they went out of their way to purloin, if they could, the advantages of the discovery which the plaintiffs had made. On the other hand no satisfactory case for damages was made out in the court below for one reason because the plaintiffs failed to establish their right, and for another reason because the learned Judge seemed to think that the profit made by the defendants was the sole criterion. That can hardly be a sound view having regard to the fact that the defendants deliberately tried to undersell the plaintiffs, and quoted prices below market price. On the other hand Mr. Remfry when challenged in this Court to make out a case proceeded to claim damages, or rather to frame his claim upon the evidence in the case, as if he was entitled to damages as enjoying the monopoly for the sole sale of the article itself, which is not the case. We think the evidence before us does not enable us to come to a conclusion on the question of the actual damages suffered by the plaintiffs, and that in any event having regard to the early stage in which the plaintiffs quite properly brought their suit, the amount involved does not make it worth while to award anything more than nominal damages. We therefore hold the plaintiffs entitled to the nominal damages of one rupee. We decree the injunction and grant a certificate and one rupee damages. We think under the circumstances the plaintiffs are entitled to their full costs which will include fees calculated on the higher scale on the subject-matter of Rs. 4,000 with the exception of so much of the court-fee as was paid in respect of the sum of Rs. 25,000 claimed under the head of damages; that much the plaintiffs must bear themselves.

PIGGOTT J.—I concur.

Suit decreed.

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BANERJI, J.KALYAN SINGH AND ANOTHER (*Defendants*)*versus*ALLAH DIYA (*Plaintiff*)**Letters Patent, section 10—Review of judgment—Decree under that section.**Held* that no application for a review of judgment is allowable where the decree was given in an appeal under section 10 of the Letters Patent.*Hafiz Muhammad Mohsin v. Sheo Prasad*, [1904] 1 A. L. J. R., 509, followed.

Application for review of judgment.

J. M. Banerji, for the applicants.*Hameedullah* and *S. M. Y. Hasan*, for the opposite party.

The judgment of the Court was delivered by

Richards,
C. J.

RICHARDS, C. J.—A preliminary objection has been taken to the hearing of this application that no application for review is allowable where the decree was given in an appeal under section 10 of the Letters Patent. It was so held in the case of *Hafiz Mohammad Mohsin v. Sheo Prasad* (1). This decision is binding on us. We accordingly reject the application with costs.

Application rejected.

* Review of Judgment in L. P. A. No. 99 of 1916.

(1) [1904] 1 A. L. J. R., 509.

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May, 30.

LORD
BUCK-
MASTER,
SIR JOHN
EDGE,
MR. AMBER
ALI
SIR WALTER
PHILLIMORE.RANJIT SINGH MAHARAJA BAHADUR (*Defendent*)*versus*MAHARAJ BAHADUR SINGH (*Plaintiff*)

Limitation Act, (XV of 1877) Schedule II, Articles, 113, 144—Chaukidari Chakran lands—Rights of patnidars when such lands are resumed by Government and transferred to zemindar—transfer "subject to contracts"—Village Chaukidari Act, 1870 (Bengal Act VI of 1870) section 51,

The word "contract" primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in section 51 of Bengal Act VI of 1870, and the rights thereby reserved to patnidars and others on the transfer to the zemindar of *Chaukidari Chakran* lands, comprehensively included in the word "contracts", are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession.

Where therefore a *patnidar* sued the zemindar to recover possession of such lands

Held that the Article of Schedule II of the Indian Limitation Act, 1877 applicable was not Act 113 but Act 144 and that the period of limitation accordingly was not three but twelve years.

CONSOLIDATED APPEAL from seven decrees of the Calcutta High Court, reversing decrees of the District Judge of Birbhum.

The respondent was *patnidar* or *darpatnidar* of villages included in seven *patni* grants from the appellant a zemindar. Government resumed the *Chaukidari Chakran* lands within these villages under Bengal Act VI of 1870 and transferred them to appellant. Respondent claimed the lands under section 51, and his right to possession being denied, brought seven suits in the Munsif's court for possession. Appellant pleaded *inter alia* that the suits, which were instituted at periods from five to eight years after the transfers, were barred by limitation, the Article applicable according to him being Article 113, which allows three years only. This contention was accepted by the District Judge, who on appeal from the Munsif dismissed the suits but the High Court (CHITTY AND TENNON, JJ.) reversed this decision and decreed the suits, holding that the Article applicable was Article 144, by which the period of limitation is twelve years from the date when possession became adverse.

Defendant appealed.

De Gruyther, K. C., (*Eddis* with him) for the appellant. The suits were for specific performance of contracts and were barred by Article 113. The respondent's rights arose solely out of covenants to be implied in the *patnis*, and by virtue of section 51 of Bengal Act VI of 1870, which provides that the transfer shall be subject to rights of contract.

Ranjit Singh v. Kali Dasi, [1917] 44 I. A., 117.

The decree in that case was to execute a conveyance on certain terms, not one for possession. Up to the date of the transfer from Government the *patnidar* had no right to the lands: he had only an implied right to get a conveyance on terms to be fixed. The contract was that the zemindar shall, if Government gives him the *Chaukidari Chakran* lands, execute a lease in the *patnidar's* favour. If there were no such contract, then the transfer to the zemindar was absolute and not subject to any obligation under section 51 of the village *Chaukidari* Act (Bengal Act VI of 1870).

Reference was made to

Hari Narain Masumdar v. Mukund Lal Mandal, [1900] 4 Cal. W. N., 114.

Upjohn K. C., (with him *Sir, W. Garth*), for the respondent.—The argument against me rests on a strict construction of the word "contract" in section 51. I say the word is wider, like the

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Roman *transactio* : it includes conveyance. The contract here is one under which a third person gets a right to land. LORD PARKER, in .

Ranjit Singh v. Kali Dasi Debi (S. C.)

laid down that the object of section 51 was to preserve the rights of third persons : not personal rights, but real rights in the land. Here a real right was created when each *Patni* was granted, long before the *Chaukidari* Act, which merely lays down that if other persons have real rights on the land those rights shall prevail against the zemindars. There was no contract in the technical sense : nor are we applying for performance of any : we are simply enforcing a real right on statutory terms. We ask for possession : whoever heard of a decree for possession in a suit for specific performance before execution of any conveyance. Further, in all these cases judgments are given for mesne profits. There is nothing in the nature of specific performance here : there is no date fixed for the performance of the contract. Article 113 has no application : the proper Article is 144.

[LORD BUCKMASTER :—The decree is that you shall pay Rs. 58 till the rent is fixed by a future suit. Is that right ?]

We have to pay Rs. 58 anyhow and may have to pay more. It is like having an equitable right. A man's claim in equity is subject to terms to be imposed by the court.

De Gruyther K. C., replied.

Their Lordships' judgment was delivered by

Lord
Buckmaster.

LORD BUCKMASTER.—This is a consolidated appeal against seven decrees of the High Court of Calcutta dated the 5th March, 1913. These decrees were made in seven suits instituted by the respondent on the 10th and 20th September, 1904, against the appellant and others claiming to recover possession and settlement of certain *choikidari chakeran* lands in villages of which the appellant is the *zemindar*. It is unnecessary to deal with the history and vicissitudes of the litigation, as the only question that now arises for determination is whether the suits were barred by the Indian Limitation Act, 1877. This statute, as is well known, fixed different periods of limitation within which suits of different characters should be brought. The appellant contends that Article 113 of the 2nd schedule of that statute regulates the rights of the parties in the present case, while the respondent asserts that the period is fixed by Article 144 of the same schedule. By the terms of the schedule, Article 113 is stated to apply to a suit for specific performance of a contract, the period of limitation is fixed at three years, and the time from which the period begins to run is stated to be the date fixed for the performance, or if no such date is fixed, the date when the plaintiff has notice that performance is refused. Article 144, on the other hand, relates to a suit for

possession of immovable property or any interest therein not thereby otherwise specially provided for, the period is twelve years, and the time from which the period begins to run is when the possession of the defendant becomes adverse to the plaintiff. If Article 113 applies the appellant is entitled to succeed. But it is admitted that he must fail if Article 144 prescribes the true period.

The circumstances out of which the action arose can be briefly stated. The respondent is the *putnidar* of half and *durputnidar* of the other half of the village of Gopalpur, and is *putnidar* of six other villages, all of the said villages being within the *zemindari* of the appellant. Some of the lands in these villages included in the *putni* and the *durputni* were originally held as *chowkidari chakeran* lands, but in June, 1898, these lands were all resumed by the Collector under the Bengal Act VI of 1870, and then transferred to the appellant. It is unnecessary to state the history of these lands, the circumstances attaching to their tenure and the respective rights of the parties when they were resumed by the Collector, for all these matters have been fully dealt with in a judgment of this Board in the case of *Raja Ranjit Singh v. Kali Dasi Debi* (1). It was there decided that upon such resumption and transfer to the *zemindar* as is provided by the Bengal Act VI of 1870, the *putnidar* or the *durputnidar* is entitled under section 51 to possession of the *chowkidari chakeran* lands. That right depended upon the interpretation given by the Board to section 51 of Act VI of 1870. This section operates to transfer the land to the *zemindar*

"subject to all contracts theretofore made in respect of, under, or by virtue of which any person other than the *zemindar* may have any right to any land, or portion of his estate or tenure in the place in which such land may be situate."

LORD PARKER in delivering the judgment of the Board, while commenting upon the fact that these words were not happily chosen, expressed the opinion that their obvious intention was to preserve the rights of third parties. He said:—

"They contemplate a case in which the village in which the resumed lands are situate has been made the subject of a contract by the *zemindar* or those through whom he claims, and that under this contract some third party may have interest in the lands resumed. They are wide enough to include, and in their Lordships' opinion do include, the rights of a *putnidar* under a *putni* grant by virtue of which the *putnidar* is lessee of the *zemindar's* interest in the lands resumed, and also the rights of *durputnidar* under a *durputni* grant."

There is, therefore, no longer any question as to the right of the respondent to the lands, but the appellant's contention is that as the rights of the *putnidar* are reserved under the words referred to they must be assumed to be contractual rights, that consequently a suit to enforce those rights must be a suit for specific performance, and that the date from which the statute begins

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to run must be the date of the grants to the zemindar. Their Lordships are unable to accede to this contention. It does not follow that because the rights originally arose by virtue of a grant declared to be a contract within the meaning of section 51 they are therefore rights, contractual in the sense that the contract by its terms creates and regulates the personal obligations and duties of the grantor in the circumstances that have arisen. At the time when the *putni* grants were made the resumption of the *shoukidari chakeran* lands was not even contemplated, and the grant necessarily contains no reference whatever to the circumstances that would arise and the relationships that would exist in the event of the Government resuming possession. Upon resumption of such possession the rights of the *putnidar* were those conferred on him by the estate and interest created by the *putni* leases, and it was these rights that were kept alive by section 51 of Act VI of 1870 of the Bengal Council. It is only necessary to examine the words which prescribe the date from which the period begins to run in Article 113 of the second schedule of the Limitation Act to show the difficulties in the way of any contrary contention. This date, as has already been pointed out, is either the date fixed for performance or the date when the plaintiff has notice that performance has been refused, but no date whatever has been fixed for performance in such a case as the present, either by the original grant or by the terms of the statute, nor has there been any refusal to perform a contract, for there was no unexecuted contract which had to be performed. A suit for specific performance is essentially a suit for enforcing a stipulated obligation relating to property. The word "contract" itself, primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word was used in section 51, and the rights thereby reserved to the *putnidars*, comprehensively included in the word "contracts," are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, and it is this which, in their Lordships' opinion, is the character of the suits in the present case.

From this it follows the period of limitation is that fixed by Article 144; consequently the judgment appealed from is in their Lordships' opinion correct, and they will humbly advise His Majesty that this appeal should be dismissed with costs.

Downer and Johnson—Solicitor for the appellant.

G. C. Fan—Solicitor for the respondent.

A. P. P.

Appeal dismissed.

HARIHAR BANERJI AND OTHERS (*Defendants*)

versus

RAMSASHI ROY AND OTHERS (*Plaintiffs*)

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July, 16.

LORD

ATKINSON,
SIR JOHN
EDGE, MR.
AMBER ALI,SIR
WALTER
PHILLIMORE.

Transfer of Property Act, (Act IV of 1882), section 106—Landlord and tenant—Notice to quit—Requisites of a valid notice—Test of its sufficiency—Service of notice to quit—Service on one joint tenant raises presumption of notice reaching others—Delivery of notice to quit by post—Presumption in favour of its reaching addressee—Effect of registering the letter containing the notice.

The principles governing the sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law, even though not strictly accurate or consistent; the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties, "*ut res magis valeat quam pereat*."

Section 106 of the Transfer of Property Act, 1882, only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere: the vicarious tender or delivery must be made at the residence of the person intended to be bound.

In the case of joint tenants service of a notice to quit upon one is *prima facie* evidence that it has reached the others.

There is a presumption that a notice to quit posted in a letter properly addressed to the person intended to be bound reaches that person. Such presumption applies with still greater force to letters which are registered, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by somebody else.

APPEAL from a decree of the Calcutta High Court, confirming a decree of the Subordinate Judge of Hooghly, which reversed a decree of the First Munsif of Howrah.

The facts of the case are sufficiently stated in their Lordships' judgment and in that of the Calcutta High Court and the only questions for decision in this appeal were (1) whether the plaintiff's notice to quit was sufficient (2), whether it was duly served. The

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Munsif decided both these questions against plaintiff. He held that the notice was vague and ambiguous and that it required the defendants to vacate a portion only (6 cottahs) of their lands: also that some of the defendants were not served with the notice. He dismissed the suit. The Subordinate Judge, on appeal, remanded the case for trial on the merits. He held that the notice was served on all the defendants and that it was sufficient and was not vitiated by the fact that the area and boundaries of the land were misdescribed. The remand order was upheld on appeal by the Calcutta High Court (FLETCHER and TEUNON, JJ.) who delivered the following judgment:—

FLETCHER, J.—This is an appeal from a decision of the learned Officiating Subordinate Judge of Hooghly, dated the 19th May, 1914, reversing the decision of the Munsif of the first court at Howrah. The suit was brought for ejectment. The property was held on an annual tenancy and the tenancy is said to have been determined by a notice to quit properly served upon the tenants. The Munsif dismissed the suit on the grounds, first of all, that the notice was insufficient and, secondly, that the notice had not been served on all the defendants. The notice called upon the tenants to deliver up possession of a certain holding which was held in the name of one Ram Nidhi Manjhi at a rental of Rs. 25 per annum. Those are the words expressed in the notice itself and that is the description of the holding which the defendants were required to give up possession of. It is true that there was to the notice a schedule annexed in which the area of the land was inaccurately stated and apparently also one of the boundaries in that schedule was not given correctly. But the fact remains that the notice required the tenants to deliver up this property originally held by Ram Nidhi Manjhi and for which he was paying a rental of Rs. 25 per year. Nobody could doubt when he received a notice like that that what he was required to give up was not a portion of the holding but the whole holding for which Rs. 25 was payable. The errors in the schedule are, as the learned Subordinate Judge observes, mere inaccuracies which do not affect the validity of the notice. That seems to me to dispose of the first point.

The second point is about the service of the notice. The appellants who are the principal defendants in the case say that the notice was not duly served on them. As regards the defendants Nos. 1, 4 and 5, they were admittedly served with the notice. The others were served, it is said, by registered letters. The posting of the registered letters is proved. The return through the Post Office and the receipts of the registered letters given to the postman when he delivered the letters and received these receipts in the ordinary course of his business have been given in proof. It is said, however, that as strict proof has not been given in the case of the registered letters, that is, as the signatures of

the addressees or their agents have not been strictly proved, the ordinary presumption that when a letter is posted in the ordinary course it reaches the addressee does not take effect. That seems to me a matter that does not require a careful consideration. There is no reason to think that the registered letters were taken less care of than unregistered letters. The defendants did not dare to go into the witness-box to contradict the fact that they did receive these notices through the Post Office. I should have thought that, on that ground alone, the learned Judge was entitled to come to the conclusion that these notices had been duly served upon the defendants. Further, the defendants Nos. 6 and 7 have been found as a fact to form members of the same joint family as the defendant No. 5. It is admitted that the defendant No. 5 was duly served and one of the necessary incidents of a joint Hindu family is that the family should be living together in commensality and it, therefore, follows that the defendant No. 5 when he received that notice on his own behalf and on behalf of his brothers was either a member of the family or an authorised agent living at the same residence as the defendants Nos. 6 and 7. There seems to be no doubt that these defendants had been duly served.

The other point is about the receipt given by the *gomashita*. The Post Office delivered this registered letter to a person who, it is said, was the *gomashita* of the defendants Nos. 2 and 3. It is said that the plaintiffs have not proved that the *gomashita* was a duly authorised agent. The defendants Nos. 2 and 3 could have come forward and given evidence before the learned Judge that this letter, although duly addressed and delivered at their residence, had been purloined by some unscrupulous servant and had never, in fact, reached their hands. They did not, in fact, do so. There cannot be the slightest doubt that the person who took in the registered letter was a person authorised to do so, and that that letter duly found its way into the hands of the defendants Nos. 2 and 3. I agree in the decision of the learned Subordinate Judge. The present appeal, therefore, fails and must be dismissed with costs.

TEUNON, J.—I agree.

Defendants appealed.

De Gruyther K. C. (*Kenworthy Brown* with him), for the appellants.—The notice to quit was not a proper notice under section 106 of the Transfer of Property Act. Appellants held $2\frac{1}{2}$ bighas: the notice related only to 6 cottahs. It was not an inadvertent misdescription or mistake: it was a deliberate manœuvring for position. There were several polts, and the notice related to one single plot in the possession of Ghose: this is clear from the boundaries given: the whole question is, what is Ram Nidhi's holding. They do not want to admit that the whole $2\frac{1}{2}$ bighas is that

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holding, so they claim the part hoping by that means to get possession of the whole. Further, the notice was not duly served. The posting of registered letters is not a sufficient compliance with section 106: the notice must be delivered personally or to a member of the family or servant at the party's residence.

Jogendra Chandur v. Dwarkanath, [1888] I. L. R., 15 Cal., 681 ;

Subadini v. Durga Charan, [1900] I. L. R., 28 Cal., 118,

which lay down the contrary are incorrect.

Branson (Dube with him), for the respondents.—The High Court's decision is correct. The notice clearly referred to the whole of Ram Nidhi Manjhi's holding. As to service the expression in section 106 is "delivered": posting of registered letters is a sufficient delivery within the meaning of the section. We rely on

Papillon v. Brunton, [1860] 5 H. & N., 518.

De Gruyther, K. C., replied.

Their Lordships' judgment was delivered by

Lord
Atkinson.

LORD ATKINSON.—This is an appeal against a decree of the High Court of Judicature at Fort William, Bengal, dated the 16th April, 1915, which dismissed an appeal from the Subordinate Court of Hooghly, dated the 19th May, 1914.

The action out of which the appeal has arisen is one of ejectment brought not by owners or occupiers of land against persons trespassing upon it, but by landlords of a particular piece of land against their former tenants of the same to recover possession thereof on the ground that the tenancy of those tenants has been determined by an effective notice to quit duly served.

Two sets of defendants have been named in the plaint, the first containing the names of seven persons named Banerji, some of whom were, and still are, members of a joint Hindu family; others were once such members and have ceased to be so. For convenience these are styled the principal defendants, and are alleged by the plaintiffs to have been their tenants from year to year of the piece of land mentioned up to the service of the aforesaid notice to quit. The second set of defendants consists of three limited companies—two milling companies, numbered 8 and 9 respectively; Andrew Yule (Limited), timber merchants, the managing agents of the two first-named companies; and numbered 10, and a firm named Amrita Lal Ghose and Sons, numbered 11. These latter defendants, Nos. 8, 9, 10 and 11, are stated to be the subtenants of the principal defendants, and being in the possession of the above-mentioned piece of land are made *pro forma* defendants. In the third paragraph of the appellants' case it is in effect stated that the only questions in the case which have up to the present been decided are—first, the question whether, assuming that the

principal defendants were the tenants of the plaintiffs of the aforesaid piece of land from year to year, the notice to quit alleged to have been served upon them was sufficient and proper in form; and, second, the question, whether it had been duly served. The Munsiff in whose court the suit was filed decided both these questions in favour of the defendants, and on this ground dismissed the suit. His decision was reversed upon appeal by the Subordinate Judge, and it was by him ordered that the case be sent back to the lower, i.e., the Munsiff's court, with a direction to remit the suit to its original number, and to proceed to try the issues raised in the suit other than issue No. 2 and determine the suit after giving the parties due opportunity for adducing evidence.

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The principal defendants appealed from this order to the High Court of Judicature at Fort William in Bengal. The appeal was dismissed with costs, this latter court being, like the Subordinate Judge, of opinion that the notice to quit dated the 9 Assin, 1317, B. S., given by the plaintiffs had been duly served and was effective to determine the alleged tenancy from year to year of the principal defendants.

On the 11th July, in the year 1906, the present plaintiff No. 1 addressed the present defendant No. 10 a letter in the words and figures following:—

"Messrs. Andrew Yule and Co., Calcutta.

Dear Sirs,

I am informed that since the 1st day of March last you are filling up and occupying our *khas* (patit) vacant land and *khal* in Char Ramkrishtopur, Howrah, described below. You have taken no permission from us nor have you made any arrangement with us for it. Please take notice that the land is the absolute property of myself and my co-sharers, and therefore any improvements you may make to it will belong to us absolutely. Further, you are liable to pay for your use and occupation of the land and for all damages that we may suffer thereby from the 1st March last, that is, from the date from which you have been using and occupying it.

Therefore, on behalf of myself and my co-sharers I demand from you that you do within ten days of receipt hereof make a settlement with us for the land. Failing which we shall take such steps as the law provides.

Description of Land.

All that piece of (or) parcel of *khas patit* land consisting of low land, *khal*, &c, measuring about 10 cottahs and butted and bounded as follows."

The boundaries are then given; but nothing turns upon them.

This statement that Yule's land is 10 cottahs in extent is of importance. On the 23rd July in the same year plaintiff No. 1 in the present suit, as executor of his father Rammoya Roy and Srimati Adhar Roy, widow, and executrix of the same Rammoya Roy deceased, brought an action against the seven principal defendants in the present suit to recover a sum of Rs. 3-14-10 arrears of rent due to the deceased Rammoya Roy.

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In the second paragraph of the plaint in the former suit it is stated that the plaintiffs have been in possession of about 6 cottahs of *bastu* land, mentioned in the schedule, situate in the said village of Char Ramkrishtopur, on payment of the prescribed annual rent of 25 rupees thereof as *Sirbarakars* of an annual *gar mourashi*, *thika* tenant under the plaintiffs, Rs. 12-8 annas being annually paid by them separately by four instalments to the plaintiff. The statement that the rent of 25 rupees a year issued out of 6 cottahs of land is undoubtedly inconsistent with their claim in the present suit, in which they allege that it issues out of a holding about 2 bighas $2\frac{1}{2}$ cottahs in extent. It is not, however, more inconsistent with their present claim, than is the defence put in by the defendants inconsistent with the admission they made before the Subordinate Judge, to the effect that they were in possession of a holding belonging to the plaintiffs formerly occupied as tenant by one Ram Nidhi Manjhi, and that this rent of 25 rupees issued out of the holding, whereas the defence is that the lands out of which this rent of 25 rupees issued is 2 bighas $2\frac{1}{2}$ cottahs in extent purchased *benami* by their predecessors and belonging to them as long-standing *mourashi mokurrani* land.

Again, on the 18th February, 1908, the present appellant No. 1, executor of his late father, and the latter's widow as his executrix, addressed to the same Andrew Yule and Co.

"Messrs. Andrew Yule and Co.,

Managing Agents, Fort William Flour Mills Company (Limited).

Dear Sirs,

We are informed that you have filled up a *khal* situate in the land specified below, and occupied the said land also, which is our *khas* land, without our permission and without entering into any settlement with us. This land adjoins on the west a piece of land measuring 6 cottahs, for which the name of Nidhiram Manjhi is recorded in our *serista* as a tenant at will, having no permanent rights. We also beg to draw your attention to the letter written by one of us on the 11th July, 1906, protesting against your filling up the said *khal* and occupying the said land.

Under the circumstances, unless you deliver up possession of the said piece of land more particularly described below within one month [torn] date or take a settlement from us on reasonable terms, we shall be unde[torn] painful necessity of taking such steps as we may be advised for the recove[torn] of possession against you and such other person or persons who may claim any right to interfere with our rights and *khas* possession.

We further demand from you a sum of 920 ($23 \times 4 \times 10$) rupees on account of the use and occupation of the said land and filled up *khal* from the 1st March, 1906, to the 31st January, 1908, and require you to pay the same to us within a month of date.

Description of the Land.

All that piece or parcel of *khas* vacant land consisting of low land, *khal*, &c., measuring about 10 cottahs or more, situate in our zemludari

of Char Ramkrishnopur, sub-district of Howrah and thana Shibpur, and butted and bounded as follows."

The boundaries are then set out.

This letter, treating Yule and Co., as trespassers instead of sub-tenants of the principal defendants, as they are treated in the present suit, may have, with the other inconsistencies already mentioned, induced, and their Lordships think most probably did induce, the principal defendants to refuse to be content with the decision of the Subordinate Judge and High Court, and to prefer the present appeal to this Board on two points, one of which, the proper service of the notice, is technical and unmeritorious. It is not pretended that the plaintiffs are estopped by these proceedings and documents. But the strangest argument that could well be addressed to any legal tribunal has been founded upon by them and pressed on behalf of the principal defendants. It is this that the plaintiffs deliberately and for some indirect object narrowed their notice to quit to what they knew was a small portion of the holding for which their tenants paid them rent, in order that, having got possession of this portion, they might treat the companies occupying the remainder of the holding as trespassers. If they knew the law, as they must be assumed to do, they must have been well aware that a notice to quit calling upon the tenants of a holding to quit a portion of it is absolutely bad, and they must have known also that this design could not be accomplished unless the ejectment founded on the notice was so framed as to obtain secure possession of the portion mentioned in the notice and no more, and that the action could be at once defeated by the tenants by proof that the contents of their holding were more than the part named.

It is desirable therefore to refer to the pleadings to see how the respective parties framed their claims and defences, in order to discover whether the former were fashioned so as to carry out the alleged knavish design. In paragraph 5 of the plaintiffs' plaint the nature of the holding of which the claim to recover possession is described. It is a *jumma* of land bearing an annual rental of 25 rupees in the name of Nidhiram *alias* Ram Nidhi Manjhi, recorded in the *serishtā* of the plaintiffs, for which the principal defendants paid the annual rent of 25 rupees, and of which they were in possession. So far the description of the holding is reasonably plain and clear, and if it stopped there it is difficult to suppose that any person of ordinary intelligence reading it would not at once see it was the possession of that *jumma* in its entirety—nothing more and nothing less—which was claimed. Any difficulty which exists arises from the statement of the contents of this *jumma*. The plaintiffs mention 6 cottahs, but it is not quite clear whether by mention of that area the plaintiffs mean to assert that this was in

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fact its area at the date of the filing of the plaint, or merely that it is its area as recorded in the plaintiffs' *serishta*. If the holding be one of *char* lands it may well be that its area would be considerably augmented by accretion in the long course of sixty years during which it is alleged to have been in the tenancy of the defendants and their predecessors.

The description, however, does not stop there. In the same paragraph it is further stated that in the suit already mentioned brought by plaintiffs Nos. 1 and 2 to recover arrears of rent the principal defendants had stated that the whole quantity of 2 bighas 2½ cottahs was comprised in the *jumma* in respect of which the annual rent of 25 rupees was paid. In the schedule these different estimates or descriptions of the contents of the *jumma* are repeated, but whatever its actual contents it is stated to be the land recorded in the plaintiffs' *serishta* in the name of Ram Nidhi Manjhi, subject to an annual payment of 25 rupees. In the sixth paragraph of the plaint it is averred that the formal defendants are in the possession of the said lands; that is, the lands comprised in the *jumma*, in the immediately preceding paragraph mentioned as monthly tenants under the principal defendants. This paragraph refutes absolutely the suggestion that all the plaintiffs seek to recover is the 6 cottahs of the *jumma* in the occupation of Amrita Ghose and Sons. What is sought to be recovered is all the lands occupied by all the *pro forma* defendants, and not merely the portion occupied by any one of them. The contents of the succeeding paragraph lead to the same conclusion. It appears to their Lordships that in the face of this pleading it is perfectly plain that what the plaintiffs in this suit seek to recover is possession not of a *jumma* 6 cottahs in extent, nor yet a portion, 6 cottahs in extent, of a larger *jumma*, but the whole *jumma* described as formerly held by Ram Nidhi Manjhi, for which he and the principal defendants after him paid an annual rent of 25 rupees, and which is in actual occupation of the formal defendants.

The written statements filed by the principal and *pro forma* defendants suggest the same conclusion. From paragraph 12 of the latter it appears that in the month of May, 1900, the principal defendants entered into an agreement with the *pro forma* defendants to grant to the latter a lease of 13½ cottahs of low land forming part of the "land in suit." The part cannot be equal to or greater than the whole; 13½ cottahs cannot be a portion of 6 cottahs; and thus the lands in suit, in the opinion of the formal defendants, cannot be a mere part of the *jumma* 6 acres in area. In this statement it is also averred that the defendant No. 8, the Monarch Flour Mills Company, on the faith of this promise of the lease immediately began to raise the level of the land demised to them and to raise buildings upon it.

It is further averred in the statement that the defendant No. 8 filled up at an expense of about 3,000 rupees a khal immediately North of the premises of defendant No. 9, and that in May, 1905, the principal defendants claiming the lands so made by this filling up, the defendant No. 9 agreed with them to rent a piece of land 17 acres in extent situate East of the plot 13½ acres in extent already mentioned; that the said defendant No. 9, relying on these promises to grant a lease to them, erected buildings upon the said lands and paid rent to the principal defendants in respect of them; that the principal defendants evaded executing these leases though tendered to them for execution, and ultimately refused to execute them; and that defendants 8 and 9 were about to institute a suit against the principal defendants for specific performance of their agreement to grant the leases when the news of the institution of the present suit reached them.

This written statement was filed on the 22nd December, 1911, three days after the filing of the written statement of the principal defendants. Of course, these latter people are not bound by the averments contained in the written statement of their sub-tenants.

The written statement of the formal defendants is that in their view, at all events, the present suit is not brought to recover merely possession of the 6 cottahs in the occupation of defendant No. 11, Ghose and Sons; but is brought for the recovery of the possession of lands which they themselves have promised to lease. In paragraph 9 of their statement it is averred that the land in suit is not the 6 cottahs held by Ghose and Sons but 2 bighas 2½ cottahs held by them in one plot, not two plots. And they repeat *ad nauseam* in various forms the statement that the lands in suit are not confined to a *jumma* of 6 cottahs bearing an annual rent of 25 rupees; that they never had possession of a *jote* of 6 cottahs; nor ever paid rent in respect of such a *jote*; that the lands in suit are not confined in a *jote jumma* of 6 cottahs at an annual rent of 25 rupees, alleged by the plaintiffs in their plaint to be recorded in the name of Ram Nidhi Manjhi; and further that if there be any such *jote* of 6 cottahs recorded in the plaintiff's *serishita*, the principal defendants never had any connection with it or interest in it.

In paragraph 12 of the written statement they repeated the assertion already mentioned that the 2 bighas 2½ cottahs for which they pay 25 rupees is ancestral property acquired in the way already described, but not a particle of evidence was given by the defendants at the hearing to sustain any one of the averments contained in this paragraph. Nor was any evidence whatever then given to sustain the accusation that the plaintiffs harboured the stupid and fraudulent design attributed to them in framing their notice to quit in its actual form. The form of their pleading repels the

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idea. This is a vital matter, because of the principles upon which, according to the authorities, to notices quit containing errors honestly but mistakenly or inadvertently made are to be construed. These principles would be entirely inapplicable to inaccuracies deliberately inserted for fraudulent purposes. The principles that the notice to quit should be construed *ut res magis valeat quam pereat* applicable in the first class of cases could not be applied to the second. There is no reason why if the plaintiffs before they served this notice to quit had obtained more full and accurate information as to the precise facts touching this holding for which the principal defendants paid them this annual rent of 25 rupees, they should not have availed themselves of it and embodied it in their notice to quit.

In their Lordships' view there is nothing whatever to show that the plaintiffs were actuated by a desire to play any trick, or effect any fraudulent purpose in connection with this notice to quit or the ejectment suit consequent upon it, or to show they did not serve the notice and institute the suit in the honest desire to exercise legitimately the rights which the law conferred upon them in reference to the possession and enjoyment of their own property.

If this were a case arising in England the English authorities would therefore be applicable. It has not been suggested, and could not, their Lordships think, be successfully contended, that the principles they lay down are not equally applicable to cases arising in India. They establish that notices to quit, though not strictly accurate or consistent in the statements embodied in them, may still be good and effective in law; that the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with all those facts and circumstances; and further, that they are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam pereat*. To take a few of these authorities out of many to illustrate these principles.

In *Doe d. Huntingtower v. Culliford* (1), the defendant went into possession of a house and an acre of land in the parish of Ilchester on the 4th August, 1821, as tenant to the plaintiff. On the 28th September, 1822, the plaintiff served upon the defendant a notice, dated the 27th September, 1822, to quit this house and this land at Lady Day next or at the end of your current year. Lady Day next would be the 25th March, 1823, and the current year of the tenancy would be the 4th August, 1823, but acting on the above-mentioned principles it was held to be a good notice to

(1) 4 Dow and Ry., 248.

quit on Lady Day, 1823, *i. e.*, the 25th March, 1823. ABBOTT C. J., in delivering judgment said :—

"There is one rule of construction in cases of this nature which is no less sound than ancient, namely, to give such a sense to ambiguous words as will effectuate the intention of the parties. Applying that rule to this case, it appears to me the words 'at the end of your current year' may be understood to mean the end of the current year ending at the ensuing Lady Day. The words, I think, are plainly applicable to the current year Lady Day, 1823."

BAYLEY, J., said :—

"We are to look at the intention of the landlord. When general language is used which is open to doubt, the rule is to make it sensible, not, insensible. The state of the defendant's holding shows it to be clear that the landlord did not mean the year ending Michaelmas Day. He could not intend to give notice to quit in two days, because that would be no notice whatever. By mentioning Lady Day next it is clear he meant to give a six months' notice, or such notice as the law requires. He intended to give an effective notice, and it is quite sufficient if the tenant understands what is meant."

In *Doe d. Williams and another v. Smith* (1), the tenant, who held lands under a demise originally from May, 1832, to the 2nd February, 1833, and held certain buildings from May 1832 to May, 1833, retained possession after February and May, 1833 without any express contract. On the 22nd October, 1833, the landlord served a notice to quit and deliver up possession of all the buildings and the land at the expiration of half a year from the delivery of the notice "or such other time or times as your present year's holding of or in the said premises or any part thereof respectively shall expire after the expiration of half a year from the delivery of this notice." LORD DENMAN, C. J., in delivering judgment said :—

"I think the notice was well enough. It is admitted that it would be good from May, 1834. The half-year would expire in April, 1834. It would therefore not be good for the 2nd February, 1834, but I think that, although the word 'present' is used, the notice may be referred to 2nd February, 1835, which was after the expiration of the half-year, and that there was no danger of the tenant being misled."

LITLEDALE, J., concurred for the same reasons, saying :—

"This is certainly a lame and inaccurate notice ; but, such as it is, we must endeavour to give it a rational interpretation."

PATTERSON, J., said :—

"It is not required that a notice should be worded with the accuracy of a plea. This is not drawn with strict precision, but I think it is sufficiently clear."

That case was followed and approved of in *Wride v. Dyer* (2).

(1) 5 Ad. & E., 350.

(2) [1900] 1 Q. B., 23.

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The case of *Doe v. Archer* (1), is very applicable to the present case. There a farm was leased for twenty-one years at a rent of £180 per annum, consisting, as described in the lease, of town Barton and its several parcels described by name at a rent of £83, other closes named at rents of £5 5s. and £11 and the Shippen Barton and several parcels described by name at £86 reserving to either party power to determine the lease at the end of fourteen years on giving two years' previous notice. It was held that a notice by the landlord to the tenant to "quit Town Barton, &c., agreeably to terms of the covenant between us on the expiration of the fourteen years of your term" was sufficient.

LORD ELLENBOROUGH in delivering judgment said :—

"The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only, and so the notice in question must have been understood by the tenant.

The notice to quit Town Barton, where the mansion was, meant the Town Barton *cum sociis*, especially with reference to the lease, which only gave him power to determine the tenancy as to the whole, which was let together."

LE BLANC, J., said :—

"There being no power under the lease to determine the tenancy as to part only, the notice to quit could have no operation at all unless taken, as it must have been intended, to apply to the whole."

BAYLEY, J., said :—

"We are to construe a notice to quit in such a way *ut res magis valeat quam pereat*."

In order to judge of what the notice to quit in this case conveyed to those of the principal defendants upon whom it was served it is necessary by examination of the evidence given at the trial before the Munsiff to ascertain what were the material facts in reference to the connection of those defendants with the lands in suit. Three witnesses were examined on behalf of the plaintiffs, namely, Ramsashi Roy, Suresh Chandra Chatterji, and Hira Lal Kar. The second of these gave no material evidence upon the point now under consideration. One witness, and only one, namely, Jyotish Chandra Banerji, was examined on behalf of the defendants. Ramsashi Roy proved amongst other things that the plaintiffs in the suit are the *maliks* of two towzi, Nos. 3994 and 3994A acquired by purchase, of which the latter belonged to the witness and his mother, and the former belonged to Guru Das and his cousins; that the Banerjis were the tenants of the lands in suit; that he accepted rent from them; that Nidhi Ram was the tenant; that somehow or other the Banerjis got the lands from Nidhi Ram; that they paid rent to the plaintiffs for it, and their rents were accepted;

(1) 14 East, 245.

that the Banerjis were not trespassers ; that Nidhi Ram was treated in his witness's, *serishta* as dead ; that the land in the possession of the principal defendants was included within the boundaries given in the notice to quit ; that the actual occupiers of the lands were Messrs. Andrew Yule and Co., and Amrita Lal Ghose ; and that he, the witness, only came to know in May or June, 1900, that the Banerjis had under-tenants who paid them rent.

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In reply to the court he said the Banerjis (defendants) are not trespassers ; they are tenants in the sense that they pay him rent ; that he accepts rent from them as Sarbarakars, meaning thereby that they were occupying the place of tenants ; that he has been accepting rent from them since 1900 ; he believed his uncle (the owner of towzi 3994) also receives rent from them ; that he did not know when they acquired their interest in the lands in suit ; that he treated them as tenants to the extent of receiving rent from them as Sarbarakars. On being further cross-examined by counsel he said that the quantity of land in the possession of defendant 11 was 6 cottahs ; that there are no *pucca* structures upon it ; the quantity of land in the possession of defendants 8 to 10, he said, was 30 cottahs, the total quantity 2 bighas ; that before 1900 the lands were *khal* (a closed channel) and *patit* ; that to the East of the 2 bighas odd there is no public pathway, but a private pathway, 6 to 10 feet wide, used by Andrew Yule and Co, solely ; that to the east of that pathway lie the lands of the Port Commissioners ; that these latter lands formerly belonged to his, witness's, predecessors, and were acquired by the Commissioners ; that he did not include in the plaint this Eastern pathway within the disputed land.

The witness Hira Lal Kar stated that he was *gomashta* for all the plaintiffs. He proved that he received rent from the Banerjis for the plaintiffs and gave receipts for it, eight of which were apparently produced, proved, and marked Ex. A and Exs B (1) to B (7). They have not been printed in the Appendix, as they ought to have been since they may describe the holding in respect of which the rent was paid and throw light upon the point in controversy.

Well, in the face of this evidence, it is not surprising that when the case came before the Subordinate Judge it is stated in his judgment that it was admitted on both sides that the defendants', i. e., the Banerjis', tenancy consisted of the holding of Ram Nidhi Manjhi. It is not suggested that the knowledge of this fact was recently acquired by the principal defendants, and the sufficiency or insufficiency of the notice to quit must therefore be determined having regard to the fact that admittedly the principal defendants were, to their own knowledge, tenants of Ram Nidhi Manjhi. The fact

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that in their written statement they don't deny this fact, but studiously evade admitting it, while they have given no evidence whatever to disprove it, all suggest that they were well aware who their predecessor in occupation was. And it is almost impossible to believe that the counsel for the principal defendants would have omitted to confine his clients' admission to their state of knowledge subsequent to the service of the notice to quit if he could have honestly and truthfully done so.

Turning to the contents of the notice to quit, the material part of it is :—

" You are informed by this notice that Char Ramkrishtopur, pergunnah Boro, recorded in towzi Nos. 3994 and 3994A in the Collectorate of district Hooghly, within station Shibpur, is our zemindari. The *bastu* land, bounded as below, within the said Char, is land, bearing a yearly *jumma* of 25 rupees, standing in the name of the late Nidhi Ram, *alias* Ram Nidhi Manjhi. You have been in possession of the said land on payment of rent at the said rate and taking *dakhilas* in the name of the said Nidhi Ram Manjhi as *thika* tenants at will of the said one *jumma* only under us. Now it being necessary for us to take *khas* possession of all the lands comprised in the said *jumma*, you are informed by this notice that you should vacate that land, by removing the huts, &c., that exist on the said land on or before the last day of the month of Chaitra of the current year 1317 B. S. We shall take *khas* possession of all the lands comprised in the said *jumma* on the expiry of the said fixed time. In case we do not get *khas* possession of the said land on the expiry of the said time fixed, we shall take *khas* possession of that land by instituting a suit in proper court against you, and you shall be liable for all damages.

The 9th Assin, 1317 B.S.

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1 (one) plot of *bastu* land, about 6 cottahs in area, situate in village Char Ramkrishtopur, within station Sibpur, pergunnah Boro (6 cottahs).

Boundaries.

North : Ramkrishtopur Ghat Road.

West : *Jamai* land of the late Thakundas Banerji.

South : *Jamai* land of the late Bhuban Mohan Banerji.

East : Land included in the said towzi."

The question is what must that notice have conveyed to an ordinary reader, much less to tenants who were aware, as the principal defendants have admitted, that they held Ram Nidhi Manjhi's holding.

The notice begins by stating that the *bastu* lands, bounded as below within the Char of Ramkrishtopur, are lands bearing yearly *jumma* of 25 rupees standing in the name of Nidhi Ram, *alias* Ram Nidhi Manjhi. It is then averred that the principal defendants

have been in possession of these lands on payment of rent at the aforesaid rate, taking *dakhilas* in the name of the said Nidhi Ram Manjhi, as *thika* tenants at will, of "the said one *jumma* only under the plaintiffs." It is then averred that it is necessary for the plaintiffs to take *khas* possession of all the lands comprised in the *jumma* already mentioned. The principal defendants are then required to vacate that land, that is, all the land comprised in the aforesaid *jumma*, before a day named, and they are informed that on the expiry of that time the plaintiffs will take possession of all the lands comprised in the aforesaid *jumma*. If the boundaries alone were added it could not, their Lordships think, be successfully contended that the meaning of this notice to any ordinary reader was not that possession of the entire *jumma* in the tenancy of the principal defendants, which has stood in the name of Ram Nidhi Manjhi, and for which he and they paid a rent of 25 rupees per annum, should be delivered up to the plaintiffs. To tenants who, like the principal defendants, were admittedly in possession of the entire *jumma* and paid this rent, that must have been clear to demonstration, but it is contended that all this clearness is obscured, and this certainly rendered doubtful by the statement in the schedule that the lands the possession of which are to be delivered up are one plot of *bastu* lands 6 cottahs in extent.

The principal defendants knew perfectly well that a plot of 6 cottahs in extent is only a small fraction, one-sixth or one-seventh, of the lands in the entire *jumma*. They must presumably have known the law that a notice requiring a tenant to quit only a small portion of the holding of which he was tenant was bad and ineffective; but the presence of these words 6 cottahs in the schedule, it was, in effect, contended, reverses all the presumptions such as would apply in English cases, and necessitates that the landlord should be presumed to have intended to serve a notice bad and ineffectual to his own knowledge rather than a valid and effectual one, and that the notice itself should be construed *ut res magis pereat quam valeat* instead of the contrary. No argument has been addressed to their Lordships, and no authority produced to show that the principles of the above-recited English cases are inapplicable to Indian cases. From the very nature of a notice to quit, which is merely the formal expression of the landlord's will that the tenancy of his tenant shall terminate, it would *prima facie* appear that they are applicable. In addition it may well be that the description of the lands of the *jumma* as *bastu* lands may refer to their condition as originally held by Ram Nidhi Manjhi, and not to their condition after the defendants 8 and 9 had, during the years subsequent to the year 1905, built *pucca* buildings upon them, and defendant No. 11 has erected huts upon his 6 cottahs.

In their Lordships' view the erroneous statement of the contents of the *jumma* does not predominate over the descrip-

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tion given of it in the earlier portion of the notice to quit. They have not the slightest doubt that the principal defendants were perfectly well aware that the notice required the defendants, as the plaintiffs desired and intended that it should, to quit and deliver up possession of the entire *jumma* for which they for years paid the rent of 25 rupees. If anything additional were needed to convince one that this was so it would be the evidence of the only witness examined for the defendants. He says not a word about the principal defendants and their predecessor having from time immemorial had ancestral *mokurrari* rights in the property containing 2 bighas and $2\frac{1}{2}$ cottahs bearing an annual rental of 25 rupees, not a word to the effect that although he got, as he admits, the notice to quit he did not understand that it referred to the whole *jumma* for which Nidhi Ram formerly and the principal defendants in succession to him paid this rent of 25 rupees per annum. Their Lordships are, therefore, clearly of opinion that the notice was a 'good' notice to quit this last-named *jumma* in its entirety, whatever its area may be. What its actual area is can be determined at the trial, and the possession of that area can be recovered in these proceedings.

Next and lastly as to the service of the notice to quit. The 106th section of the Transfer of Property Act, 1882, only requires that such a notice should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence, or if such tender or delivery be not practicable, affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere; the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. Well, in the case of joint tenants, each is intended to be bound, and it has long ago been decided that service of a notice to quit upon one joint tenant is *prima facie* evidence that it has reached the other joint tenants. *Macartney v. Crick* (1), *Doe d. Bradford v. Watkins* (2), *Pollock v. Kally* (3).

It was proved and found that defendants Nos. 5, 6 and 7 are members of a joint Hindu family, and that of these No. 5 was duly served with a duplicate of the notice to quit. The mode of service adopted was this: Hira Lal Kar, the *gomashta* of all the plaintiffs, who knew all the defendants and their addresses, sent to each by registered letter addressed to them at these addresses duplicates of the notice to quit signed by all the plaintiffs. For these notices he received receipts on the registration of them. And the peon of the Post Office, who, the defendants' only witness admitted, knew all their houses, got from all of them receipts for the letters when delivered. These receipts were produced, one purporting to be

(1) 5 Esp., 196. (2) 7 East, 551. (3) 6 I. C. L. R., 367.

signed on behalf of Srimati Panchkawri Dabi, the guardian *ad litem* of the minor defendant No. 7, by a person signing on behalf of the addressee with the initials F. C. B.; another addressed to Babu Nula Kumar Banerji, the minor, purporting to be signed in something the same way; a third addressed to Babu Narindra Nath Banerji, defendant No. 6, purporting to be signed for the addressee in the same way; a fourth addressed to Fakir Chandra Banerji, defendant No. 5, signed by the addressee; a fifth addressed to Babu Harihar Banerji, defendant No. 1, signed by the addressee; a sixth addressed to Babu Jyotish Chandra Banerji, defendant No. 4, examined as a witness on behalf of his co-defendants, signed by himself; a seventh addressed to Babu Narayan Chandra Banerji, defendant No. 2, purporting to be signed on his behalf by Jogendra Nath Dey; and an eighth addressed to Babu Paran Chandra Banerji, defendant No. 3, purporting to be signed on the addressee's behalf by the same person, Jogendra Nath Dey. The defendant No. 4 in his cross-examination stated he did not know a person named Jogendra Nath Dey, but, strange to say, after the signatures of five of the principal defendants, including Narayan Chandra Banerji, Para Chandra Banerji, and Jyotish Chandra Banerji, to their written statement filed in the suit of the plaintiffs to recover rent instituted in July, 1906, already referred to, appears the statement, "Satisfied from the statement of Jogendra Nath Dey." That was followed by something which is now illegible. It probably was the signature of some official before whom the defendants or their signatures to the written statement were identified or verified.

Hira Lal Kar stated that he left all the notices with Babu Prabodh, a man 30 years of age, son of defendant No. 2, who lives in his father's house. There would seem to be some error in the print of this witness's evidence on this point, as the witness is represented as having said he gave all the notices, not one notice, to Babu Prabodh. The Subordinate Judge found that this was good service on Narayan, the defendant No. 2. The Munsiff held there was no proof of the service of the notice to quit on any of the defendants other than those numbered 1, 4 and 5. He seemed to be of opinion that the registered letters must be presumed to have been delivered to the person who signed on behalf of the addressee the receipt of it, but not to the addressee himself in the first instance or at all, and that as there was no proof that the persons other than the addressees who so signed were the duly authorised agents of the addressees to receive these notices the proof of service was defective. Service of a notice upon or delivery to such an agent would be good service or delivery to the principal though in fact the notice was destroyed by the agent and never was seen or heard of by the principal: *Tanham v. Nicholson*(¹),

(1) L. R., 5 E. & J. App., 561.

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but it is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself, or that he cannot do so by the hand of another person, or that if another person does sign it on the addressee's behalf the presumption is that it never was delivered to the addressee himself mediately or immediately. For instance, if a servant in the addressee's house saw a notice handed in by the postman carried to the addressee and handed to him that servant could certify that it was delivered to his master and could, if requested by the master, sign the receipt on the latter's behalf, though he was not the agent of the master authorised to take delivery on his, the master's behalf.

The latest, clearest, and most conclusive authority upon the question of the sufficiency of the service or delivery of a notice to quit by post is probably the case of *The Gresham House Estate Company v. Rossa Grande Gold Mining Company* (1). There the defendants, who were sued for rent, contended that they had, before the rent accrued due, terminated their tenancy by a notice to quit enclosed in a letter which they had put into the post correctly addressed to the plaintiffs, and which, if delivered in due course, would have been received in time to determine the tenancy. The plaintiffs called evidence to show the letter had never been received. The learned Judge presiding at the trial directed the jury that a notice to quit enclosed in a letter sent through the post was *prima facie* evidence that it had been received, and left to the jury the question whether it had, in fact, been received or not. The jury found it had been received. On a motion for a new trial on the ground of misdirection, the court, consisting of COCKBURN, O. J., BLACKBURN, MELLER and HANNEN, JJ., held that if a letter properly directed, containing a notice to quit, is proved to have been put into the Post Office it is presumed that the letter reached its destination at the proper time according to the regular course of business of the Post Office, and was received by the person to whom it was addressed. That presumption would appear to their Lordships to apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself.

The only one of the defendants who appeared as a witness admitted he had received through the Post Office the notice addressed to him. None of the other defendants appeared as witnesses to deny that they had received the notices properly addressed to them and properly posted. In their Lordships' view the evidence of delivery of the notices to quit to all the principal defendants was, under these circumstances, adequately and sufficiently proved, and constituted good service of them within the meaning of section 106 of "The Transfer of Property Act, 1882." They are there-

(1) [1870] W. N., 119.

fore of opinion that the appeal fails upon both the points raised for decision, and should be dismissed, and will humbly advise His Majesty accordingly. As they think that the erroneous mode in which the plaintiffs shaped their claims in the years 1906, 1907, and 1908, in the letters and litigation already referred to, may have misled the defendants and brought about this appeal, they think the parties should be left to abide their own costs incurred in it.

Appeal dismissed.

Rebder & Higgs:—Solicitors for the appellants.

Watkins & Hunter:—Solicitors for the respondents.

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GOPI LAL AND OTHERS (*Petitioners*)

versus

LAKHPAT RAI AND OTHERS (*Opposite-parties*)*

Evidence Act (I of 1872), section 126—Vakil and client—Communication made to vakil in the course of his employment—Privilege.

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May, 21, 22.
PIGGOTT, J.
WALSH, J.

A suit was brought by one firm for the revocation of a patent granted to another firm. The question was the formation and the process of the working of a certain stove owned and used by the firm to which the letters patent had been granted for the purpose of manufacturing *banslochan*. A vakil was tendered in evidence by the applicant for revocation. This vakil had been employed by the other firm to defend them against a charge of creating a nuisance by smell in the preparation of *banslochan*. In his capacity as vakil the witness at their invitation visited the premises in order to make himself acquainted with the stove which it was alleged created the nuisance. The knowledge which the witness had acquired as to the formation and process of the working of the stove was acquired in the course of his employment:—*Held* that the evidence was

* Original Suit No. 1 of 1917.

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not admissible. It is immaterial that a communication is verbal, that is to say, by word of mouth or by demonstration, and it is excluded by the rule of professional privilege.

Surendra Nath Sen, for the plaintiff.

Remfry, (with him *Kamala Kamta Kanta Verma*), for the opposite-party.

The judgment of the Court was delivered by

Walsh, J.

WALSH, J.—It is necessary for us to dispose of a question which has arisen under section 126 of the Evidence Act. The proceedings before us are a suit or petition brought by the applicant or petitioner to revoke certain Letters Patent granted to the respondent firm consisting amongst others of a member named Lakhpat Rai, and the question which arises for decision is the formation and the process of the working of a certain stove owned and used by the respondent firm for the manufacture of *banslochan*. In the course of the proceedings on behalf of the petitioner a vakil of the name of A. K. Banerji was tendered in evidence on behalf of the petitioner to prove the formation and the process of the working of this particular stove which was then in the possession of the aforesaid Lakhpat Rai. In the year 1895 the Municipal authorities took proceedings against the said Lakhpat Rai, or the firm of which he was then a member, for a nuisance by smell in the preparation of *banslochan*. The witness was employed by the firm to represent them as defendants in answer to that charge and in his capacity as a vakil he, at their invitation, visited their premises in order to make himself acquainted with the stove which it was alleged created the nuisance. A question was raised by a member of the court as to whether any question could be asked from this witness as to the information conveyed to him by his clients with regard to the subject-matter in respect of which he was representing them. The decision of that question turns upon the language of section 126 :—“No vakil shall at any time be permitted unless with his client’s express consent” (in this case the witness has got no consent from Lakhpat Rai) “to disclose any communication made to him in the course and for the purpose of his employment as such vakil by or on behalf of his client.” Mr. Banerji told us that any knowledge which he had acquired as to the formation and the process of the working of the stove in question was acquired by him only in the course of and for the purpose of his employment as such vakil. The only question therefore which remains is as to whether any communication within the meaning of the section was made to him by his client. The exact fact which he proposed to prove was not disclosed and the nature of the communication was not given: We thought it undesirable to hear the evidence without first deciding whether it could under any circumstances be admissible. We think that as a matter of law it is immaterial

whether the communication was verbal, that is to say, by word of mouth, or by demonstration. To our mind if the communication were of such a nature that the client had, for the purpose of enabling his vakil to defend the charge of nuisance, described the formation and the process of the working of the stove in his own language, it would be impossible to contend that such conversation would not be excluded by the rule of professional privilege laid down in section 126. We think it follows that if the client, instead of giving the vakil a verbal description of the process itself, told him to go himself to see it, or pointed it out to him that would equally be a communication within the meaning of the section.

This view is borne out really by proviso (2) of the section. In England there has been some discussion in the decided cases as to whether the rule of professional privilege applies to facts brought to the knowledge of a professional gentleman by his senses, *i. e.*, facts observed by him; and it was decided at any rate in one well-known case that where a matter is in court, and by his senses the counsel becomes aware that an entry in a book has been fabricated or altered after its production in evidence before the court, this is a matter which is brought to his senses by observation independently altogether of his client and is a matter which he is bound to disclose. But the Code says that any fact observed by the vakil in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment is not protected. That clearly indicates that facts observed may be just as much communication as other communication in the ordinary way by word of mouth. The rule is a statutory rule and ought to be strictly applied for at least two reasons. It is in the interest of the proper and honourable conduct of an honourable profession. If communications coming either directly or indirectly to the knowledge of the vakil or lawyer in the course of and for the purpose of his employment are not protected, it is easy to conceive cases in which the vakil might become acquainted with circumstances for example of crime which it would be the ordinary duty of a citizen to communicate to the proper authorities, and he would render himself liable for prosecution under the Penal Code for not disclosing such information to the proper authorities. It is clear that professional gentlemen who do their duty ought not to be placed in a position of that kind. Secondly it is of importance to the public that they should be protected in the right which the law gives them to defend themselves against proceedings of all kinds with absolute freedom, untrammelled by the embarrassment of the possible consequences of failure to disclose the full facts within their knowledge to the expert assistance on which they rely for the conduct of their cases. It would be impossible for the ordinary man to consult a lawyer with anything like confidence, for example, about some machinery or system in his own premises about which

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he is litigating with a rival in trade, if, when the public authorities threatened him with a case for nuisance he had to call a lawyer to assist him in answering that charge without knowing whether or not the lawyer might not the next day turn round and present his opponent in the civil suit with all the information which the lawyer had obtained from his otherwise unauthorised visit to his client's premises.

One word I should like to add. It was suggested to Dr. Sen that he should open his case by giving some indication of the broad lines on which he would proceed to tender evidence. I attach great importance to that duty. I am afraid, judging from the cases which come in appeal before this Court, it is not always as strictly regarded in the courts of Subordinate Judges as it ought to be, so that the legal gentleman who represents the plaintiff or petitioner fails to give sufficient indication of the lines on which he proposes to present his evidence in court. Counsel are here to assist the court, and in a delicate matter of this kind (as far as we can see the respondents to this application had no intimation or warning that this question was going to be raised) a party in our opinion has a right to be warned that a professional gentleman previously employed by him is going to be put in the box to disclose a communication made to him in the course and for the purpose of his employment, in order that he may have a full opportunity, not in the hurry and suddenness of surprise, but with care and deliberation, to decide whether he shall exercise the undoubted option he possesses in his own interest, in the interest of the court or in the interest of public time, to waive his objection.

In addition to this as my brother has remarked in the course of the argument, there are a number of authorities on the Indian law as codified. It is better where a delicate question of this kind is going to be raised, that warning should be given so that an opportunity is provided for seeing whether the question is quite as clear as may be supposed by the legal gentleman intending to produce the evidence.

Piggott, J.

PIGGOTT AND WALSH, JJ.—This is a suit for revocation of a patent. It was agreed that the evidence taken in the previous suit which we have just disposed of should be admissible in this suit. Upon the broad issue of fact namely that the patent is bad in law, either because it has been anticipated, or because it is not a proper subject-matter for a patent, we have made up our minds against the plaintiff for reasons which are contained in the judgment in First Appeal No. 178 of 1917 (1) delivered to-day and which may be found there by the applicant if he cares to read them. We do not think, having listened to Dr. Sen's argument and to the testimony of the witnesses Gopi Lal and Kunji Lal, given orally before

us, that they have succeeded in shaking the conclusions arrived at by us in the other suit. No serious question has been raised about our jurisdiction to entertain this suit and we must simply dismiss it with costs upon the ground that the claim has not been proved. We were invited to read certain learned authors on the subject of the ancient process of manufacture of *banslochan*. We declined to do so. So far as they were matters of opinion on admitted facts there was no necessity for us to read them; so far as they were tendered for the purpose of proving any controverted fact in the suit we were unable to discover any section of the Evidence Act which entitled us to read them. We therefore hold them to be inadmissible. The suit is dismissed with costs.

Appeal dismissed.

(1) Since reported 16 A. L. J. R , 941.

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CRIMINAL

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November, 1.

TUDBALL, J.

THAKUR DAS

versus

ABDULLA.*

Sanction for perjury—Granted to a private person—Summary trial—Sanction not proper.

In a summary trial the court thought that perjury had been committed and it granted sanction to a private person to prosecute the person deemed guilty of perjury. *Held*, that the sanction so granted was not proper, and if the court thought that perjury had been committed it ought to have taken action itself.

CRIMINAL REVISION from an order of CHAUDHRI ABDUL HASAN, Officiating Sessions Judge of Benares.

G. Banerji, for the applicant.

Muhammad Yusuf, for the opposite-party.

The following judgment was delivered by

Tudball, J.

TUDBALL, J.—The circumstances of this case are such that no private sanction, in my opinion, ought to have been granted. The trial of the original case was a summary trial. There is no record of the evidence. The matter is one involving the eternal Hindu and Musalman question. In the absence of any record of the evidence, it would be difficult indeed to secure a conviction. There are many ways of explaining the fact that the applicant made a statement which was incorrect. In such a matter as this if the court thought that perjury had been committed, it would have been better advised if it had taken action itself instead of placing in the hands of a private person the right of vindicating the law. I allow the application and I set aside the order of the court below. The application for sanction is refused.

Application dismissed.

* Cr. Rev. No. 710 of 1918.

PRIVY COUNCIL.

GAURISHANKER BALMUKUND (*Appellant*)*versus*CHINNUMIYA AND OTHERS (*Respondents*)

Civil Procedure Code, (Act XIV of 1882) sections 320, 325A—Execution of decrees—Transfer of decrees affecting immovable property to Collector—Restriction on judgment-debtor's power of mortgage, its extent—Whether the judgment-debtor's incompetence is absolute or limited.

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LORD SHAW,
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MR. AMER
ALI,
SIR WALTER
PHILLIMORE.

The incompetence to alienate without the Collector's permission, imposed upon the judgment-debtor by section 325A of the Civil Procedure Code, 1882, is absolute and is not limited to the time during which the property is under the Collector's control. A mortgage created by the judgment-debtor in defiance of the prohibition is of no effect even after the property has come back into his hands. *Magniram Vithuram v. Bakubai*, [1912] I. L. R., 36 Bom., 510, overruled; *Murray v. Murat Singh*, [1907] 3 Nag. R., 172 and *Musammatt Salu Bai v. Bajat Khan*, [1917] 13 Nag. L. R., 130, approved.

Appeal from a decree of the Judicial Commissioner's court of the Central Provinces, dated April 26, 1913, affirming a decree of the Additional District Judge of Amraoti.

The sole question in this appeal was whether a mortgage effected by the owner of immovable property without the Collector's permission at a time when such property was under the Collector's control in terms of section 320 of the Civil Procedure Code, was valid after the property had been released from the Collector's control. The lower courts both held that such mortgage was absolutely void. Hence this appeal.

De Gruyther K. C., and *Parikh*, for the appellant, submitted that the incompetency to mortgage, imposed upon the judgment-debtor by section 325A of the Civil Procedure Code must be construed *secundum subjectam materiam*. The result of sections 320 &c. of the Code was that after the debts, for which the Collector was put in, were discharged, the Collector had no further rights over the property: why then should the judgment-debtor be debarred from mortgaging the residue which would revert to him? A

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limitation should be placed on the literal words used. We submit that the mortgage is enforceable against the mortgagor himself, once the Collector's management has ceased :

Magniram Vithuram v. Bakubai, [1912] I. L. R., 36 Bom., 510 ;

Jhabulal Kalar v. Rampershad, [1890] 4 Cen. Provinces, L. R., 156.

Our submission is supported by section 43 of the Transfer of Property Act, 1882 and section 18 of the Specific Relief Act, 1877.

The decision in

Murray v. Murat Singh, [1907] 3 Nag. L. R., 172,

affirmed by a majority in

Musanmat Salu Bai v. Bajat Khan, [1917] 13 Nag. L. R., 130,

is incorrect : we rely on the dissenting judgment of MITRA, J., in the latter case.

The mortgagor is estopped from denying that the mortgage was good.

[LORD SHAW.—This is the case of a statutory prohibition not one of the misrepresentation of authority contemplated by section 43 of the Transfer of Property Act].

[SIR W. PHILLIMORE.—If the statute is part of public policy, the mortgage should not be allowed to defeat it. There is a close analogy in England—the case of a married woman restrained from anticipation.]

The respondents did not appear.

Their Lordships' judgment was delivered by

Lord Shaw. LORD SHAW.—By section 325A of the Code of Civil Procedure (Act XIV of 1882) it is provided that :—

"So long as the Collector can exercise or perform in respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by sections 322 to 325 (both inclusive), the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease, or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for money."

In the present case the two salient facts are simply these :—That in 1891 the Collector of the district came under the Act into possession of the property in question ; and that secondly, while he was still in possession of that property, a mortgage upon it was granted on the 22nd July, 1892, by the judgment-debtor. It is now sought to make that mortgage operative in the appellant's favour by reason of this ; that the construction, it is alleged, of section 325A is not to be read in the complete and operative sense natural

to the words, that is to say, of incompetency to mortgage such property, but must be read with an implied limitation. The limitation suggested is that there still remained in the judgment-debtor a power to mortgage the property so as to become operative over any residue that might arise to the latter after the Collector's regime had ended. It is the fact that the Collector's regime has now ended, but it is also the fact that, pending his regime, namely, on the 22nd July, 1892, the mortgage which is now founded upon was granted.

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Their Lordships have been referred to authority upon this question. That which is founded on by the appellant particularly is the case of *Magniram Vithuram Marwadi v. Bakubaimard Rakhma Lohar* (1). Their Lordships are of opinion that that case was erroneously decided. Upon the contrary, the case of *Murray v. Muratsingh* (2), referred to in the judgment under appeal, and the case which has been decided recently by the Full Bench of the Central Provinces *Musammal Salu Bai v. Bajat Khan* (3), are, in the opinion of the Board, proper decisions and sound in law.

In short, the sole point in this appeal is whether a declaration by statute that a judgment-debtor shall be incompetent to mortgage his property is or is not to be read in the exact and plain sense which the words imply. It is not necessary to go into reasons for the statute, but if reasons were to be implied, it is manifest that a confusion of title of a somewhat extraordinary kind would arise if it was held that there was a competency on the one hand to mortgage the residuary interest, so to speak, of the judgment-debtor by him, leaving, on the other, uncontrolled and unimpaired during the same time, all those acts of administration by a Collector, which it is admitted in argument would be perfectly competent. The confusion emerging from such a situation is not hard to figure. Their Lordships content themselves with holding that the judgments of the courts below on this point are right, and they will humbly advise His Majesty that the appeal should be disallowed. No other point was taken upon the appeal. The respondents not having appeared, there will be no order as to costs.

E. Dalgado :—Solicitor for the appellant.

A. P. P.

Appeal dismissed.

(1) [1912] I. L. R., 36 Bom., 510. (2) [1917] 3 Nag. L. R., p. 171.

(3) [1917] 13 Nag. L. R., 130.

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June, 6.

PIGGOTT, J.
WALSH, J.

HIGH COURT.

KUNJ BEHARI LAL (*Defendant*)*versus*LALTU SINGH AND OTHERS (*Plaintiffs*)**Hindu Law—Alienation by widow—Spiritual benefit of husband—To what extent alienation permissible—Whether spiritual benefit equivalent to *śradh* of the deceased.*

A Hindu widow succeeded to certain property as heir to her sons. She went on a pilgrimage to Jagannath, and there made an oral gift of a portion of the property in her possession in favour of the *Pandas* of the temple. On her return home she executed a formal deed of gift in which after alluding to the oral gift she stated that she had made the gift and *shankalap* "for the salvation of her husband and his family members and for her own salvation." The portion endowed constituted no more than $\frac{1}{80}$ th part of the entire estate. After her death the next reversioner to her husband brought a suit for recovery of possession of the property from the donee and his lessee by cancellation of the deed of gift:—*Held* that the gift was valid having been made with a view to the spiritual benefit of the widow's husband and her sons who were included in the expression "husband's family members." An alienation made by a Hindu widow for the spiritual benefit of the deceased will not be set aside merely because it was not made in connexion with a *śradh* ceremony of the deceased.

There are ceremonies and duties incumbent upon a widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out and for this purpose she has a power of alienation in respect of the *corpus* of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be what proportion does the property alienated bear to the entire estate, but only, whether the alienation was a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. There may be alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities; and with regard to such alienations the question of the proportion borne by the property alienated to the value of the entire estate becomes pertinent.

* F. A. No. 7 of 1916.

FIRST APPEAL from a decree of BABU RAM CHANDER SAKSENA, Additional Subordinate Judge of Moradabad.

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Raja Gur Sahai, the owner of a large estate, died in 1868 leaving two sons and a widow. Both the sons died in 1873, and the widow, Rani Kishori Kuar, succeeded to a Hindu mother's estate in the property. Two years later she went on a pilgrimage to several sacred places including Jagannath. At Jagannath she made a *shankalap* or oral gift of certain zemindary property and houses, forming part of the estate of the late Raja, in favour of two *Pandas* of the temple at Jagannath. On her returning home she executed, on 8th January, 1876, a formal deed of gift of the said property in favour of the said *Pandas*, setting forth that she had made the *shankalap* at the time of her visiting and worshipping at the temple of Jagannath, and that she made the gift and *shankalap* "for the salvation of her husband and his family members and for her own salvation." The property gifted formed a very small portion of the estate left by the Raja. The zemindary property which had been included in the gift came after successive transfers to the appellant Kunj Behari Lal. Rani Kishori Kuar died in 1907, and in 1913 the plaintiff Kuar Laltu Singh, as the next reversioner and successor to the estate, brought a suit for recovery of possession of the property from Kunj Behari Lal and a lessee of his. The plaintiff alleged that the deed of gift was not one executed by the Rani herself, with due knowledge and proper understanding, and that even if it was so executed it was invalid inasmuch as she had only a life interest and could not alienate the property. The defence, *inter alia*, was that the deed was properly and validly executed by the Rani; and that the gift by her of a very insignificant portion of the estate made on the occasion of a pilgrimage, which, "according to the customs of the Hindu religion, it was absolutely necessary and binding upon her to make, for the benefit of the souls of her husband and sons," was one made "for a lawful necessity," and was valid under the Hindu Law. The court of first instance without deciding whether or not the deed had been really and intelligently executed by the Rani, came to the conclusion that it was in any case not binding upon the reversioner, inasmuch as the Rani "had no necessity to transfer the property, as she had ample means to defray the expenses of pilgrimage to holy places and for any offerings she may have desired to make, and she was not bound to make a pilgrimage to Jagannath or make a gift there, as they were not necessary for the spiritual welfare or benefit of her sons and husband." The court held that the gift "was not made for any legal necessity or for objects and purposes sanctioned by the Hindu Law," and accordingly decreed the suit. The defendant Kunj Behari Lal appealed to the High Court.

B. E. O'Connor, (with him Iqbal Ahmad), for the appellant.—

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The question of law in this case is as to the extent of the power of a Hindu female, holding a Hindu widow's estate, to make a gift for spiritual purposes of a portion of the immoveable property inherited by her. No question of legal necessity arises here, and the lower court has entirely misunderstood the nature of the ground on which the legality of the gift in question depends. The purpose of the gift was not secular, but spiritual, namely the salvation of the lady's husband and sons, as well as of herself. Under a misconception of the nature of the question to be determined the lower court rejected evidence tendered on behalf of the defendant as to the spiritual benefit or merit of a pilgrimage to holy places like Jagannath and of a gift to the temple or the priests made on the occasion of such pilgrimage. The lower court has not properly considered the question whether the gift of a small portion of the estate for religious purposes is valid under the Hindu Law, but has gone on to consider and decide whether a pilgrimage to Jagannath is a necessity and whether there was legal necessity for the alienation in the sense that it was required for meeting the expenses of the pilgrimage and bounty to the priests.

The power of a Hindu widow to alienate a portion of the estate for spiritual purposes, apart from legal necessity, was recognized and formulated in general terms by the Privy Council in the case of

The Collector of Masulipatam v. Cavalry Veneata Narrainapañ, [1861] 8 M. I. A., 529; at p. 551.

And a Hindu mother, in this respect, stands on the same footing as a Hindu widow:—

Raj Lukhee Dabee v. Gokool Chunder, [1869] 13 M. I. A., 209; at p. 223.

Passing now to a consideration of the cases dealing with specific instances of the exercise of this power by the Hindu widow, we have the case of

Mahomed Ashrup v. Brijessuree Dassie, [1873] 19 W. R., 426.

There it was held that a pilgrimage to Gya by a Hindu widow and the performance of her deceased husband's *sradh* at that place were, undoubtedly, religious purposes supposed to conduce to the spiritual welfare of her husband, and justified the alienation by her of a reasonable portion of the estate. A similar case was that of

Mutteeram Kowar v. Gopal Sahoo, [1873] 20 W. R., 187.

In both these cases the distinction between the widow's power of alienation for the spiritual benefit of her husband and for worldly necessity was emphasised. Two other cases, also relating to pilgrimage to Gya, are the following:—

Udai Chunder v. Ashutosh Das, [1893] I. L. R., 21 Cal., 190;

Tarini Prasad v. Bhola Nath, [1891] I. L. R., 21 Cal., 190 F. N.

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In the case of

- *Ram Kawal Singh v. Ram Kishore Das*, [1895] I. L. R., 22 Cal., 506,

the widow had made an endowment which in extent was nearly one-third of the whole estate, and was one conducive to her own spiritual welfare and not to that of her deceased husband. The alienation was therefore set aside, but it was indicated that the alienation would have been valid if it had been for the spiritual welfare of the husband or if, being for a pious purpose, the property alienated had been only a very small portion of the estate.

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- The latest Calcutta case on the subject is that of

Khub Lal Singh v. Ajodhya Misser, [1915] I. L. R., 43 Cal., 574, in which MOOKERJI, J., dealt exhaustively with the texts and the former decisions on the subject, and held not only that a Hindu widow could alienate a reasonable portion of the estate for purposes supposed to conduce to the spiritual benefit of her husband but also that she could do so for religious and meritorious purposes generally. In the present case the purpose of the gift was to secure the spiritual benefit of the donor's husband and sons, as well as of herself.

The cases of the Allahabad High Court on this subject are the following :—

Puran Dai v. Jai Narain, [1882] I. L. R., 4 All., 482 ;

Balkishan Bharthi v. Sat Ram, [1908] A. W. N., 202.

In the former, the gift was set aside as it was made for the spiritual benefit of the widow herself and did not even purport to be for that of her husband. In the latter, the gift was set aside because it comprised practically the whole of the estate, and it was indicated that the gift would have been upheld if it had been of a moderate portion of the estate.

Turning to the Madras cases, the first is that of

Rama v. Ranga, [1885] I. L. R., 8 Mad., 552.

There, too, the spiritual benefit contemplated by the widow at the time of the alienation was her own, and the alienation was of the whole of the property of the deceased husband. It was observed, however, that an alienation for pious acts which might be only indirectly beneficial to the deceased husband would be valid if reasonable and of a small share of the property. In the present case the alienation was for the object of direct spiritual benefit of the deceased husband, and was of a very reasonable and moderate portion.

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The next case is that of

Lakshminarayana v. Dasu, [1887] I. L. R., 11 Mad., 288.

The last case namely,

Vappuluri Tatayya v. Garinalla Ramakrishna, [1910] I. L. R., 34 Mad., 288,

is closely analogous to the present case. There, a daughter who inherited her father's property made a gift of land, at a place of pilgrimage, for the spiritual benefit of the father. The court held that a Hindu daughter or a widow, as the case may be can make such a gift if it be of a small portion of the property inherited; and that the gift need not be in performance of indispensable acts of duty or "religious necessity," it being sufficient that the occasion of the disposition be reasonable and proper according to the common notions of the Hindus. According to those notions the occasion of a pilgrimage to Jagannath is such an occasion. Some idea of the veneration with which Hindus regard the Jagannath temple may be gathered from the

Imperial Gazetteer of India: Vol. 20, pp. 409 to 412.

The Bombay cases are the following:—

Ganpat valad Dhaku v. Tulsiram, [1911] I. L. R., 36 Bom., 88;*Panachand Chhotalal v. Manoharlal*, [1917] I. L. R., 42 Bom., 136.

In the former, an alienation for the expenses of a pilgrimage to a sacred place, made for the spiritual benefit of the deceased husband, was upheld. In the latter, a gift to a *Guru* was set aside on the ground that it comprised nearly the whole of the estate.

Next, as to what fraction of the estate should be considered a reasonable portion for the purpose of a valid alienation for religious objects has never been definitely laid down. In an old case, namely

Ram Chandra v. Gunga Govind, [1826] 4 Mac. Sel. Rep., 147,

the opinion was expressed that an alienation of 3/16ths of the estate for religious purposes would be valid. In the present case the evidence shows that the fraction alienated was only about 1/400th of the whole. To this extremely modest fraction no objection could possibly be taken on the score of being excessive.

Tej Bahadur Sapru, (with him *Radha Kant Malaviya*) for the respondents.—A religious or charitable purpose is not, by itself, enough to validate an alienation by a Hindu widow. She may make gifts which are regarded by the Hindu religion as very meritorious, for example, an endowment in favour of a temple or for feeding the poor, but it does not follow that the gift will in every case be upheld as a valid alienation. Her powers of alienation over property inherited by her are, as laid down by the Privy Council, larger for 'religious or charitable purposes' than for secular ones; but those purposes are strictly limited in their scope

and do not comprise general charity or general piety. In fact the only such purposes which are recognized as being valid in this connection are those which are supposed, according to the Hindu Law-givers, to be conducive to the spiritual welfare of the deceased husband, from whom the widow has inherited the property. Considered in this light, all places of pilgrimage do not stand on the same footing. There are certain places where if a Hindu widow makes a gift in connection with certain religious ceremonies the gift would be upheld, but not so in the case of others. A gift under the former conditions would be a "spiritual necessity;" under the latter, only a "spiritual luxury." That was the distinction which the lower court meant.

Under the Hindu Law the widow is bound to perform the main *śradh* and the annual *śradh* ceremonies for her husband's soul; and alienations for them are valid, because the performance of them is beneficial to the husband's soul. In fact the Dayabhaga, in which the idea of spiritual benefits is developed much more than in the Mitakshara, lays down that spiritual benefit can be conferred on the husband's soul only by the performance of the *śradh* ceremonies in his honour.

Sarvadhikari : Hindu Law of Inheritance (Tagore Law Lectures for 1880), p. 132.

Mitra : Law relating to the Hindu widow (Tagore Law Lectures for 1879), pp. 396, 306, 308.

The performance of the *śradh* ceremonies of the deceased is directly conducive to the welfare of his soul, and they being the only ceremonies which according to the authorities quoted, secure the object of conferring spiritual benefit on him, it follows that alienations in connection with the performance of such ceremonies are the only ones which are valid.

Religious and meritorious acts are, in Hindu Law, divided into two categories, *ishta* and *purita* acts. Salvation or *moksha* of the soul can be attained by one who performs the latter; the former cannot confer salvation.

Saraswati : Hindu Law of Endowments (Tagore Law Lectures for 1892), pp. 20, 21, 25, 27.

Salvation of the soul of a departed person can be attained only by the performance of *śradh* ceremonies in his honour. "Conducive to the spiritual welfare" is the expression used by English Judges; the underlying idea is that of salvation or "*moksha*."

[Piggott, J.—The language used in 8 M. I. A., 529 at page 551, seems to warrant the validity of alienations for religious purposes which may not technically fall under the category of those conducive to the spiritual welfare of the husband. The words

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used are, "for religious or charitable purposes, or those which are supposed to conduce to the spiritual welfare of her husband."]

The "or" there may very well be explanatory and not disjunctive. The Privy Council does not say anything in that passage to indicate that the "religious or charitable purposes" there mentioned have no relation or reference to the benefit of the husband's soul. The Allahabad High Court has held that the principle laid down by the Privy Council in that case for testing alienations is whether or not the alienation has direct and special reference to the spiritual welfare of the deceased owner of the estate. General meritoriousness, or the spiritual benefit of the widow or of any person other than the deceased owner will not support the alienation.

Puran Dai v. Jai Narain, [1882] 1 L. R., 4 All., 482.

The same test is laid down in

Mitra: Law relating to the Hindu widow (Tagore Law Lectures for 1879), p. 310.

The real question is whether a gift to the idol at Jagannath or to a priest of the temple at that place, if not made in connection with the *sradh* ceremonies of the husband, confers spiritual benefit on his soul. It has been held, in the case of

Kartick Chunder v. Gour Mohun Roy, [1864] 1 W. R., 48,

that a gift to an idol is not a paramount duty of the widow, and can only be supposed to conduce to the spiritual benefit of herself alone, and is therefore invalid.

In the case of

Huro Mohun v. Sreemutty Auluck Monee, [1864] 1 W. R., 252,

it was held that a pilgrimage to Benares was not a 'legal necessity' for the widow, and would not justify an alienation by her, although it was a highly religious and meritorious act on her part. A pilgrimage to Jagannath stands on no better footing.

[PIGGOTT, J.—In the present case the gift was made by the widow in the belief and with the avowed object of conferring spiritual benefit on her husband and his family.]

Such belief or recital on her part would not necessarily make the gift valid if it was not really, *i. e.*, according to the Hindu Law authorities, conducive to the spiritual benefit of her husband's soul.

The object of the gift is expressed to be, "the salvation of my husband and his family members, and my own salvation." So far as the widow's own salvation is concerned, it is clear from the authorities already cited by both parties that it is not a ground which will support an alienation. As regards the salvation of the donor's husband, it has to be borne in mind in this connection that

she got the property not from her husband but from her sons. The *quantum* of estate derived by a Hindu mother may not be different from that of a Hindu widow, but the religious obligations of a mother are not the same as those of a widow. The duty of securing the spiritual salvation of a son is not enjoined on the mother to the same extent as that of the husband on the widow. Further, in the present case, the conferring of any amount of spiritual benefit on the donor's husband would not support the alienation, for it was not his property which the donor had inherited. As was pointed out in the cases in

Puran Dai v. Jai Narain, [1882] I. L. R., 4 All., 482 ;

Vuppuluri Talayya v. Garimilla Ramakishnamma, [1910] I. L. R., 34 Mad., 288,

it is the deceased owner alone on whom the spiritual benefit is to be conferred. It is apparent from the deed itself that the donor was not thinking of her sons, at least not specifically ; they are not even mentioned by her, unless by inclusion in the phrase "my husband's family members," a term wide enough to include any ascendants, descendants, collaterals and even dependants of the husband. It cannot be contended, therefore, that the donor even professed or believed that she was making the gift for the spiritual benefit of her sons.

[PRIGGOTT, J.—In the case in

Khub Lal Singh v. Ajodhya Misser, [1915] I. L. R., 43 Cal., 574,

the alienation was upheld as being for a religious and charitable object, apart from a consideration of whether or not it was conducive to the spiritual benefit of the husband's soul.]

The actual decision in that case, namely, as to the validity of an alienation for the purpose of digging and constructing a tank, is opposed to that in the case of

Runjet Ram Coolal v. Mahomed Waris, [1873] 21 W. R., 49.

Besides, in the case in

Khub Lal Singh v. Ajodhya Misser, [1915] I. L. R., 43 Cal., 574,

the widow was acting in furtherance and completion of religious and charitable works undertaken and left unfinished by the husband.

[PRIGGOTT, J.—But the decision did not rest on that ground.]

In so far, however, as the decision in that case did not enter into a consideration of the question whether or not the purpose of the alienation was one conducive to the spiritual welfare of the husband, it is submitted that it is opposed to the principle laid down in

Puran Dai v. Jai Narain [1882] I. L. R., 4 All., 482,

and is not in point so far as the present question is concerned ; namely, whether or not the gift to the temple of Jagannath

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was conducive to the spiritual benefit of the deceased owner of the estate. After a discussion of various authorities the true test and rule to be applied to alienations by the widow was laid down at p. 583 of the report; but the judgment did not proceed to apply that test to the alienation in question there.

The case in

Ram Kawal Singh v. Ram Kishore Das, [1895] I. L. R., 22 Cal., 506, did not decide that an alienation of a small portion of the estate for religious purposes would be valid, though it was not conducive to the spiritual welfare of the deceased owner. That question was not before the court.

The salient feature in the cases in

Vuppuluri Tatayya v. Garimilla Ramakrishna, [1910] I. L. R., 34 Mad., 288,

and

Lakshminarayana v. Dasu, [1887] I. L. R., 11 Mad., 288,

which strongly support my contention, is that the gifts were made in connection with the performance of the *sraddh* ceremonies of the deceased owner. This connection was emphasised throughout, and the test laid down was that of spiritual benefit to him.

All the cases cited by the appellant can be divided into two categories, according as the alienation was or was not for purposes conducive to the spiritual benefit of the deceased owner; in the former the alienation was upheld, unless it was excessive in extent; in the latter the alienation was held to be invalid, with the single exception of the case in

Khub Lal Singh v. Ajodhya Misser, [1915] I. L. R., 43 Cal., 574, where the question was not gone into.

Then, as to the extent of the property alienated, the evidence shows that it forms a much larger fraction of the whole than what the appellant makes it out to be. Evidence on this point was then discussed, as also on the question as to whether the deed of gift was in fact executed by Rani Kishori Kuar, with full knowledge and understanding.

B. E. O'Connor, was not heard in reply.

The following judgments were delivered.

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PEGGOTT, J.—The suit out of which this appeal arises was brought on the following state of facts:—One Raja Gur Sahai died in the year 1868 possessed of immoveable property of considerable value in the districts of Moradabad and Bulandshahr. He left him surviving two sons and a widow. The sons died in 1873 while still minors and leaving no issue. The widow Rani Kishori Kuar thereupon entered into possession of the estate, strictly speaking in succession to her sons, or rather to that one of her two sons who

survived the other. For practical purposes it is sufficient to say that she took possession of the property with the estate of a Hindu widow. Shortly afterwards she went on a pilgrimage in the course of which she visited Allahabad, Benares, Gaya, and Jagannath. At the last named place she made an oral gift, or I should perhaps say the promise of a gift, to certain priests of the temple of Jagannath, and this transfer of property was carried into effect by a deed of the 8th of January, 1876, executed by Rani Kishori Kuvar after her return to Moradabad and registered on the admission of her agent (general attorney) Ajab Singh. The question whether the donees under this deed of gift had any right to transfer the property thus taken by them does not arise in the present suit. There have been transfers, and the contesting defendant in this case, Kunj Behari Lal, acquired so much of the gifted property as consisted of shares in four villages, for good consideration, under a sale deed of the 27th of September, 1909. Prior to this Rani Kishori Kuvar had died, namely on the 15th of August, 1907; and after much litigation the plaintiff Laltu Singh succeeded in establishing his claim to succeed as the nearest reversioner to the estate of the late Raja Gur Sahai. The object of the present suit is to obtain a decision that the transfer purporting to be effected by the deed of gift dated the 8th of January, 1876, either passed no title at all, or at any rate conveyed no estate lasting beyond the life-time of Rani Kishori Kuvar, and thereupon to recover possession of the gifted property. It is alleged in the plaint that the *Pandas* of Jagannath had colluded with Ajab Singh already mentioned and with other *Karindas* and servants of Rani Kishori Kuvar and had obtained the execution of this document without the lady's understanding what she was assigning or even comprehending the contents of the deed or its effect upon her interests. Any one reading the plaint would be disposed to assume that this was the main point of the plaintiff's case. The learned Subordinate Judge however has lumped the question raised by these pleadings into a single issue along with the wholly different question of the capacity of Rani Kishori Kuvar, as a Hindu widow in possession of the property of her late husband, to make a gratuitous transfer of this sort. The result is that the evidence produced on what should have been the main question for trial in the case is scanty and unsatisfactory and that this issue has not been decided at all by the trial court. The learned Subordinate Judge says that he will presume that the deed of gift was really executed by Rani Kishori Kuvar after fully understanding its nature and effect; but he holds that she had no authority as a Hindu widow to make a gratuitous transfer of this property beyond her life-time. We have had to consider the question of the intelligent execution of the document and it is necessary for us to come to a finding upon the point. The transaction is an old one, and such oral evidence as the parties endeavoured to produce amounts to little and does not seem worth discussion; but I

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am impressed with the evidence given by the witnesses Shiam Sarup and Nathu Ram as to Rani Kishori Kuar's business capacity and the manner in which she looked after her estate. The lady was illiterate, but she seems to have possessed a considerable degree of intelligence and business capacity. She did not remain shut up in her residence in Moradabad but went about visiting different portions of her property and personally superintending the management of the same. Under such circumstances the mere fact that she never challenged this alienation in her life-time would warrant the presumption that she fully understood the transaction at the time when she executed the deed of gift. Fortunately the defendant-appellant has been able to bring on the record in this Court a piece of documentary evidence which carries the matter a good deal further. In the year 1893 Rani Kishori Kuar was examined on commission in connection with another litigation. She there stated that she had a distinct recollection of having made the gift now in question to the *Pandas* or officiating priests of the temple of Jagannathji. She mentioned from memory the most essential portions of the contents of this document, naming the village of Sherpur which formed the principal item of property transferred. Under all the circumstances, and in view of the manner in which this particular point was litigated in the court below, I think we need have no hesitation in coming to the finding that Rani Kishori Kuar executed this deed of gift with full knowledge and adequate understanding of its contents and of its effect upon her interests.

In the court below various alternative lines of defence were relied on by the present appellant but most of the pleas embodied in the memorandum of appeal before us have not been pressed. Now that we have already found in favour of the defendant upon the question of the intelligent execution of the document, the only further point for our consideration is the authority of Rani Kishori Kuar to make this transfer. The question of law thus raised is discussed at considerable length in the judgment under appeal and has been very completely argued out before us with reference to a large number of authorities. I think I may say that very little attempt has been made before us to support the decision of the court below on the line of argument on which it proceeds. The learned Subordinate Judge would seem to have misunderstood the pronouncement of their Lordships of the Privy Council which forms the foundation of the subsequent case-law on the subject and he has throughout discussed the question of the validity of this gift as if it were in some way connected with the question whether Rani Kishori Kuar would have been entitled to alienate any portion of her late husband's estate in order to meet the expenses of her pilgrimage to the holy places of Northern India. The latter question does not arise at all. The lady would seem to have met the expenses of this pilgrimage out of the income of her husband's

estate over which income she had full disposing power. We have simply to consider whether she had or had not a right to make this particular gift in favour of the idol worshipped in the temple of Jagannath and the attendant priests. The foundation of the case-law on the subject is the decision referred to and misrepresented by the learned Subordinate Judge, namely the case of *The Collector of Masulipatam v. Cavalry Vencata-Narainappa* (1). The important passage frequently quoted in subsequent decisions is to be found at page 551 and may be quoted once more in this place. "For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband she (i. e., the Hindu widow) has a larger power of disposition than that which she possesses for purely worldly purposes." In the present case the gift to the temple and to the attendant priests appears on the face of it to be an alienation for religious and charitable purposes. The immediate object of the alienation as cited in the deed itself is "for the salvation of my husband and his family-members and for my own salvation." In a recent case before the Calcutta High Court, *Khub Lal Singh v. Ajodhya Misser* (2), the question of law now under consideration was discussed at great length. Previous authorities were reviewed and a decision was pronounced by a Bench which included one of the most distinguished Hindu Judges who adorned the Bench of that court. The important principles laid down by him I take to be the following. "There is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand. A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid. Whether an alienation covers a reasonable portion of the property of her husband is a question which must be determined with reference to the circumstances of each particular disposition." The point which has been pressed upon us with great learning and ingenuity on behalf of the respondent to this appeal turns upon the meaning to be attached to the words "with a view to his spiritual benefit" in the principle above laid down. It was contended that those proceedings by means of which a Hindu widow may seek to promote the spiritual welfare of her late husband can be ascertained with certainty from authoritative text-books accepted by Hindus generally and that the question whether a particular gift, made under certain circumstances, would or would not be accepted by Hindu opinion as conferring a spiritual benefit upon the deceased husband of the donor was a pure question of law which could be settled upon authority, independently altogether of the question whether the object of the gift was or was not one which any ordinary persons would accept as fulfilling a religious or charitable purpose. When this argument came to be further pressed, with

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(1) [1861] 8 M. L. A., 529. (2) [1915] I. L. R., 43 Cal., 574.

(2) [1887] I. L. R., 11 Mad., 288.

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reference to the particular authorities and texts on which it proceeded, it proved to amount to this:—that it is only by means of those rites and ceremonies connected with the funeral of the deceased, or with the subsequent commemoration of his death, generally known under the name of *Sradh*, that the spiritual welfare of a deceased Hindu can be promoted. Consequently it was contended that the only gifts made for religious or charitable purposes by which a Hindu widow could be regarded as promoting the spiritual welfare of her late husband would be gifts made in connection with some *sradh* ceremony. The argument is an ingenious one; but the question can scarcely be regarded as coming before us at this stage of its history as purely *res integra*. There is a mass of case-law on the subject, a great deal of which has been expounded to us on behalf of the parties to the present appeal. It is impossible to point to a single case in which an alienation by a Hindu widow has been set aside only on the ground that it was not made in connection with a *sradh* ceremony of the deceased. It is quite true that there are at least two decisions of the Madras High Court in *Lakshminarayana v. Dasu* (1), in *Vappuluri Tatayya v. Garinalla Ramakrishna* (2), in which the fact that the alienation was made in connection with a *sradh* ceremony is insisted upon in such a fashion as to show that it was of considerable importance in the minds of the learned Judges. The question whether this is an indispensable condition to the validity of a gift can be tested by examining a few cases in which such alienations have been set aside. Take for instance the case of *Rama v. Ranga* (3). The learned Judges set forth the objects for which the particular alienation which they were considering had been made. Now that alienation, on the face of it, had nothing to do with a *sradh* ceremony of the deceased; but it was not set aside on that ground. It was pointed out that the ceremonies for the sake of which the widow in that case had sold a portion of her late husband's estate were not of the kind regarded by the Hindu religion as indispensable for the spiritual benefit of her late husband, such as funeral obsequies and ceremonies incident to those obsequies. They then proceeded to hold that they could not justify the alienation, "unless such sale is reasonable in the circumstances of the family and the property alienated is but a small portion of the property inherited from her husband." The principle underlying the decision appears to be that there are ceremonies, and I may add duties, incumbent upon a Hindu widow, in the sense that their performance is regarded as indispensable to the spiritual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out, and for this purpose she has a power of alienation in respect of the *corpus* of the property in her hands, independent altogether of the proportion which the property alienated may bear to

(1) [1887] I. L. R., 11 Mad., 288. (2) [1910] I. L. R., 34 Mad., 288.

(3) [1885] I. L. R., 8 Mad., 552.

the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be, what proportion does the property alienated bear to the entire estate, but only, was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. The learned Judges however recognized the possibility of alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities; and with regard to alienations made for such a purpose as this they say that they would be prepared to take into consideration such questions as the proportion borne by the property alienated to the value of the entire estate. The same sort of principle seems to be implied in *Ramkawal Singh and others v. Ram Kishore Das and another* (1), where the learned Judges finally came to the conclusion that the alienation which they were considering could not be supported, either on the ground that it was a religious necessity, (that is to say indispensable to the spiritual welfare of the husband) or that, being for a pious purpose, the property alienated was small in value and represented only a very small portion of the estate inherited. The same may be said of the latest pronouncement of the Bombay High Court in *Panach and Chhota Lal v. Manohar Lal Nand Lal* (2). We have been referred to two decisions of this Court, (1) in *Puran Dei v. Jainarain* (3). There stress was laid upon the fact that the alienation which the court had to consider had been made without any reference whatever to the idea of conferring spiritual benefit upon the deceased husband, but apparently for the spiritual benefit of the widow alone. The other case of this Court is that of *Balkishan Bharthi v. Sat Ram Singh and others* (4). This case is of considerable importance as containing a review of the previous case-law by the learned Hindu Judge of this Court who is still with us. The principle he desired to affirm is to be found in the Tagore Law Lectures, 1879 at page 309. "A gift by a widow of the whole of her husband's estate is invalid; but a gift of a moderate portion of the property made by the widow for the spiritual benefit of her husband may be valid." In the case then before him the learned Judge found that the gift which he had to consider, comprising as it did practically the whole of her late husband's estate, was one which the widow was not justified in making. On the line of reasoning which he followed it seems clear that he would have affirmed the gift, if it had affected property forming only a small fraction of the entire estate.

In this connection we were also asked on behalf of the respondent to attach considerable importance to the fact that Rani Kishori

(1) [1895] I. L. R., 22 Cal., 506. (2) [1917] I. L. R., 42 Bom., 136.

(3) [1882] I. L. R., 4 All., 482. (4) [1908] A. W. N., 202.

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Kuar had taken the estate in succession to her son, and not immediately on "the death of her husband." Under the circumstances of the case. I do not think this fact is of serious importance. To begin with, the recital in the deed of gift itself, setting forth that the donor desired to confer spiritual benefit upon her late husband and upon his family members, is quite sufficient to include the spiritual welfare of these two boys who died before attaining majority. Apart from this I do not think it would be just to take too rigid and technical view of the position of a Hindu widow who had entered into possession of her late husband's estate after a short interval, during which her two minor sons died. She naturally treated the estate as that of her husband and regarded herself as being in possession in virtue of her rights as his widow. It could scarcely be suggested that her power of alienation for the spiritual benefit of the former owner of the estate is so rigidly limited that in all circumstances the person whose spiritual benefit is sought must have been the last male owner. In the present case for instance, it could scarcely be contended that no alienation of property by way of gift would be valid unless expressly made for the benefit of that particular one of the two sons of Raja Gur Sahai who survived the other and who was therefore for a brief interval the sole owner of the estate.

Leaving this question for the present, we have to go on to consider what was after all the value of the property transferred under this gift in comparison with the entire value of the Rajas' estate. That gentlemen executed a will in the year 1864 to which he appended a specification of his property, showing that he had zemindari rights in more than 80 villages and a great deal of house property in Moradabad and in Amroha. Two years later, that is to say in 1866, he received from the Government a formal *sanad* granting him zemindari property bringing in a total revenue of Rs. 10,195-13-4 for his mutiny services. I think this must have been to some extent a confirmation of a grant previously made; for I find some of the properties included in this *sanad*, at page A 23, also included in the specification given at the foot of the will, at pages 19A and 20A. It is clear however that the grant received under the *sanad* was much less in value than the property dealt with under the will. Taking the land revenue assessment as a rough test, it would seem that the proprietary rights in the four villages affected by the deed of gift in suit amounted to little more than 1/40 of the property granted to Raja Gur Sahai under the *sanad*. Taking the house property into consideration, and forming such rough estimate as seems reasonably possible, I should feel no hesitation in holding that the value of the property in suit cannot have amounted to more than 1/80th part of the entire estate. There is another line of reasoning leading to very much the same conclusion. There was evidence given that the income enjoyed by Rani Kishori Kuar from the entire estate was at least

Rs. 6,000, a year. The income derivable from the zemindari property included in the deed of gift would seem to have varied considerably from time to time, if we are to judge from different leases which have been produced in evidence by the two parties. The Government land revenue assessed upon this particular property has apparently risen from Rs. 280, in 1862 to Rs. 545. The plaintiff has proved two leases of the years 1862 and 1869. Under the former the property in question was leased out at a net profit of Rs. 635, a year. Under the latter the net profit must have been Rs. 870. There is certainly no evidence on the record which would justify us in putting the net annual profits derivable from the villages in question at more than Rs. 800. Taking it at that figure, it amounts to about $\frac{1}{75}$ of the annual income enjoyed by Rani Kishori Kuar. I think we may come without serious hesitation to a finding that the value of the property dealt with by this deed of gift was not more than $\frac{1}{75}$ th of the entire estate of Raja Gur Sabai as it passed into the hands of Rani Kishori Kuar. There has been something said in argument about that lady's management of the estate during the entire period covered by her possession. On the one hand the appellant relied upon an admission made by the principal plaintiff, to the effect that the income of the property had gone up by something like 25 per cent since the death of the Raja; and I was disposed at first to assume that this increase represented the result of purchases made by the lady out of the surplus income of the estate. That such purchases were made by her seems to be true, as there is a statement to that effect by the lady in her deposition of the year 1893, which does not seem to have been challenged at the time. On the other hand something has been said on behalf of the plaintiff respondent that this is not the only alienation by the lady which he has been compelled to challenge. It was no part of the case set up in the plaint that there had been other alienations. As a matter of fact, the only evidence is to the effect that the lady, not long before she died, tried to dedicate permanently for the benefit of a temple built by her husband in Moradabad two shops the income of which had always been spent on the temple by the orders of her husband. On the whole this lady's management of the estate does not seem to have been in any way extravagant, and on the evidence as it stands the finding seems to be justified that, even allowing for the alienation contested in the present suit, the lady must have passed on to the reversionary heir an estate certainly not less in value than that which she had received on the death of the survivor of her two sons, while the probability is that it had increased in value. Under these circumstances I think we need have no hesitation in holding that the gift now in question was a gift of a moderate portion only of the property of her late husband, that it was a gift for religious and pious purposes, and that it was made by the lady, not solely with a view to her own spiritual benefit, but in

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order that the spiritual merit likely to accrue from the same might benefit herself, her late husband, and her sons. It is obviously impossible to ask a court of justice to record a finding that any particular act done by the surviving widow either did or did not benefit her late husband in that changed environment to which she may be presumed to have passed after that episode in life which men call death; nor can we accept the contention on behalf of the respondent that gifts for religious or charitable purposes made by a Hindu widow cannot be recognized under the Hindu Law as calculated to confer any benefit upon the soul of her deceased husband unless they be made in connection with particular funeral ceremonies. I think the present alienation should be affirmed as a gift for religious and charitable purposes, reasonable under the circumstances, and effected by the donor in good faith for the spiritual benefit of the late owners of the property as well as for her own. These findings are sufficient to dispose of the appeal, which I would allow accordingly; and setting aside the decree and order of the court below, would dismiss the plaintiff's suit with costs throughout, including fees in this Court on the higher scale.

Walsh, J.

WALSH, J.—Three questions arise for decision in this case, one, a question of law, whether a gift by a Hindu widow of property inherited from her husband, whether through her sons or not, made for religious purposes, whether with a view to the welfare of her deceased husband's soul or not, is binding upon the reversioner. Secondly, the question of fact whether under the circumstances of this case the gift which is attacked was in excess of what has been regarded by the law as a reasonable proportion of the whole estate. Thirdly whether the deceased lady understood and intended to carry out the terms of the deed.

It is clearly established that in or about 1876 when she made this gift she was a *pardah-nashin* and illiterate lady possessed of "great managing power." It is proved that she managed her affairs with great ability. She took tours to the various villages which comprised the substantial estate which her husband had left. She received and considered applications from her tenants. She met their wishes and endeavoured to remove their grievances. She made purchases by way of accretion to the estate out of the savings at her disposal. She gave on oath in 1893 a fairly clear account of this part of her business saying that her agents were acquainted with the details. No lease of the estate was made without her sanction, and the plaintiff in this case admitted on oath that the property while in her hands in one way or another increased in value by at least 25 per cent. The evidence clearly shows her to have been, in spite of lack of education, a woman of character and capacity.

The terms of the deed attacked are remarkably simple and clear. They have all the appearance of genuineness. She declared

in the only way possible that she as an honest and religious woman, executed this deed of transfer in performance of a promise she had previously given to the *Pandas* when on a pilgrimage of her own and that she was doing so for the salvation of her husband, his family and herself. She seems to have taken every precaution that there should be no possibility of doubt as to the reality and legality of the transaction and as to the value of the property of which she was so disposing. This deed according to the first argument presented to us on behalf of the successful plaintiff is one which the Hindu Law does not permit under any circumstances. I am bound to say that nothing surprises me more than the contrast between the veneration with which these pious acts for the welfare of a departed soul are regarded by the Hindu community, and the vehemence and determination with which they are attacked by individual members of that community. The plaintiff in this case is himself a Hindu and would presumably suggest to, if not inculcate upon, the members of his own family the very conduct which he asks us as a matter of general Hindu Law to declare to be invalid. If he cares to know my opinion, conduct of this kind seems to me more calculated than anything else to discourage the carrying out in practice of the precepts which the Hindu community teaches. The attempt has hopelessly failed. To my mind the law is well settled, and if it had not been so earnestly argued by Dr. Sapru for the respondent, I should have said it was absolutely unarguable. Whether it is necessary to establish that the intention of the donor was to confer spiritual benefit upon the soul of the departed, or whether it is sufficient in given circumstances that the object of the deed itself is shown to be religious, (the latter proposition seems to have been laid down by the Privy Council when they used the word "*or*" in the passage which has already been referred to) does not matter in this case because the lady clearly put the benefit to her husband's soul and the salvation of the other members of his family before her own. In my opinion the matter is as clearly settled as anything can be by a consistent course of authority from 1861 when the case already referred to was decided by the Privy Council and reported in 8 Moore Indian Appeals down to the recent decision in 1915 by MR. JUSTICE MOOKERJI reported in

It so happens that the last decision was delivered six days before the judgment in this particular case and was no doubt not known to the learned Subordinate Judge. But I do not think that it contained anything new, and the intermediate cases between those two termini, although they may be cited to justify the statement of the law as contained in MR. JUSTICE MOOKERJI's judgment do not add anything to it or take anything from it. The judgment of MR. JUSTICE MOOKERJI is an amplification of and an

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admirable commentary upon the judgment of the Privy Council in 8 Moore Indian Appeals. It shows how accurate the language used in the judgment of the Privy Council was and it may be cited as a correct statement of the old law with a full exposition calculated to remove ambiguity, and I therefore cite from it the following passage as a correct statement of the law on the first question in this appeal. "The true rule thus appears to be that there is a distinction between legal necessity for worldly purposes on the one hand and the promotion of the spiritual welfare of the deceased on the other hand, and that within proper limits the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit." He cites also a passage from the judgment of Lord Gifford in *Cossinut v. Hurroo Soondry* (1), showing further the settled and ancient character of this well-known rule of Hindu Law. "It is absolutely impossible to define the extent and limit of the power of the widow to dispose of her husband's property for religious purposes because it must depend upon the circumstances of the disposition." MR. JUSTICE MOOKERJI goes on to point out that a question of fact has always to be determined, namely whether the alienation covers a reasonable portion of the property of the husband, with reference to the circumstances of the particular disposition and he cites other authorities which may be found on page 585 of his (MR. JUSTICE MOOKERJI'S) judgment, (one goes back to the year 1826) indicating that $\frac{3}{8}$ of the entire estate had been held not excessive, and in another case a gift of property between $\frac{1}{4}$ and $\frac{1}{3}$ of the whole had been upheld. Many of the authorities cited to the learned Subordinate Judge and referred to in his judgment seem to have been relied on rather for the purpose of confusing him than for any legal purpose which I can discover. He has unfortunately in his judgment confused the question of legal necessity with the question of the validity of a gift made for religious purposes. It may be that the defendants contributed to this confusion by pleading "legal necessity" in para 8 of their defence. To my mind no authority bearing upon the question of legal necessity ever had any relevance to this suit and should never have been cited in the court below. At one time the learned Subordinate Judge in his judgment said that the point raised was fully concluded by authority. At another time he found as a question of fact that the pilgrimage of the lady was absolutely unnecessary, and finally he says, "To sum up the lady had no necessity to transfer the property as she had ample means to defray the expenses for pilgrimage to holy places and for any offerings she may have desired to make." As my brother has pointed out this has nothing to do with the deed of gift in suit and

(1) [1819] 2 Morley Digest, 198.

possibly explains the error into which the learned Subordinate Judge seems to have fallen. As I have said above the point is well settled and is unarguable.

There may be on occasions a serious question upon the point whether the gift could be described as religious or charitable at all. This question was not raised in this case; but it has been determined and it is obviously a most important question. The only question about which the reversioner need trouble himself is whether the *quantum* in proportion to the whole estate is excessive. I am satisfied that this suit was never launched on that basis at all and that the idea never occurred to the plaintiff. The defendant who seems to have been fully advised as to his legal position did in paragraph 8 of the written statement open the door to the contention. There is a suggestion that the plaintiff professed to attack the transaction on that ground in issue No. 7 as framed. I do not think that at the trial it was ever relied on at all. I think the *quantum* was treated as immaterial. There is a case decided by Mr. JUSTICE KARAMAT HUSAIN in this Court in which he lays down (the case is not on all fours with this case) that it is unnecessary to find out the income and value of the property. I think the learned Subordinate Judge in this case laid that down at the instance of the plaintiff, the plaintiff knowing that he had no materials to establish the fact. At any rate the *onus* is upon the person having special knowledge of the alienated property. I do not propose to travel over the ground my learned brother has travelled. I think it is sufficient to say that in this case no suggestion of any kind is made even now at the 11th hour that the evidence shows anything approaching 3/16, and no authority of any kind has been quoted to us which discredits in any way the authority of 1826 in which it was held that 3/16 might be disposed of.

There is one further question, the 3rd question argued in support of this decree before us by Dr. Sapru, whether the lady understood and intended to carry out the terms of the deed. It is really covered by the uncontradicted evidence to which I referred at the commencement of this judgment, and it is finally set at rest by the deposition which has been put in evidence sworn to by the lady in another suit in 1893. It is quite true that there is no evidence that this document was explained to her at the time and that she was made to understand it. It is difficult to see how there could be. In my experience of cases of this kind where a *parda-nashin* lady is concerned, certainly where the transaction is dubious, there is generally direct evidence of a number of people who shouted out the contents of the document to her. In this case the circumstances speak for themselves. The deed itself has a ring of genuineness about it. The simplest woman in the world would have no difficulty in understanding it dealing with her own property if it was

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read to her at all, and 17 years afterwards when advanced in years and suffering according to her own account from defective memory and embarrassment in appearing behind the *pardah* before a large number of people, she was able to give a fair and honest account of the transaction. On that occasion she showed intelligence of a high order. She was asked an almost impossible question for anybody to answer, certainly for an owner of a large estate of this kind to answer, with reference to the profits of a village she had had nothing to do with for 17 years. "What is the profit of the village you gave?" Being behind the *pardah* she wanted to know whether it was her own or her opponent's pleader who was asking this question. I do not suppose that she was prepared to tell an untruth if it was her opponent's pleader. She could have known nothing about the subject at all. What was passing in her mind was that it was an impertinent question. Her conduct on that occasion seems to me to be that of an intelligent and capable woman such as is described by the uncontradicted evidence. I am satisfied that this was as genuine a gift for religious purposes as any gift of the kind that was ever made. I agree in the order proposed by my brother.

BY THE COURT.—The appeal is allowed, the decree and order of the court below are set aside and the plaintiff's suit is dismissed with costs throughout.

-B. K. M.,

Appeal allowed.

MUKAT LAL (*Plaintiff*)*versus*GOPAL SARUP (*Defendant*)*

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Nov. 28.

RICHARDS,
O. J.
BANKS, J.

Limitation Act (IX of 1908), schedule I, article 2—Sale of plaintiff's property in execution of money decree—Tender of decretal amount by plaintiff—Sale held by Amin in spite of it in collusion with decree-holder—Sale set aside—Suit for damages—Limitation.

In execution of a simple money decree certain immovable property belonging to the plaintiff was advertised for sale. On the date fixed for the sale the Amin came to sell the property. Before the sale, the plaintiff alleged, he had tendered the decretal amount to the defendant, but in spite of it the defendant held the sale in collusion with the decree-holder. The sale was subsequently set aside on plaintiff's application under Order XXI, rule 89 of the Code of Civil Procedure. The plaintiff brought this action for damages against the Amin nineteen months after the date of sale. The defendant *inter alia* pleaded limitation in bar of the suit under Article 2 of Schedule I to the Limitation Act.

Held that the suit was barred under Article 2 of Schedule I to the Limitation Act, inasmuch as the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the Code of Civil Procedure.

"The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible."

Cases of this nature are distinguishable from cases where a defendant pleads in defence to an alleged illegal act that it was done in pursuance of a legislative enactment which requires notice of the action before the institution of the suit. *Ranchordas Morarji v. The Municipal Commissioner for the City of Bombay*, [1901] 1. L. R., 25 Bom., 387, not followed.

FIRST APPEAL from a decree of L. JOHNSTON ESQ., District Judge of Meerut.

Suit for damages.

The plaintiff alleged in his plaint that in execution of a simple money-decree against him his immoveable property had been attached and advertised for sale. On the date of the sale, the defendant, who was the court Amin came to the village to conduct the sale. Before the sale the plaintiff tendered the full amount mentioned in the proclamation of sale to the defendant but the

* F. A. No. 233 of 1916.

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latter, acting in collusion with the decree-holder dishonestly and with a view to cause loss to the plaintiff, did not accept the tender and sold the property at a very low value. The sale was subsequently set aside on the plaintiff's application under Order 21, rule 89, Civil Procedure Code. The action of the defendant was wholly illegal, irregular and fraudulent, and had resulted in damage to the plaintiff. The defendant pleaded, *inter alia*, that the suit, having been instituted more than three months after the date of the sale was barred by limitation under Article 2 of the Limitation Act, 1908. The lower court sustained this plea and dismissed the suit without trying it on the merits.

Plaintiff appealed.

Sital Prasad Ghosh, for the appellant.—On the facts alleged in the plaint Article 2 did not apply and the suit would be governed by Article 36, and was within time. Article 2 was only intended to protect persons or public authorities acting *bona fide* in pursuance of the powers conferred under a statute. But where a man knows that what he is doing is wholly unwarranted by the law and indeed opposed to its provisions, and he acts maliciously and dishonestly in defiance of the law, he cannot claim the privilege of the shorter period of limitation provided for by Article 2. He can only do so when he acting in good faith commits an illegality either by mistake or inadvertence or even negligence.

[RICHARDS, C. J.—Do you lay any stress on the word “alleged” in Article 2 in support of your argument.]

No. Nothing turns upon it. I rely upon

Ranchordas Morarji v. The Municipal Commissioner for the City of Bombay, [1901] I. L. R., 25 Bom., 387 ;

Selmes v. Fudge, [1871] L. R., 6 Q. B., 724;

Wali Ullah v. Raj Bahadur, [1914] 16 O. C., 211, S. C., 21 I. C., 426;

Halsbury's Laws of England, Vol. XXIII, 343.

[RICHARDS, C. J.—In this case but for the statutory duty of the defendant to accept your tender, you would have had no cause of action. The plaintiff's whole case is based upon the statute. Article 2 does not make any distinction between acts done or omitted wilfully or even maliciously and acts done or omitted negligently or under a mistake. Cases arising under enactments requiring previous notice of action stand on a different principle. He referred to

O'Dea v. Hickman, [1886] 18 L. R. Ir., 233.

The defendant was really guilty of a mal-feasance of maliciously and illegally selling the plaintiff's property. That has caused the latter damage. Article 2 does not apply to a case of mal-feasance. Article 36 really applies.—

[BANERJI, J., Article 2 covers acts of commission and omission alike.]

Kailas Nath Katju, for the respondent, was not called upon.

The judgment of the Court was delivered by

RICHARDS, C. J.—This appeal arises out of a suit in which the plaintiff claimed damages against the defendant on certain allegations which are set forth in the plaint. They are as follows:— There was a decree out against the plaintiff for a small sum of Rs. 205-13. The defendant was the court Amin whose duty it was to sell the plaintiff's property in execution of the decree. The plaintiff alleges that on the day of the sale he tendered the amount of the decree to the defendant whose duty it was under Order 21, rule 69 to receive the money and not proceed with the sale. The plaintiff goes on to allege that the defendant being a friend of the decree-holder refused to accept the money and proceeded with the sale, the result being that the plaintiff had to deposit the full purchase money which the auction purchaser had bid for the property together with 5 per cent, as a condition precedent to getting the sale set aside. The defendant denied that the plaintiff had tendered him the money (and it does seem a little strange that the plaintiff would have allowed the property, which he alleges to be worth about Rs. 5,000 to be attached and advertised for sale sooner than discharge a decree for a trivial sum.) However these questions have not been gone into in the court below. The learned District Judge instead of allowing the case to be tried by the Munsif took it on his own file because the conduct of a court official was being challenged by the suit. We think his action in this respect was quite correct. The learned Judge held that the suit was barred by Article (2) of the Limitation Act. That article provides a period of limitation of ninety days for suits brought for "compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in British India." In the present case if the act of the defendant complained of be the alleged refusal to accept the money due on foot of the decree, the suit is based on the allegation that the defendant omitted to do an act which it was his duty to do under one of the provisions of the Code of Civil Procedure namely to receive the decretal money before sale. If on the other hand the act complained of be the proceeding to sell the property, again there can be no doubt that the complaint is that the defendant did an act purporting to be under the Code but improperly, namely to sell the property after the decretal amount had been tendered. The learned District Judge dismissed the plaintiff's suit as barred by Article 2 of the Limitation Act, (it being admitted that the suit was not brought within ninety days of the alleged act of the defendant). As a matter of fact the suit was not instituted until after the expiration of about nineteen months of the act complained of. In appeal to this Court it has been argued that Article 2 does not apply to any case where the act alleged is a wilful act and that the article only applies where the defendant in doing or

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omitting to do the act *bona fide* believed that he was acting correctly and in accordance with law; and it is accordingly contended that the court below ought to have determined whether or not the defendant wilfully refused to receive the decretal money from the plaintiff and if it found that he did, it ought to have given a decree against him notwithstanding the suit had been instituted after the expiration of ninety days. In support of this contention a number of authorities have been cited. For the most part they are cases in which the defendant claimed the protection of provisions in various enactments requiring notice of action. In one case no doubt the question whether or not Article 2 of the Limitation Act applied did arise, namely in the case of *Ranchordas Morarji v. The Municipal Commissioner for the City of Bombay* (1), but it seems to us that the learned Judges who decided that case held that the Article of the Limitation Act did not apply by applying the reasoning which formed the basis of the decision in some cases that the defendant could not plead the want of notice of action. It seems to us that the reasons which have been given in several cases for holding that the defendant could not plead want of notice of action do not necessarily apply to a plea of limitation. In the present case the whole foundation of the plaintiff's claim is the alleged omission by the defendant to perform a duty imposed by the Code. The policy of the law is quite clear, namely that suits of this nature should be brought and investigated as promptly as possible. The issue of fact in the present case would have been whether the plaintiff tendered and the defendant refused to receive the decretal amount. A moment's reflection will show how unsatisfactory it would be that such a matter should be investigated two or three years after the sale. It may not be unreasonable where a defendant pleads as a defence to an alleged illegal act that the act was done in pursuance of a legislative enactment which requires notice of action before the institution of suit, that the defendant should show that he acted *bona fide* and in the belief that his action was justified. But such reasoning is not equally applicable to a plea of limitation. We think that the view taken by the learned District Judge was correct and we accordingly dismiss the appeal with costs.

K. N. K.

Appeal dismissed.

(1) [1901] I. L. R., 25 Bom, 387.

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K, a commission agent, exposed for sale canisters containing <i>ghes</i> as good and genuine. On analysis the <i>ghes</i> was found to be adulterated:—Held that he was liable to punishment, under Act VI of 1912 and that he, being a commission agent who exposed the same for sale, could not come within section 6 of the Act.	
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The defendant was a proprietor in a certain mahal. He had in his possession lands of three descriptions	

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namely, sir, properly so called, <i>khudkasht</i> , cultivated as such for over 12 years and having all the incidents of sir though not so recorded and <i>khudkasht</i> of less than 12 years. He made a usufructuary mortgage of his share to the plaintiff and entered into a contract with him to the effect that he would hold all the lands of each of the three descriptions as tenant of the plaintiff at a certain specified rent for each class of land. Plaintiff brought three suits for arrears of rent. The defendant, <i>inter alia</i> , contended (1) that the plaintiff was not entitled to sue alone, the right to collect the rents of these lands being vested in the entire body of the co-sharers of the mahal; and (2) that the rent agreement between the parties was unenforceable being in contravention of section 10 of the Tenancy Act:—Held (1) that the defendant was estopped from raising the first plea inasmuch as he had entered into a rent-agreement with the plaintiff in respect of these particular lands; and (2) that the Revenue Court was not precluded from accepting an agreement whereby the defendant undertook to pay to the plaintiff a certain rent for the ex-proprietary holdings.	
The provisions of section 10 of the Tenancy Act fix a maximum rent, but the parties are not thereby prevented either from contracting for the payment of a lower rate of rent, or from coming to a conclusion with reference to section 10 as to what rent is likely to be fair and they may agree to pay the same. Such an agreement is not enforceable in itself; what is wanted is an order under section 10, clause 5, fixing the rent to be paid by an ex-proprietary tenant; but the law does not lay down that this order cannot be based upon an agreement come	

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to between the parties or that its terms cannot be taken into account.	transaction was one single transaction effected under cover of two deeds, and the covenants relating to the surrender of exproprietary rights and the transfer to the mortgagees of actual cultivating possession thereon were void and unenforceable, the attempt in this way being to evade the provisions of sections 10 and 20 of the Tenancy Act.
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Sections 10, 21 —Two documents executed on the same day—Usufrutuary mortgage of sir land with covenant that mortgagors will not set up exproprietary rights—Deed of relinquishment of sir —Actual possession of such land given to mortgagees—One transaction under colour of two deeds—Covenants void—Evasion of law.	Section 20 —Attempts to evade provisions of. See Agra Tenancy Act section 10 329
If a covenant to relinquish the sir lands is part of a transaction of sale or of mortgage then the agreement to surrender will be void and unenforceable, no matter what ingenious devices may be employed to give colour to it. If a court is satisfied that there was first of all a transfer by way of sale or mortgage and that the transferee, having obtained the status of an exproprietary tenant, with full knowledge of that fact and of the rights preserved to him by statute, deliberately chooses as a separate transaction, to relinquish his exproprietary tenancy into the hands of the new proprietor, or of the mortgagee in possession, the law cannot protect a reckless and imprudent man against the consequences of his own acts. Mir Dad Khan and others owned certain zemindari property with 30 bighas of sir land. They were indebted to certain persons for a sum of Rs 9,000. On June 19th, 1913, two documents were executed by one of which the zemindars covenanted to mortgage with possession the 30 bighas of sir. The mortgage-deed contained not merely an express stipulation to put the mortgagees in actual cultivating possession of the sir lands, but a penalty clause binding the mortgagors not to assert their rights as exproprietary tenants. By the other document, which was a deed of relinquishment, the mortgagors purported to surrender or to relinquish in favour of the mortgagees, in lieu of Rs. 1,000, their rights as exproprietary tenants in the 30 bighas of sir.—Held that the	Section 20 —Mortgage of occupancy holding—Mortgage void—Suit for redemption—Suit maintainable. A usufructuary mortgage was made of an occupancy holding in 1905. The mortgage was void under section 20 of the Tenancy Act. The mortgagor sued to redeem the mortgage and offered to pay the money due thereunder:—Held that the plaintiff was entitled to get back possession on his paying the mortgage money as he had offered to do. RAMZAN v. BHUKHAL RAI ... 747 Section 20 —Transfer—Occupancy tenancy acquired by a member of joint Hindu family—Profits thrown into common stock—Whether such property may be joint family property—Personal law of the parties inapplicable. A special statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters Hence, where a zamindar granted the lease of certain land to M who formed with certain other persons a joint Hindu family and it was found that M threw the profits derived from this land into the common stock of the joint family, held that the tenancy did not become part of the assets of the joint family, inasmuch as its doing so would amount to the Court sanctioning the transfer of a tenancy

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otherwise than under section 20 of the Tenancy Act.	to remain in exclusive possession as mortgagees and that the defendants had acquired a share in the equity of redemption. In accordance with this decision the Assistant Collector held that the defendants were non-occupancy tenants and he decreed their ejection:— <i>Held</i> that the defendants had been properly ejected under section 34 of the Tenancy Act.
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—Section 22 —Occupancy holding—Succession.	
Several persons were entitled to an occupancy holding. The holding as between the zemindar and the persons entitled thereto was one holding of which the rent was jointly paid. One Bhim Sen was in possession of a three-eighths share. The plaintiffs who were the nearest reversioners of Bhim Sen brought a suit against one Roshan Singh to recover possession thereof. Bhim Sen died before the Tenancy Act came into operation and was succeeded by his widow, who died after the Act had come into force. The plaintiffs cultivated the "holding" jointly with Bhim Sen, but they did not cultivate the particular plots constituting Bhim Sen's share. The suit was dismissed on the ground that the plaintiffs did not share in the cultivation with Bhim Sen of his plots:— <i>Held</i> that section 22 of the Tenancy Act did not apply, and the plaintiffs were entitled to succeed.	<i>Per</i> WALSH, J.—The words "a person occupying land without the consent of the landlord" (in section 34 of the Tenancy Act) mean one who enters into occupation without express consent or without any previous arrangement.
BHUP SINGH v. JAI RAM ... 459	JAGARDEO SINGH v. ALI HAMMAD 249
—Section 34 —Person occupying land without consent of landlord—Ejection decree in Revenue Court—Usufructuary mortgage of <i>sir</i> before Tenancy Act—Mortgagee in possession—Dispossession by person owning equity of redemption—Status of such owner.	—Section 57— <i>Act detrimental to land.</i> See Landlord and Tenant ... 621
Plaintiffs were in possession of certain plots of <i>sir</i> land under a usufructuary mortgage made prior to the passing of the Agra Tenancy Act. Defendants who had acquired a part of the equity of redemption managed to get into possession of these plots, whereupon the plaintiffs sued to eject them in the Revenue Court. The defendants denied the relationship of landlord and tenant and also raised other pleas. They were referred by the Revenue Court to the Civil Court. The Civil Court held that the plaintiffs were entitled	—Section 95— <i>Suit for declaration of tenancy—Court-fee payable in appeal.</i> See Court-Fees Act Art. 5, ... 167
	—Section 150 —Muafi land—Resumption—Proprietor—Perpetual lessee entitled to resume.
	In section 150 of the Agra Tenancy Act the Legislature has used the word "proprietor" and not "landholder," and it may thereby have intended that the right to resume should lie only in the proprietor and nobody else. Consequently, a holder of a perpetual lease of certain land under which the lessor reserved to himself, the right to receive an annual payment together with the right to re-enter in case of default is a proprietor of the <i>mahal</i> for the purposes of section 150 and entitled to resume.
	MATA BADAL SINGH v. GOURISH NARAIN SINGH ... 619
	—Sections 158, 167—Resumption of rent-free grant—Jurisdiction of Civil and Revenue Court—Revision to High Court.
	An application was made to the Revenue Court for partition. Cer-

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tain persons objected that they had become proprietors of a certain share by reason of their having held it as a rent free grant for more than fifty years and for two generations. The Revenue Court held that this was a question of proprietary title and referred the parties to the Civil Court. The latter thereupon brought a suit in the Civil Court for the declaration contended for by them. The court of first instance held that it was not a question of proprietary title and that the suit was cognizable by the Revenue Court. The plaint was accordingly returned for presentation to the proper court. The decision of the first court was affirmed by the District Judge in appeal:—<i>Held</i>, in revision, that having regard to section 167 of the Tenancy Act and to the fact that cases under section 158 of that Act are mentioned in the fourth schedule to it as cases cognizable by the Revenue Court, a suit for a declaration that <i>muafi</i> rights had ripened into proprietary rights could only be brought in the Revenue Court and not in the Civil Court.	this case the quality of the land in excess will have to be taken into consideration; (3) if some of the co-sharers neglect to cultivate their <i>sir</i> and <i>khudkashi</i> they cannot call upon the others to account for the profits of the <i>sir</i> and <i>khudkashi</i> of those co sharers unless such <i>sir</i> and <i>khudkashi</i> were in excess of their own.
NANNHU v. SRI THAKURJI MAHARAJ	ANGAD SINGH v ZORAWAR SINGH 146
Section 164 —Suit for profits—Co-sharer in possession of <i>sir</i> and <i>khudkashi</i> in excess—Basis of calculation of profits.	Section 164 —Suit for profits against lambardar —Death of lambardar during pendency of suit—Suit continued against representative of lambardar —Liability of such representative —Construction of statute.
Where some of the co sharers in a <i>mahal</i> are found to be in possession of considerable areas as <i>sir</i> and <i>khudkashi</i>, in calculating the profits the following matters should be taken into consideration:—(1) Where different co-sharers are entitled to different portions of the <i>mahal</i> as their <i>sir</i> and <i>khudkashi</i> each co-sharer would be entitled to the profits of his own <i>sir</i> and <i>khudkashi</i> and he would not be obliged to account for those profits to other co sharers; (2) if, on the other hand, any co-sharer had in his hands and in his own cultivation an excess of land, over and above his proper share of <i>sir</i> and <i>khudkashi</i> he should account for the excess. In	The word 'defendant' in subsection (2) of section 164 of the Agra Tenancy Act contemplates the original defendant to a suit, and therefore the amount to which the plaintiff would be entitled would include such sums as remained uncollected owing to the negligence or misconduct of the original defendant, that is, of the lambardar. In view of the provisions of section 164, the question of gross negligence or misconduct of the original lambardar would have to be gone into and if such negligence or misconduct was shown, his representative would be liable to the extent of the assets of the deceased which came into his hands. The liability, however, of the representative of the lambardar would not be a personal liability. The assets of a deceased lambardar should not escape liability simply because the said lambardar who had neglected to make collections or was guilty of gross misconduct, happened to die after the expiry of the year during which the collections had to be made. A suit for profits actually collected and also such as remained uncollected owing to his gross negligence and gross misconduct was brought against a lambardar. He died during the pendency of the suit and his legal representative was made defendant in his place. He contended that he would not be liable for such

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sums as were left uncollected owing to the negligence and misconduct of the original defendant :—*Held* that he would be liable for such sums, the decree being confined to the assets of the deceased lambardar in his hands.

BHARATH SINGH v. TEJ SINGH F.B. 193

—Section 167
—*Ejectment suit in the Revenue Court—Defendant ejected as sub-tenant—Suit in the Civil Court by defendant for declaration of title as co-tenant—Suit not maintainable.*

Where a Revenue Court in a suit for ejectment decided that B was A's sub-tenant and accordingly decreed B's ejectment, *held* that a subsequent suit in the Civil Court by B for declaration that he was a co-tenant of A was not maintainable having regard to section 167 of the Agra Tenancy Act.

KISHORE SINGH v. BAHADUR SINGH 933

—Sections 175, 177, 193,* *scope of—Order staying or refusing to stay a suit pending in Revenue Court—Whether appeal lies to Civil Court from such order.*

Section 175 of the Agra Tenancy Act applies to all appeals, whether these be appeals to the Revenue Court itself or to the Civil Court. Section 177 deals with appeals which lie to the Civil Court and a right of appeal is only given against a "decree," and then only in certain class of cases. No appeal is given against an "order."

• Consequently an order staying a suit in the Revenue court or an order refusing to stay such suit is not a "decree" within the meaning of section 177 of the Tenancy Act, and no appeal lies to the High Court against such an order. Section 193 of the Act by incorporating the Civil Procedure Code gives an appeal to the Revenue Court and not to the Civil Court.

KIRPA DEVI v. RAM CHANDAR SARUP ... 231

—Section 177,
scope of.

See Agra Tenancy Act section 175 231

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—Section 177,
—*Suit in ejectment in Revenue Court—Defendant denying tenancy from plaintiff—Allegation of lease from other persons—Question of proprietary title in issue in court of first instance—Appeal—Jurisdiction of Civil Court.*

Where in a suit for ejectment instituted in the Revenue Court the defendants pleaded that they were not the plaintiff's tenants but that they were lessees from other persons and the plaintiff had no right to sue them, *held* that this was a question of proprietary title which was in issue in the court of first instance and was in issue in the appeal, hence an appeal lay to the Civil Court.

HAR PRASAD v. TAJAMMUL HUSAIN 239

—Section 193
—*Order of remand—Appeal—Preliminary and final decrees.*

Plaintiff brought a suit to be declared the proprietor of a *muafi*. The court of first instance dismissed the suit. The lower appellate court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that "the suit be remanded to the lower court for determination of the revenue payable by the plaintiff-appellant," *Held* that the order being one of remand no second appeal lay to the High Court; and as there was no provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree.

ANANDGIR v. SRI NIWAS ... 711•

—Section 193
—*Suit pending in Revenue Court—Order refusing to stay.*

See Agra Tenancy Act section 175 ... 231

—Section 201
—*Suit for profits—Plaintiff not recorded co-sharer—No bar to suit—Procedure to be followed in the case.*

Under section 201 of the Tenancy Act the mere fact that a plaintiff is

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not recorded as a co-sharer is not enough to bar him from maintaining a suit for profits. The procedure to be followed in a case in which a plaintiff is recorded and in a case in which he is not recorded is indicated in the section. In the latter case if an issue as to the plaintiff's title arises the Revenue Court should either try it or refer the plaintiff to a Civil Court.	
JAIMAL SINGH v. SHIB SARAN SINGH 504	
—Section 202 —Suit brought in Civil Court against defendant as trespasser—Defendant pleads tenancy—Suit referred to Revenue Court—Suit instituted there for declaration of nature of tenancy—Objection to jurisdiction over-ruled—Appeal to District Judge—Jurisdiction.	
Defendant sued in the Civil Court for ejectment as a trespasser raised the plea that he was a tenant of the plaintiff. The Civil Court referred the defendant to the Revenue Court under section 202 of the Tenancy Act. A suit was instituted by the defendant under section 95 of the Tenancy Act for a declaration of the nature of his tenancy. An objection on the score of jurisdiction was over-ruled by the Revenue Court. The Revenue Court having made a decree, an appeal was preferred to the District Judge who entertained it on the ground that the question of jurisdiction having been decided an appeal lay to him:— <i>Held</i> that no appeal lay to him, an objection on the score of jurisdiction under the circumstances being absolutely untenable.	
DEO NARAIN SINGH v. SITLA BAKSH SINGH 590	
—Agreement—Forgoing right to sue for declaration—Registration.	
See Registration Act section 17... 191	
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See Criminal Procedure Code section 423 (b) 912	
—Amendment—Decree affirmed.	
See Decree—Amendment ... 451	
Appeal—Divisible into parts—Court-fee payable.	
See Court-Fees Act section 7 (1)... 174	
—Ejectment suit referred to Revenue Court—Jurisdiction of Judge.	
See Agra Tenancy Act section 202 590	
—Order refusing to set aside sale	
See Civil Procedure Code O. 21 r. 89 433	
—Question of proprietary title—Ejectment suit—Tenancy denied.	
See Agra Tenancy Act section 177 239	
—Remand order.	
See Agra Tenancy Act section 193 711	
—Rent cases—Order.	
See Agra Tenancy Act section 175 231	
—Retrial ordered on ground that evidence not recorded—Illegal.	
See Criminal Procedure Code section 423 325	
—Suit for sale—Defendant's prior claim disallowed—Fee in appeal.	
See Court-Fees Act section 7 (4)... 81	
—Temporary dismissal—Legality of order.	
See Criminal Procedure Code section 439 210	
—Winding up proceedings—Preferential payment.	
See Companies Act section 169 ... 70	
—Arbitration—Reference to 6 arbitrators—All not taking part.	
See Civil Procedure Code Sch. II para 14 (c) 307	
Arms Act (XI of 1878), section 19 (f)—Minor—Actually in possession of arms without license—Guilty of offence under the Act.	
Held that a minor who has in his custody and under his control arms without a license is guilty of an offence under section 19 (f) of the Arms Act, there being nothing in the Act to prevent a minor being guilty of an offence thereunder.	
EMPEROR v. GHULAM HUSAIN ... 323	

Arms Act—(concl'd)	PAGE.	Bengal Land Revenue Sales Act—(concl'd)	PAGE.
—Sections 19 (f), 30		which exceeds Rs 500 is not an illegality which <i>per se</i> vitiates the sale as having been made "contrary to the provisions" of Act XI of 1859.	
—Possession of unlicensed arms—		Semble, that it is a sufficient compliance with paragraph 2 of section 6 of that Statute if the sale has been notified in the Official Gazette published at Calcutta	
Search made by Sub-Inspector without warrant from Magistrate—		SHARF UD-DIN v. SAMANTA RADHA CHURAN DAS P. C., ... 915	
Officer in charge of reporting station		—Sections 31	
—Legality of search		and 53—Encumbrances—Sale proceeds—Purchase by the proprietor—Sale brought about by the proprietor from dishonest motives—Code of Civil Procedure (Act V of 1908), sections 107 and 151—Order 41, rule 33—Powers of the Court of Appeal—Estoppel.	
Under section 30 of the Indian Arms Act, the power of search in respect of an offence punishable under clause (f) of section 19 of the Act is to be made in the presence of some officer specially appointed by name or in virtue of his office, by the Local Government in this behalf, and the provisions of Chapter VII of the Act did not render illegal a search made by an officer-in-charge of a reporting station without a warrant from a Magistrate.		The Bengal Land Revenue Sales Act (II of 1859), section 31 provides that the purchase moneys, after paying the public claims, shall be held on account of the recorded proprietor or proprietors, provided that if before payment the same be claimed by any creditor in satisfaction of a debt, it shall not be paid over without the decree of the court; but the section nowhere transfers any charges on the property from the property to the proceeds, and as the revenue sale conveys a title free from encumbrances to the purchaser, the mortgagees are clearly entitled to claim the same as creditors under the section, and the court would undoubtedly direct that such claims, in due order of priority, should be satisfied out of the sums in the hands of the Collector.	
A Sub-Inspector of police who was in charge of a reporting station searched the house of the accused reported as being in possession of arms without a license. The said officer had not a warrant from a Magistrate, but he was specially empowered by the Local Government in virtue of his office to make such a search :—Held that the search was not illegal		Where the property is bought by the recorded proprietor and the estate is acquired, under section 53 of the Act, subject to all its encumbrances existing at the time of the sale, the transaction of the sale has merely provided money for payment of the Government claims and the encumbrances are left entirely unaffected and could only be enforced against the property, and the rights to the sale proceeds of the recorded proprietor, who has purchased the property,	
BABU RAM v. EMPEROR ... 721			
Attachment—Before declaration of insolvency—How long operative. See Provincial Insolvency Act section 23 ... 32			
Banslochan—Method of preparation—Patent.			
See Patent—Novelty ... 941			
* Baptism—Infant—Subsequent conduct—Whether valid.			
See Christian Marriage Act section 5 ... 414			
Bengal Land Revenue Sales Act, (Act XI of 1859), Sections 3, 5, 6, 33—Sale for arrears of Government revenue—"Illegality" and "irregularity"—Distinction between them—"Official Gazette"—Publication in Vernacular Gazette unnecessary.			
Failure to notify in the Vernacular Government Gazette the sale of an estate the Government revenue of			

Bengal Land Revenue Sales	PAGE.		PAGE.
Act—(concl'd)		Bengal Patni Taluks Regulation, 1819 (Bengal Regulation VIII of 1819), Section 14—Money had and received—Money paid under a claim in legal proceedings—Not ordinarily recoverable—Chota Nagpur Encumbered Estates Act, 1876 (Act VI of 1876)—Has no application to immovable property outside of Chota Nagpur.	
are those under section 31, notwithstanding the fact that the motives which led him to cause the sale or purchase were dishonest.		In proceedings under section 14 of the Bengal Patni Taluks Regulation 1819 (Bengal Regulation VIII of 1819) the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not in the same position as persons who pay a claim brought against them in an ordinary suit in which they had a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so hereafter. Whether or not he contests the claim, a talukdar to stop a sale under section 14 has to deposit the full amount claimed: and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit.	
In a suit to which a puisne mortgagee was a party the prior encumbrancer prayed for and obtained a decree against the sale proceeds of a revenue sale. The puisne mortgagee brought two suits, one for a declaration that the recorded proprietor was the <i>benamidar</i> of the purchaser at the sale, and consequently the latter acquired the property subject to encumbrances, and the second to enforce his mortgage against the property. The court of first instance held that the purchaser was the real owner of the property and decreed both suits in favour of the puisne mortgagee. Against these two decrees the purchaser appealed and the puisne mortgagee appealed against the decree in favour of the prior mortgagee. The High Court heard all the appeals together, and affirming the finding of the court below dismissed the purchaser's appeals and gave the prior mortgagee a decree against the property in lieu of that against the sale proceeds:—		The Chota Nagpur Encumbered Estates Act, 1876, (Act VI of 1876) has no application to immovable property outside the limits of Chota Nagpur.	
<i>Held</i> , that inasmuch as on hearing the puisne mortgagee's appeal the High Court had before it all the facts which showed all the circumstances relating to the sale, the court had abundant power under sections 107 and 151, and Order 4, rule 33, of the Code of Civil Procedure, 1908, to vary, as it did, the decree in the prior mortgagee's suit; <i>Held</i> , also that the fact that the puisne mortgagee did not attack the sale in the prior mortgagee's suit, did not operate as an estoppel against the puisne mortgagee so as to prevent him from attacking the sale in his own suit, and obtaining consequential relief.		JOYTI PRASHAD SINGH DEO BAHADUR v. KUMUD NATH CHATTERJI P.O. 569	
TARINI CHARAN SARKAR v. BR SHUN CHAND P. C., ...	271	Bengal Tenancy Act, (Act VIII of 1885), Section 5, sub-sections 1, 4, 5—Land Tenure in Bengal—Tenure-holder or raiyat—Area exceeding 100 standard bighas—Presumption that tenant is tenure holder—Purpose for which lease is granted—Cultivation by sub-lessee.	
Section 53—Sale brought about from dishonest motives.		Defendant was assignee of a lease of over 100 standard bighas of land granted by plaintiff's predecessor for cultivation, without any restriction as to the agency to be employed in such cultivation.	
See Bengal Land Revenue Sales Act section 81 ...	271	<i>Held</i> , that under the circumstances of the case the presumption arising under sub-section (5) of section 5 of the Bengal Tenancy Act,	

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1885, that the tenant was a tenure-holder and not a *raiyyat*, since the area exceeded 100 standard bighas was not rebutted by referring under sub-section (4) of the same section to the purpose for which the right of tenancy was originally acquired.

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DHENDRA MANEINGH BHRAMARBAR.
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**Blindness—When causes exclu-
sion.**

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**Bombay Regulation IV of
1827, Section 26—Custom—Pre-
sumption in favour of.**

See Custom, proof of ... 17

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sity—Liability of Hindu Mortga-
gor's share.**

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————— *Lurking house
trespass.*

See Penal Code section 456 ... 153

**Breach of Contract Act, (XIII
of 1859)—Contract for supply of
stones by person dealing in same—
Whether governed by the Act.**

Where a person who dealt in stones entered into a contract with another to supply stones and took money in advance for that purpose but failed to supply the stones according to the terms of the contract, held that the breach of Contract Act did not apply to him, the case being one of an ordinary contract to supply stones and the money not having been advanced on account of work to be performed by an artificer, workman or labourer.

BHAGWAN DIN v. MAHMUD ALI ... 407

**Cattle Trespass Act (I of
1871), Section 23—Prosecution of
Municipal Servants for impounding
cattle—Act unjustifiable—Cattle not
found to have done damage to Muni-
cipal trees—United Provinces Muni-
cipalities Act (II of 1916), section
326 (1).**

Section 326 (1) of the Municipalities Act relates only to suits of a

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civil nature in Civil Court and has nothing to do with prosecutions under the Cattle Trespass Act.

Where a Magistrate found that cattle had done no damage to Municipal trees and that consequently the seizure of the cattle by the accused who were municipal servants was without justification, held that the accused were rightly convicted under section 22 of the Cattle Trespass Act.

SATOLA v. EMPEROR ... 148

**Chota Nagpur Encumbered
Estates Act—Application of.**

See Bengal Patni Taluks Regula-
tion section 14 ... 569

**Christian Marriage Act (V of
1872), sections 5, 68—Marriage,
scope of—Solemnisation of marriage
according to caste rites between a
Native Christian and a bhanghi
girl—Person not authorised—Whether
punishable.**

Maha Ram belonging to the *bhanghi* (sweeper) caste was baptised when an infant. When he grew up Maha Ram dressed like a Christian and used to attend a Christian School, but there was nothing which went to show what he acknowledged or formally recognised as an object of faith or belief. Maha Ram married a *bhanghi* girl, and Bachhan and Mangli were "Mans" or priests of the sweeper class who solemnised the marriage according to *bhanghi* rites. Bachhan and Mangli were Christians. They were not persons authorised to solemnise marriages under section 5 of Act V of 1872, and the Marriage Registrar of the district was not present. Bachhan and Mangli were convicted of an offence under section 68 of the Christian Marriage Act, and so was Maha Ram under section 68, read with section 109 of the Penal Code.

Held that the conviction was bad as Maha Ram was not a Christian at the time of his marriage, and that to Bachhan and Mangli section 68 of the Act did not apply, because it applies to Christian marriages only.

Per KNOX, J.—Section 3 of the Christian Marriage Act interprets the

Christian Marriage Act	PAGE	Christian Marriage Act	PAGE.
—(contd.)		—(concl'd.)	
expression ' Native Christian ' The meaning given to this latter expression is different from the meaning given by the Act to the expression " Christian." It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the Legislature contemplated applying section 68 to Christians, i. e. persons professing the Christian religion and had wished to comprehend within it a Christian descendant of a native India, it would have been easy to provide for this in section 68. That no such provision was made confines section 68 strictly to persons who at the time of marriage were persons professing the Christian religion.		much as upon the object and scope of the Act	
		MAHA RAM v EMPEROR	414
		Civil Procedure Code (Act XIV of 1882), section 244—<i>Might and ought—Mortgage—Suit for sale—Decree for sale—Sale under decree not in compliance with Transfer of Property Act—Does such sale bar mortgagor's right to redeem—Transfer of Property Act (Act IV of 1882), section 60.</i>	
		In a mortgage suit for sale the decree made did not specify a day for payment as prescribed by sections 86 and 88 of the Transfer of Property Act. In execution of the decree the mortgaged property was attached, sold and purchased (with the permission of the court) by the decree holder. The sale was confirmed. The mortgagor thereafter sued for redemption.	
		<i>Held</i>, that as the property and all right, title and interest of the defendants in the suit for sale had in fact been sold under the decree of a competent court and such decree had not been appealed it was immaterial whether or not the provisions of the Transfer of Property Act were complied with and that even though such provisions had not been complied with those defendants were debarred from a right to redeem	
		<i>Held</i> also that the present suit was barred by section 244 of the Code of Civil Procedure, 1882, inasmuch as the questions now raised could and should have been raised before the sale was confirmed and if so raised would have been decided by the court executing the decree.	
		O. GANAPATHY MUDALIAR v. N. KRISHNAMACHARIAR P. O.	858
		Section 320, 325A.—<i>Execution of decrees—Transfer of decrees affecting immovable property to Collector—Restriction on judgment-debtor's power of mortgage.</i>	
		The incompetence to alienate without the Collector's permission,	

Baptism of a person as an infant when he has no possibility of saying to the world what is the faith to which he belongs or the fact that when grown up he puts on Christian costume and attends a Christian School cannot make such a person, a person professing the Christian religion within the meaning of the Act.

Per WALSH, J.—Having regard to the history of the Legislation on the subject, the Indian Christian Marriage Act must be held to apply to Christian marriages alone. The Act, however, does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so. Section 68 refers to a class of persons, namely, those who solemnize a Christian marriage under this Act, not being authorized by section 5 to do so. The Legislature could not have intended to sweep into the net of the Christian Law, through an indirect piece of Legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnisation or celebration. This would be contrary to the ordinary mode of interpretation of a statute. The question does not turn upon the word "solemnize" so

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imposed upon the judgment-debtor by section 325A of the Civil Procedure Code, 1882 is absolute and is not limited to the time during which the property is under the Collector's control. A mortgage created by the judgment-debtor in defiance of the prohibition is of no effect even after the property has come back into his hand

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CHINNUMIYA P. O ... 993

—(Act V of 1908), Section 11—Cross-appeals—Two decrees—One decree becomes final—Effect on appeal from the other—Res judicata—Previous suit deciding question of title of the nature cognisable by a Small Cause Court—No appeal from the decision.

The plaintiff brought a suit in the court of the Munsif to recover possession over a half share in two groves numbered 123 and 2 respectively. The suit was dismissed in respect of No. 2 and it was decreed in respect of No. 123. There were two appeals to the lower appellate court, the plaintiff assailing the decree in respect of No. 2 and the defendants that in respect of No. 123. Both the appeals were tried together and disposed of by one judgment, but two decrees were passed whereby the plaintiff's appeal was dismissed, and the defendant's appeal was allowed, the case being remanded. The plaintiff appealed against the second decree to the High Court.

In regard to grove No. 123 the plaintiff sued the defendants for damages for cutting down two trees. The suit was of the nature cognisable by a Court of Small Causes, but it was instituted in the court of a Munsif. In that suit the defendants denied the plaintiff's title, and the issue as to title was decided in the plaintiff's favour. In the present suit instituted in the same court the plaintiff again set up his title which the defendants denied. The Munsif held that the decision in the former suit operated as *res judicata*. The lower appellate court reversed the finding:—*Held* (1) that the fact

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of the decree in regard to grove No. 2 having become final did not operate to bar the plaintiff's appeal in respect of grove No. 123 on any principle of *res judicata*, (2) that the present suit was barred by the rule of *res judicata* by virtue of the decision on the question of title in the previous suit irrespective of the fact that the decree in that suit was not appealable to the High Court, the suit being of a Small Cause Court nature.

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—Section 11, Expt. 5—Mortgage—Suit on mortgage-bond—Person claiming paramount title—Not a necessary party—Issue as to paramount title cannot be litigated—Res judicata.

In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit.

A person was impleaded as a subsequent mortgagee in a suit upon a mortgage. The subsequent mortgagee claimed a title to a portion of the mortgaged property as owner. He, however, did not enter appearance in that suit. The mortgagors asserted that he was entitled as owner to a portion of the property. The court held that the mortgagors were estopped from raising that plea and ordered the whole property to be sold. In a subsequent suit by the subsequent mortgagee for a declaration of his right in respect of the portion in controversy in the former suit, *held* that he was not precluded from raising the question inasmuch as in the former suit he filled two capacities viz., (1) as a subsequent mortgagee in which capacity he was entitled to raise such defence as was open to the mortgagors, and (2) as claiming a paramount title in which case he could not raise the question in that suit.

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Sections 11
47—Mortgage, suit on—Person in possession holding up as shield payments made towards prior mortgages—Suit decreed subject to his lien—Final decree made without mention of the lien—Property sold and purchased by mortgagee—Dispossession of the person in possession—Suit by such person to recover money paid for prior mortgages—Suit not maintainable.

One *B* held two mortgages, dated respectively February 20, 1895 and June 27, 1895, over certain property belonging to *K*. There was a prior usufructuary mortgage over the same property for a sum of Rs 290. In execution of a decree one *M* bought the equity of redemption. *B* brought a suit on his first mortgage for sale of the property and he impleaded *M*. *B* mentioned the prior usufructuary mortgage and offered to pay the amount due thereon. He obtained a decree and paid in the amount of the prior mortgage which money was withdrawn by that mortgagee. The property, however, was not sold *M* having come to terms with *B*. Between 1901 and 1904, *M* paid in sums of money till the whole amount which was Rs. 737 odd was paid off. *B* then sued on foot of his second mortgage and asked for sale of the property. *M* who was a defendant held up as a shield his rights by virtue of the payment of the two prior mortgages. The court held that he could hold this up as a shield and made a decree for sale subject to his lien. At the time of drawing up the final decree, however, no mention was made of the lien in favour of *M*. The property was sold and bought by *B*. *B* did not deposit any sum for payment to *M* and *B* obtained possession of the property. *M* objected that he could not be dispossessed till he was paid off but the court refused to go into this question in execution proceedings and directed *M* to bring a separate suit. *M* thereupon brought the present suit claiming Rs. 737 with interest from *B* by sale of the pro-

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perty :—Held that the suit was not maintainable, being barred by the principle of *res judicata* and the provisions of section 47 of the Code of Civil Procedure.

MOTI RAM v. BANKE LAL ... 685

Section 11,
Explanation V, Order 20, rule 12—
Suit for possession and mesne profits
—Decree silent regarding future
mesne profits—Fresh suit for such
profits not barred.

Notwithstanding the provisions of sections 13 and 43 Act No XIV of 1882 a subsequent suit for mesne profits *pendente lite* and from the date of the decree to delivery of possession could be maintained when the court had omitted to adjudicate upon the claim in the suit for possession of immovable property and for mesne profits, past and future, and the changes in Act No. V of 1908 do not bar such a suit for the mesne profits accruing due after the institution of the former suit. The change embodied in Order 20, rule 12 of the present Code of Civil Procedure is that it is the court which hears the suit which is to ascertain the mesne profits whether those mesne profits be mesne profits which accrued before the institution of the suit or afterwards up to the date of the delivery of possession, and it is this Court which is to pass the final decree for mesne profits which has to be executed by the court executing the decree, and further than this there is no alteration in the nature of the claim as to future mesne profits.

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Section 24
(4)—Provincial Small Cause Courts Act (IX of 1887), section 35—Suit pending in court of Subordinate Judge invested with Small Cause Court powers—Subordinate Judge on privilege leave—Officer not having Small Cause Court powers to the same extent succeeding him—Transfer of suits of certain value pending in Small Cause Court—Jurisdiction

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—*Munsiff not having Small Cause Court powers—Appeal—Jurisdiction.*

A Subordinate Judge was invested with the powers of a Small Cause Court Judge up to Rs. 500. A suit was filed in that jurisdiction valued at Rs. 273. The officer in question went on privilege leave and was succeeded by a Munsiff as Subordinate Judge. That Munsiff had Small Cause Court powers up to Rs. 250. After this officer had taken charge the District Judge transferred all suits above Rs. 250 in value pending in the Small Cause Court jurisdiction to another Munsiff. The suit was tried and the Munsiff decreed the suit for a very small amount. The plaintiff appealed and objection was taken on behalf of the defendants that the suit was a Small Cause Court suit and no appeal lay. The objection being allowed the plaintiff applied to the High Court for revision of that order:—*Held* that the suit being of a value exceeding Rs. 250 remained pending on the Small Cause Court side, the presiding officer of the court by reason of taking leave for a short time did not cease to be invested with the jurisdiction of a Small Cause Court Judge and the suit was tried as a Small Cause Court suit by the Munsiff to whom it had been transferred and consequently no appeal lay.

CHATURJI SINGH v. RAMIA ... 548

—*Section 47—Hindu Law—Mitakshara—Suit on mortgage against father and son—Son exempted in the decree—Simple money decree against father—Execution against son disallowed—Subsequent suit against son barred.*

A suit was instituted against a Hindu father and his son (who were members of a joint Hindu family governed by the *Mitakshara* Law) on the basis of a mortgage. The son contested his liability on the ground that there was no legal necessity. The result was that a simple money decree was granted against the father alone and in the

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decree it was stated that the son was "exempted" and costs were given to him against the plaintiff. On the decree being executed the sale of the father's share proved insufficient to pay off the decree. Thereupon it was sought to attach and sell the son's share, but upon objection being made by the son, he succeeded. A suit was accordingly brought against the son for a declaration that the son's share was liable to be sold in execution on the ground of his pious liability:—*Held* that the suit was barred by the provisions of section 47 of the Civil Procedure Code. *Held* also that the expression in a decree exempting a particular person was inaccurate and the operation of the decree was to dismiss the suit against that particular defendant.

DATA DIN v. NANKU ... 752

—*Section 48—Subsequent order, meaning of—Order giving time for payment by executing court—Limitation Act (IX of 1908), section 15—Exclusion of time.*

The expression 'subsequent order' in section 48 (b) of the Code of Civil Procedure means a subsequent order made by the court which made the decree and acting as that court and not as a court executing the decree. Where therefore a court executing the decree, allows a judgment-debtor two months' time to pay up the decree, the order allowing time is not a subsequent order within the meaning of section 48 and does not give a fresh period to the decree-holder to execute his decree.

The order giving time is not an order staying execution or an injunction and in computing time that period cannot be excluded.

JORAWAN v. MAHABIR DUBE ... 71

—*Section 60—Attachment—Insolvent's salary.*

See Provincial Insolvency Act, section 16 (2) ... 107

Civil Procedure Code—(contd.) PAGE.

—Section 60
(c), Order 21, rule 92—Execution of decree—Sale in execution—House of an agriculturist—Exemption from liability to sale—Issue raised in a separate suit by the judgment-debtor that house not saleable—*Estoppel*.

In execution of a money decree passed against the defendant a house was sold and it was purchased by the plaintiff. The defendant raised no objection to the sale which was duly confirmed. The plaintiff having obtained formal possession brought a suit against the defendant for recovery of actual possession. The suit was resisted on the ground that the defendant was an agriculturist and consequently the house was exempted from liability to sale under section 60 (c) of the Code of Civil Procedure:—*Held* that defendant having allowed the auction sale to take place without objection and that sale having been confirmed it became conclusive as between the parties, and the purchaser acquired a vested interest in the property sold and the defendant was precluded from questioning the validity of the sale and the title of the purchaser.

LALA RAM v. THAKUR PRASAD ... 691

—Section 73
—Rateable distribution—Execution of decree—Proportionate distribution of sale-proceeds—Suit for refund of assets distributed.

Held that a suit brought by a plaintiff (a decree-holder) for refund of assets before the actual distribution of them to the other decree-holders was premature and liable to be dismissed. Where plaintiff and defendants held money decrees against certain judgment debtors, and the judgment-debtors of the plaintiff represented only $\frac{1}{4}$ th of the property sold, *held* that the plaintiff was entitled to rateable distribution out of the $\frac{1}{4}$ th which was the share of his judgment-debtors.

RAM CHANDRA NAIK KALIA v. RAGHUNATH SARAN SINGH ... 530

Civil Procedure Code—(contd.) PAGE.

—Section 92
—Public endowment—Breach of condition by Mohunt—District Judge ordering suspension of Mohunt on mere report—No suit filed—Jurisdiction—Interference by High Court in revision.

The Code of Civil Procedure gives no powers to the District Judge to take any action in order to protect property forming the subject matter of a public endowment unless and until a regular suit is filed in his court under section 92, and when the District Judge exercises any of the powers vested in him under that section he acts without jurisdiction. The High Court therefore interfered in this case in its revisional jurisdiction and set aside the order of the District Judge suspending a Mohunt when there was no suit before him under section 92.

MOHUNT DARSHEAN DAS v. THE COLLECTOR OF MEERUT ... 742

—Section 107
—Power of Court in appeal to vary decrees.

See Bengal Land Revenue Sales Act section 31... 271

—Section 110
—Privy Council—Leave to appeal—Cross-Appeals to the High Court—No substantial question of law

In a suit the court of first instance decreed it in part and dismissed it in part. There were cross-appeals to the High Court on behalf of the plaintiffs and the defendants. The High Court decreed the defendants' appeal reversing the judgment and decree of the court below. In the plaintiffs' appeal the High Court affirmed the first court's decree. The plaintiffs applied for leave to appeal against the judgment of the High Court reversing the first court's decree and the application was granted. On an application for leave to appeal against the portion of the judgment affirming the first court's decree, *held* that that could not be granted inasmuch as there was no substantial question of law.

CHIRANJI LAL v. BEHARI LAL ... 864

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Section 115

—Application for leave to appeal in forma pauperis—Application rejected—Appellant praying permission to pay court fee on memorandum of appeal—Court refusing permission—Failure to exercise jurisdiction

An application was presented with a memorandum of appeal for permission to appeal as a pauper. The appellate court rejected the application. The appellant then prayed permission to put in the necessary court fee on his memorandum of appeal. This petition was rejected on the ground that the petitioner's appeal had been rejected:—*Held* that the court had rejected the application for leave to appeal in forma pauperis and not an appeal and it had failed to exercise jurisdiction in refusing to allow the petitioner to pay in the court-fee for his memorandum of appeal.

MUHAMMAD FARZAND ALI v. RAHAT ALI ... 309

Section 115

—Cantonment Magistrate exercising Small Cause Court powers—Prosecution ordered by—Civil case—Revision.

A Cantonment Magistrate exercising the powers of a Small Cause Court ordered a decree-holder to deposit diet money for his judgment-debtor who was about to be arrested. The decree-holder complained to the Cantonment Magistrate that one Mul Chand, Ahalmad of the Collector's court had refused to accept the money which he had tendered. There was a report by the Cantonment Magistrate to the Collector who reported that the decree-holder's statement was false and recommended his prosecution under section 182 of the Indian Penal Code. The Cantonment Magistrate thereupon sanctioned the prosecution:—*Held* in revision, that the matter was of a civil nature and could not be brought up on the criminal side; and, treating it as a civil matter it was impossible under section 115 of the Civil Procedure Code to interfere.

RAM PRASAD v. EMPEROR ... 921

Civil Procedure Code—(contd) PAGE

Section 115

—Plaint returned by Munsif for presentation to proper court—Decision affirmed—Revision—Erroneous decision of question of law.

Where a Munsif returned a plaint for presentation to the proper court on the ground that the cause of action had not arisen within his jurisdiction and his decision was affirmed by the appellate court, *held* that the decision was not open to revision by the High Court it being only an erroneous decision of a question of law which the courts below had jurisdiction to determine.

JWALA PRASAD v. EAST INDIAN RAILWAY COMPANY ... 535

Section 115

—Revision—Jurisdiction of High Court—Question of law or fact bearing on jurisdiction of court—High Court may interfere when such question wrongly decided.

In execution of a decree a house belonging to a minor was advertised for sale. An application was put in for the adjournment of the sale. The vakalatnama under which the application was filed had been executed by one Gaya Prasad; it did not appear on the face of the vakalatnama that he was executing it as guardian of the minor. An affidavit was also filed in support of the application, and the two together made it clear that he was acting as the guardian of the minor. The adjournment was granted for six days, and after the expiry of the period the sale was held and the property was sold for very much less than its proper value. An application was made under Order 21, rule 89, of the Code of Civil Procedure by the Vakil who had applied for the adjournment. It purported to be tendered on behalf of the minor. The court of first instance rejected the application on the ground that the minor had not been represented by a next friend. This order was affirmed by the lower appellate court:—*Held* in revision, that when a question of jurisdiction was involy-

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ed the High Court was competent to revise a finding of law or fact bearing on a question of jurisdiction

BEHARI LAL v. BALDEO NARAIN... 717

—Section 115
—Revision—Mistake of law made by lower court—Jurisdiction.

Where a court has jurisdiction to determine a particular matter, and in the exercise of its jurisdiction, it makes a mistake in law, this does not entitle the party against whom the decision is to apply to the High Court in revision.

A suit was brought on a promissory note. The defendant pleaded minority at the date of execution. The court of first instance dismissed the suit. On appeal the lower appellate court held that the defendant having knowingly misrepresented his age, he was estopped from pleading infancy and was bound in equity to refund the money and the suit was decreed. Inasmuch as a second appeal did not lie to the High Court, the suit being of the nature cognizable by a Court of Small Causes, the defendant applied in revision against that decree:—*Held* that no revision lay, the lower court having merely made a mistake of law in deciding the case.

DHARA SINGH v. GAYAN CHAND ... 441

—Section 115
—Revision—Decree fixing a date for payment of money—Suit to be dismissed if money not paid on date fixed—Part of decree—Court has no jurisdiction to extend the time so fixed.

• Where a decree embodies certain conditions and provides that a suit shall stand dismissed if those conditions are not complied with e. g., where the date is fixed in the decree for paying in money and in the event of non-compliance it is provided that the suit shall be dismissed, the court has no jurisdiction to interfere with the decree by altering any of the conditions, namely, by extending the time.

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There is no distinction in this respect between a decree for pre-emption and any other decree. The only exception is that of a mortgage-decree in which time may be extended by virtue of the provisions of Order 34 of the Code of Civil Procedure.

SAJJADI, BEGAM v. DILAWAR HUSAIN ... 625

—Section 115—
Suit on mortgage—Sub-mortgage—Amount due on sub-mortgage ordered to be paid out of sale-proceeds—Decree directing property to be sold for mortgage money as well as for amount of sub-mortgage—Wrong decree—Application for amendment—Order that amendment uncalled for—Refusal to exercise jurisdiction—Revision.

A suit was brought for sale on a mortgage. The mortgagee had created a sub-mortgage, and in the judgment that was passed the court ordered that the property be sold, but that before the mortgagee was paid any money the sub-mortgagee should receive the money due under the sub-mortgage out of the sale-proceeds. In the decree as drawn up the property was ordered to be sold for the mortgage money as well as for the money due under the sub-mortgage. An application by the mortgagor for amendment of the decree was refused with the order that the amendment was "uncalled for." *Held* that this order was tantamount to a refusal to exercise jurisdiction and the High Court's interference in revision was justified.

PULE BISHUNATH RAO v. BRAMHANAND SWAMI ... 749

—Section 146
—Transferee—Delivery of possession.

See Civil Procedure Code, Order 21, rule 95 ... 150

—Section 151
—Power of court in appeal to vary decree

See Bengal Land Revenue Sales Act, section 31 ... 271

Civil Procedure Code—(contd.) PAGE.

Order VI,
rule 14—Signature of plaintiff authorised by a man in Jail—Validity of signature—Jail Regulations, breach of—Whether cause of action destroyed—Practice—Professional misconduct, mixing up of questions of—Decision of case.

Jail Regulations and Manuals have the force of law but they cannot over-ride or alter the general law. A plaint signed or a suit authorised by a man in Jail is just as good as any other plaint or suit, however many Jail Regulations are broken. The breach of Jail Regulations by the prisoner, his pleader or friends cannot destroy a cause of action and the court should not enter into the question whether permission of Jail authorities had been given or not.

A person in Jail who is unable to sign a plaint may authorise some other person under Order VI, rule 14 to sign for him and the plaint so signed will be a valid plaint.

The object of courts is to decide the right of parties and not to punish them for mistakes which they make in the conduct of their case by deciding otherwise than in accordance with their rights.

If a court thinks that there has been any breach of professional etiquette, or any matter calling for the exercise of disciplinary powers, in the conduct of the pleader or advocate in the case, it should decide the merits and reserve such question for further consideration after the disposal of the suit.

BISHESHAR NATH v. EMPEROR ...

Order IX,
rules 3, 6—One plaintiff out of six present—Appearing plaintiff general attorney for the others—Dismissal of suit for want of prosecution—Dismissal on merits—Second suit on same cause of action barred.

On the date fixed for the hearing of a suit the defendants and their pleader did not appear. The plaintiffs' pleader also did not appear, but one of the plaintiffs was present.

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He was also the general attorney of the other plaintiffs. The court dismissed the suit for "want of prosecution." The plaintiffs thereupon applied to have the dismissal set aside, but the application was refused on the ground that their remedy was by means of a separate suit. They consequently brought a second suit claiming the same reliefs as they had claimed in the former suit:—*Held* that inasmuch as all the plaintiffs must be deemed to have been present through the plaintiff who had appeared and was general attorney for the non appearing plaintiffs the suit must be regarded as having been dismissed on the merits, and not under Order 9, rule 3 of the Code of Civil Procedure and a second suit on the same cause of action was therefore barred.

HINGO SINGH v. JHURI SINGH ... 462

Order XI,
rule 6—Practice—Interrogatories—Suit for breach of contract—Irrelevant interrogatory.

A suit was brought to recover damages for breach of contract. The defendant put in a list of ten interrogatories for the plaintiff to answer. The interrogatories being served on the plaintiff, the plaintiff appeared in court answered three and objected to the rest as being irrelevant. Later on the defendant put in an application in which it was prayed that the plaintiff be ordered to answer the remaining interrogatories and the court thereupon passed an *ex parte* order to this effect. "The plaintiff be asked to answer the interrogatories. If he fails to comply he will do so at his own risk." The plaintiff subsequently presented another application in which the court was asked to reconsider the *ex parte* order and in which the former objection was reiterated. The court refused to reconsider the *ex parte* order and said that the order was not "prejudicial to the plaintiff." The defendant then put in an application asking the court to dismiss the suit which was then set down for hearing on a subsequent

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date. On that date the court held that the interrogatories were not irrelevant, and without giving the plaintiff a further opportunity of answering them, it proceeded to dismiss the suit:—*Held* that the order of the court was wrong inasmuch as it was not justified by anything in Order 11 of the Code of Civil Procedure in postponing its adjudication on the question whether the interrogatories were relevant or not to the date of hearing and then refusing the plaintiff the option of complying, or refusing to comply with a clear and specific order directing him to answer such interrogatories as might be held to be relevant.

Held also that an objection under rule 6 of Order 11 required adjudication by the court, that the rule gave the plaintiff an alternative remedy and not that he was to ask the interrogatories to which he objected to be struck out.

BHAGWAN DAS GONDKA v. RAM KUMAR RAMESHWAR DAS ... 762

—Order XXI,
rule 11—Application for execution
complied with provisions of—Decree
not filed—Second application.

See Limitation Act, Art 182 ... 87

—Order XXI,
rule 32—Injunction, decree for—
Execution of decree—Decree passed
in regard to a hereditary office—
Right claimed as legal representative
—Decree passed against defendants
as legal representatives

A decree for a perpetual injunction was passed in favour of the plaintiff and certain other persons called defendants of the third party against persons who were called defendants of the second party. The right claimed in the suit was the right to perform "Arti" in a certain temple, the parties asserting their right thereto as descendants of the original founders. The defendants of the second party were restrained from interfering with the performance of the "Arti" by the plaintiff and defendants of the third party. The defendants of the second party

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having obstructed the performance of the "Arti," one of the defendants of the third party applied that the decree might be enforced through the Superintendent of Police. The application was granted:—*Held* that Order XXI rule 32 of the Code of Civil Procedure prescribed the mode of executing a decree for an injunction and the court was not justified in ordering the police to interfere in the matter nor was it justified in appointing a Commissioner to see that the decree-holder performed without obstruction the duties appertaining to his office. Clause (5) of rule 32 of Order XXI does not authorize the passing of such orders and provides for a different state of things

Held also that the decree related to a hereditary office which the plaintiff claimed and which the defendants resisted and was not passed against the defendants as individuals but as descendants of the original founder.

GOSWAMI GORDHANLALJI v. GOSWAMI MAKSUDAN BAILABH ... 700

—Order XXI,
rule 58—No suit brought within one
year from such dismissal—Order
conclusive—Decree, execution of—
Objection to attachment and sale—
Claimant's objection dismissed for
want of evidence.

Where an objection under Order 21, rule 58, of the Code of Civil Procedure was dismissed because the objector failed to produce any evidence, and no suit was brought to challenge the validity of that order within one year from the date of the order under Article 11 of Schedule II to the Limitation Act, *held* that the order had become conclusive.

The only order under Order 21, rule 58 of the Code of Civil Procedure, upon which the character of finality is impressed is an order made after enquiry. It does not follow, however, that because a claimant does not adduce evidence or is absent there are no materials before the court to enable it to enquire into it.

GOKUL v. MOHRI BIBI ... 256

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—Order XXI,
rule 63—Suit for declaration that
property not saleable—Execution of
decree—Valuation of suit.

Where a suit is brought for a declaration that certain property attached in execution of a decree is not saleable, the proper valuation to put on the suit for purposes of jurisdiction is not the value of the property but the amount of the decree for which execution was taken out.

ANANDI KUNWAR v. RAM NIBAN-
JAN DAS ... 374

—Order XXI,
rules 89, 92—Court, meaning of—
Deposit by judgment-debtor in the
treasury—Whether deposit in accord-
ance with rule—Auction-sale not
set aside—Jurisdiction—Revision.

The word "court" in rules 89 and 92 of Order 21 of the Code of Civil Procedure means the Civil Court.

The provisions of rule 89 are an indulgence to a judgment debtor, and an auction purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. Whether or not the section has been so complied with is clearly a question which a court has jurisdiction to decide, and, in the exercise of such jurisdiction, if the court has come to an erroneous conclusion, its decision cannot be interfered with in revision by the High Court. Hence where a judgment-debtor deposited the purchase-money plus five per cent compensation for payment to the auction-purchaser in the treasury owing to the Civil Court being closed, and the court below refused to set aside the sale because on the court re-opening the money had not been withdrawn and re-deposited in the Civil Court, held that the court had exercised its jurisdiction and even though the decision might be erroneous, it could not be interfered with in revision. Held also that an appeal by the auction-purchaser lay from an order refusing to set aside a sale.

FAZAL RAB v. MAHZUR AHMAD ... 433

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—Order XXI,
rule 90—Sale in execution—Order
for stay obtained by fraud on court
—Effect of such order—Whether sale
taking place on date fixed a nullity.

An *ex-parte* order for stay of an auction sale was obtained by fraud, and it was subsequently discharged by the Judge who had passed it. Before the *ex-parte* order was set aside the sale was held and the property sold. Held that the sale was not void.

THE GANGES FLOUR MILLS COM-
PANY v. SHADI RAM ... 46

—Order XXI,
rules 92, 93—Execution of decree—
Purchaser at auction—Transfer of
property by auction purchaser—
Vendee deprived of possession—Auc-
tion-purchaser refunding money to
his vendee—Suit for refund of
purchase-money—Sale not set aside
—Suit not maintainable.

Certain persons obtained a decree against A. In execution of the decree certain property was attached, and one B came forward with a claim that the property was his and not liable to sale. His claim was disallowed and the property was sold at auction and purchased by S1. S1 sold the property to S2 who obtained possession. In the meantime B succeeded in his appeal against the dismissal of his suit and in due course ousted S2. S1 had to refund to S2 the money received by him. S1 then transferred his rights to the plaintiffs. The auction sale had not been set aside. In a suit for refund of the purchase-money, held that the suit was not maintainable.

MAN MOHAN LAL v. GOPI NATH 511

—Order XXI,
rule 93—Execution of decree—Sale
in execution—Property sold by
auction a second time after a pre-
vious sale—Suit by purchaser for
refund of purchase money—Main-
tainability of suit.

Where on the date of an auction sale held under the Code of Civil Procedure of 1882 the judgment-

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debtor had no saleable interest in the property by reason of the fact that the property had been previously sold by auction the purchasers at the second sale acquired no interest by their purchase and became entitled to maintain a suit for the refund of the money paid by them into court.

GIRDHAR DAS v. SIDHESHWARI PRASAD NARAIN SINGH ... 236

—Order XXI, rule 95, sections 115, 146—*Revisional jurisdiction of High Court—Another remedy open to applicant—Delivery of possession to transferee from auction-purchaser—Whether transferee may apply for delivery of possession.*

No appeal lies from an order delivering possession under Order 21, rule 95 of the Code of Civil Procedure, and a court entertaining an appeal therefrom acts without jurisdiction.

Having regard to section 146 of the Code of Civil Procedure a transferee from an auction-purchaser is entitled to delivery of possession under Order 21, rule 95 of the Code.

Ordinarily the High Court does not interfere where another remedy is open to a party, but each case must be judged on its peculiar facts. Where, therefore, in a case there were no complicated questions of fact or law and the applicants were clearly entitled to possession by virtue of their purchase from the auction-purchaser, the High Court interfered in revision with the order dismissing the application for delivery of possession.

• BUDDHU MISIR v. BHAGIRATHI KUAR ... 150

—Order XXIII, rule 1—*Discretion in partition cases.*

See Partition Act, section 2 ... 584

—Order XXIII, rule 1—*Trial of suit—Evidence concluded—Application by plaintiff to withdraw suit with leave to bring a fresh one—Application made during or after arguments—Leave*

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granted to bring fresh suit—Exercise of jurisdiction—Revision.

A suit was instituted in the court of the Munsif. After the evidence had concluded and either during or after arguments the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. He based his application upon the fact that he had failed to give formal proof of a plaint which was essential to the plaintiffs' success. The court granted leave to bring a fresh suit. Upon an application in revision against the order, *held* that the court had jurisdiction to grant the leave, and the fact that in so acting the court came to a wrong decision was not sufficient to bring the case within the purview of section 115 of the Code of Civil Procedure.

JHUNKU LAL v. BISHESHWAR DAS 495

—Order XXIV rule 1—*Application of, to dower decrees.*

See Interest—Decretal amount deposited in part ... 15

—Order XXXII rules 1, 2, 12—*Suit filed by minor without next friend—Minor attaining majority during pendency of suit—Application by minor to be allowed to proceed with suit as major—Plaint ordered to be struck off—Order illegal—Revision.*

A minor filed a suit without a next friend. It was reported that the minor would come of age two days after the date when the suit was filed. On the date fixed for deciding this question an application signed by the plaintiff and his pleader was filed in which it was denied that the plaintiff was a minor and it was also stated that if he was so on the date of the suit he had in the interval come of age and he prayed for permission to go on with the suit. The plaint was registered and notice was issued to the defendant. Upon the defendant objecting the court ordered the plaint to be taken off the file:—

Held, in revision, that the order was bad inasmuch as the court had refused to exercise jurisdiction which was vested in it by law and the

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High Court could interfere in revision.		Order <i>XLII</i> , rule 33—Power of court in appeal to vary decree.	
NASIR-UD DIN HUSAIN v. ASHFAQ HUSAIN ...	737	See Bengal Land Revenue Sales Act, section 31 ...	271
Order <i>XXXIV</i> , rule 4—Application more than three years after decree in appeal		Order <i>XLIII</i> , rule 1—Appeal—Memorandum of appeal—Order returning memorandum of appeal to be presented to proper court.	
See Limitation Act section 6 ...	85	No appeal lies against the order of an appellate court returning a memorandum of appeal to be presented to the proper court.	
Order <i>XXXIV</i> , rule 6—Application for decree thereunder—Whether application in execution—Limitation—When right to apply accrues—Limitation Act (IX of 1908), Sch. I, art. 181.		NUR-UD-DIN KHAN v. PRAN KISHAN CHAKRABARTY...	630
An application under the provisions of Order 34, rule 6 of the Code of Civil Procedure is an application in the original suit for a new decree and it cannot be regarded as an application in execution. Such an application is governed as to limitation by article 181 of Schedule I to the Limitation Act and must be made within three years from the date when the right to apply accrued. Held therefore that where the entire mortgaged property was sold in 1911 in execution of a decree for sale on a mortgage, and the mortgagee made a fresh application under Order 34, rule 6 of the Civil Procedure Code in 1915 (an application for a similar decree having been made in 1913), held that the application was time barred, and the application not being an application in execution of the original mortgage-decree, the intermediate application did not save limitation.		Order <i>LI</i> rule 22—Cross objections against co-respondent when may be entertained—Mortgage deed—Executants—Two females and four males.	
MUHAMMAD ILTIQAT HUSAIN v. ALIM-UN-NISSA ...	437	Plaintiff sued for sale on the basis of a mortgage deed. The bond was held to be proved against the male executants, but not against the females. Against the decree the male executants preferred an appeal and the plaintiff preferred cross-objections against the female executants who had been arranged on the same side with them as respondents and contended that the deed had been proved against the females too:—Held that the plaintiffs were entitled to file cross-objections against their co-respondents.	
Order <i>XXXIV</i> , rule 6—Order refusing to pass decree thereunder—Decree—Ad valorem court-fees payable		MUSLEHA BIBI v. RAM NARAIN ...	587
An order refusing to make a decree under Order 34, rule 6 of the Code of Civil Procedure must be regarded as a "decree" within the meaning of the definition of that term in that Code, and ad valorem court-fees must be paid on the memorandum of appeal presented to the lower appellate court and that presented to the High Court.		Schedule <i>II</i> , para 14 (c)—Reference to arbitration without intervention of court—Six arbitrators appointed—all the arbitrators not taking part in the proceedings—Award invalid.	
MOHAMMAD ILTIQAT HUSAIN v. ALIM-UN-NISSA ...	437	Disputes between the plaintiffs and defendants were referred to the arbitration of six arbitrators, the decision in the case to be according to the verdict of the majority. The arbitrators met on two different dates, but on neither of those dates was any award drawn up. The arbitrators of the defendants did not agree with those for the plaintiffs and they withdrew from the arbi-	

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tration. They took away the records of the depositions of witnesses. Thereupon on a third date the arbitrators for the plaintiffs recorded the evidence afresh, and took fresh proceedings in the absence of the defendants and their arbitrators and gave an award:—*Held* that all the arbitrators not having taken part in fresh proceedings on the third date, the award so passed by the arbitrators was invalid on the face of it under paragraph 14 (c), schedule II to the Civil Procedure Code.

KALI CHARAN PANDE *v.* GUPT
NATH MISRA ... 207

Common intention—Death caused by several persons.

See Penal Code, section 304 ... 11

Companies Act (VI of 1882).
section 169—Appeal—Order in winding up proceedings under that Act—Order passed after new Act came in force—Order directing preferential payment.

An order directing a preferential payment to be made to a creditor is one which relates to and is an incident of the winding up, and the right of appeal is an incident of the winding.

When the liquidation of a company began under the Act of 1882 but the order complained of was passed after the Act of 1913 was passed, *held* notwithstanding that section 169 of the Act of 1882 would govern the right of appeal and consequently no appeal lay.

THE PEOPLES INDUSTRIAL BANK
v. HAR KISHEN LAL ... 70

Compensation—Land acquisition, basis of

See Land Acquisition Act, section 23. 301

Compromise—Decree on—Plaintiff to execute decree on payment or deposit of sums of money—Money remitted by money order—No deposit as required by decree—Mortgage made by defendant as preliminary to sale of property provided in compromise—Whether decree executable.

In a suit for dower a decree was made in terms of the compromise

Compromise—(conold.) PAGE.

entered into in the suit. The terms were (1) that the defendant would sell to the plaintiff property worth Rs. 12,000; (2) that the plaintiff was to pay a deposit in court the price of the stamp, the registration-fee and another sum of Rs. 15 and if he did not do so his claim would stand dismissed with costs except for the sum of Rs. 700 due to a creditor; and (3) that an agreement was to be executed within three months from its date containing the terms of the compromise. The agreement was in fact executed and it contained hypothecation of the very property which was to be sold to the plaintiff by the defendant. The plaintiff, however remitted the price of the stamp, the registration-fee and the sum of Rs. 15 by money-order to the defendant which was refused by the latter, the plaintiff then applied for the execution of the decree and he asked for the sale of the property. The defendant objected that the price of the stamp, the registration-fee not having been paid or deposited the plaintiff lost his right and that the plaintiff could not apply for sale but must bring a suit for sale on the mortgage: *held* (1) that the mortgage was a collateral security and the plaintiff could sell the property to realise his claim as a money decree; (2) that the remittance by money-order was not a "payment" under the compromise.

INAYAT-ULLAH KHAN *v.* HASH-
MAT-ULLAH KHAN ... 472

Consideration—Non-payment of part or whole of, effect thereof.

Where parties enter into a bargain for the sale of property of any nature, if the real intention is that the right to the property should pass the mere fact of non-payment of part or even the whole of the consideration will not make the deed of transfer fictitious. The non-passing of the consideration may often be very strong evidence that the deed was not intended to operate.

ALAMDAR HUSAIN *v.* MOTI RAM ... 454

Construction of Statutes—
Decree for profits—Liability of
lambardar.

See Agra Tenancy Act, section 164 193

Contract, breach of—Covenant
of title—Limitation.

See Limitation Act, article 116 ... 706

Contract, meaning of—Village
Chaukidari Act.

See Limitation Act art. 113 ... 964

Contract Act, (Act IV of 1872),
section 16—Undue influence—Un-
conscionable bargain—Expectant heir
—English equitable rules inapplic-
able to India—Ultimate result of
dealings not conclusive that they are
unconscionable—Compounding of in-
terest not necessarily oppressive—
Illustrations to Indian Statutes, their
legal effect.

Questions as to undue influence, unconscionable bargains, and dealings with expectant heirs, must be decided on the provisions of the Indian Contract Act, 1872, as amended by the Indian Contract Amendment Act, 1899 and these alone. The principles on which English Courts of Equity deal with similar questions are entirely inapplicable.

In money lending transactions the mere fact that the sum ultimately claimed exceeds enormously the amount originally advanced is no ground for holding the transaction unconscionable. It must also appear that there is something unconscionable either in the original dealings, or in the subsequent stages of the transaction.

By making short term loans and insisting on capitalising the interest immediately it falls due, a money-lender may pile up compound interest at an oppressive and unconscionable rate. But there is nothing inherently wrong or oppressive in his securing interest upon interest after the interest has been due and unpaid for a considerable time.

Their Lordships in this case agreed with the lower courts that the Indian Contract Act throws upon the person dealing with an expectant heir and in a position to dominate

Contract Act—(contd) PAGE.

the latter's will the burden of showing that he has not used his position to obtain an unfair advantage, but held it unnecessary to decide whether such a situation in fact arose here.

The illustrations to an Indian Statute are to be taken as part of the Statute.

BALLA MAL v. AHAD SHAH P. C. 905

Section 30—
Wagering contract—Common inten-
tion to wager essential—Speculation
not equivalent to wagering—Bombay
Act III of 1865, sections 1, 2—
Pukka-Adatias—Their position.

Speculation does not necessarily involve a contract by way of wager. To constitute such a contract a common intention to wager is essential. The mere fact that one party to a contract for sale of goods did not intend to deliver, even if known to the other party, does not vitiate the contract, unless there is a bargain or understanding between the parties that delivery is not to be called for.

BHAGWANDAS PARASRAM v.
BURJORJI RUTLONJI BOMANJI P. C. 241

Section 65—
Infant—Contract—Money lent—
Fraudulent misrepresentation as to
age—Equitable relief—Costs—Dis-
cretion—Interference by appellate
court.

A minor cannot be made to repay money which he has spent merely because he received it under a contract induced by his fraud.

The plaintiff brought a suit for sale on two mortgage bonds. The defendant pleaded that at the time of execution of the bonds he was a minor. There was no allegation nor proof that the defendant had made any fraudulent misrepresentation as to his age whereby he had induced the plaintiff to advance him money:—*Held* that the plaintiff was not entitled to recover.

The court below had deprived the successful defendant of his costs because in its opinion he was respon-

Contract Act—(contd.)	PAGE	Contract Act—(contd.)	PAGE
sible for the litigation. There was also no proof of any wrongful conduct on the part of the defendant:— <i>Held</i> that there being no evidence of this fact, the successful defendant ought to have been awarded costs.		where one man is compelled to pay money for which another is legally liable.	
Where the Judge has given his reasons and all the circumstances are before the Court of Appeal, the Court of Appeal can, if satisfied that the discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made.		RAM RICHCHA PRASAD TEWARI v. RAGHUNATH PRASAD TEWARI ... 581	
RADHEY SHIAM v. BINARI LAL ... 592		—Section 70—	
application of—Property sold subject to mortgage—Money left with vendee to pay it off—Suit for pre-emption—Pre-emptor directed under decree to pay full price—Money withdrawn by vendee—Mortgage not discharged by him—Suit by mortgagees decreed against pre-emptor—Pre-emptor discharges decree to save property—Suit to recover from vendee money so paid—Vendee not liable.		Sale—Money left with vendees for payment to mortgagees—Property mortgaged to secure the sum due different from property sold—Vendees paying interest to mortgagees owing to delay on the part of vendors to get sale-deed registered—Suit for unpaid purchase-money—Vendees claiming set-off in respect of the interest paid—Gratuitous payment.	
Certain property was sold subject to a mortgage. The vendor left money in the hands of the vendee sufficient to discharge the mortgage. A suit was brought to pre-empt the sale but the decree made the pre-emptors liable to the vendees for the entire money and not for the amount actually paid by the latter. The pre-emptors paid the whole of the sale consideration as directed in the decree and got possession. The vendees did not pay off the mortgage but withdrew from court the money deposited by the pre-emptor. The mortgagees brought a suit for sale which was decreed and the pre-emptors in order to save the property from sale paid off the amount due to the mortgagee. They then brought a suit to recover from the vendees the money so paid by him.		Certain immovable property was sold and the vendors left a portion of the consideration in the hands of the vendees for payment to certain of their (vendors') creditors who held a mortgage over property other than that sold. Owing to delay in the registration of the sale-deed which was due to action on the part of the vendors, the vendees did not pay the money to the creditors. When, however, the sale deed was registered and the vendees tendered the money left with them to the creditors, the latter refused to accept it without the interest which had accrued in the meantime. The vendees paid the interest also. In a suit brought by the vendors for recovery of the unpaid portion of the purchase money the vendees claimed a set-off in respect of the money they had to pay to the vendors' creditors as interest:— <i>Held</i> that the vendees were not entitled to recover the amount claimed inasmuch as the money paid as interest was a gratuitous payment, the property mortgaged to secure the sum due to the creditors being no part of the property sold, and the fact that the vendors benefited by the payment was immaterial.	
<i>Held</i> that the plaintiffs were not entitled to recover inasmuch as there was no contractual liability between the plaintiffs and the defendants nor was there that liability which the law implies under circumstances		SURAJ BHAN v. HASHIM BEGAM ... 581	
		—Section 176	
		—Money advanced on pledge of ornaments—Sale by pawnee—Reasonable notice of sale to pawnor—Meaning of.	
		Section 176 of the Contract Act does not contemplate that the pawnee	

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should give the pawnor information of the actual date, time and place of sale. The expression 'reasonable notice of the sale' means an intimation of an intention to sell and it does not necessarily mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor; all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right is analogous to that of a seller's right to re-sell the goods sold and the two rights must be exercised in more or less the same method.		of the partnership beyond the date at which the suit was instituted. It is to meet the precise predicament that a partnership is not terminable at will that the court's power to decree dissolution is conferred in the events enumerated in section 254.	
A pawnee gave to the pawnor a notice that unless the articles pledged were redeemed within a fortnight, he would sell them without further reference, but omitted to specify the actual date, time and place of the sale. He then sold the articles but the debt was not fully paid off. In a suit for the balance the pawnor contended that the notice was not reasonable because of the omission to specify the actual date, time and place of the sale:— <i>Held</i> that the notice was reasonable.		RAHMAT UN-NISSA BEGUM v. PRION. 513	
KUNJ BEHARI LAL v. THE BHARGAVA COMMERCIAL BANK ... 390		Contribution—Suit for—Satisfaction of joint-debt.	
Section 252—Partnership—Right to a dissolution—How far affected by terms of partnership contract—Power of court to decree dissolution.		See Provincial Small Cause Courts Act, section 25 ... 787	
A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.		Costs—Joint-decree for costs against defendants claiming under separate titles—Defendants wrong-doers—Suit for contribution—Suit not maintainable.	
It is not therefore a contravention of section 252 of the Indian Contract Act for a partner to seek dissolution, or for the court to decree it, though the partnership agreement contemplated the continuance		N got a half share in certain property under a deed of gift executed by J. R got a half share in the same property under a separate deed of gift also executed by J. B and Z alleging themselves to be owners brought a suit against N and R to recover their shares in the property. R did not defend the suit, and N contended that the suit had been brought in collusion with R. The suit was decreed (it being found that N and R each had separately in his possession a share to which B and Z were entitled) and costs were jointly awarded against them. The whole of the costs was realised from N alone. In a suit for contribution by N against R, <i>held</i> that the suit would not lie, N and R being independent wrong-doers whose interests were in conflict.	
		NANDLAL SINGH v. BENI MADHO SINGH ... 689	
		Court-Fees Act (VII of 1870), section 7, cl. 11—Suit for declaration that plaintiff is an occupancy tenant—Agra Tenancy Act (II of 1901), section 95—Court-fee payable on memorandum of appeal.	
		In a suit to establish or disprove a right of occupancy the plaint or memorandum of appeal should bear a court-fee of eight annas as provided in Article 5 of Schedule II to the Court-Fees Act, and section 7, clause	

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II of the Act does not apply to such a suit.

RATAN SINGH v. KHEM KARAN ... 167

Section 7

(i) and (vi)—*Suit for pre-emption—Consideration stated in sale deed as Rs. 44,000, plaintiff alleges a smaller consideration—Suit decreed in respect of some property on payment of Rs. 21,000—Court-fee payable on memorandum of appeal—Appeal divisible into two parts.*

A suit for pre-emption was brought in respect of five villages, on payment of Rs. 2,500 as consideration. The consideration stated in the sale deed was Rs. 44,000. The suit was dismissed in regard to three of the villages and it was decreed in respect of the other two on payment of Rs. 21,000. It was held that the consideration was Rs. 44,000. The plaintiff preferred an appeal against that decree and paid a court-fee on five times the Government revenue of all the five villages on his memorandum of appeal:—*Held* that the appeal was divisible into two parts; that, in respect of that part in which the question related only to the sale consideration the plaintiff must pay *ad valorem* court-fee on the difference between the amounts alleged as the sale price on the one side and decreed on the other, and that in regard to the other part in which the right of pre-emption was in dispute he need only pay court-fees on five times the Government revenue.

ABINASH CHANDRA v. SHEKHAR CHAND ... 174

Section 7

—*Application of.*

See Court-Fees Act, Article 5 ... 167

Section 7,

cl. iv. (c)—*Ad valorem fee—Suit for sale on mortgage—Defendant sets up prior charge—Court disallows defendant's claim—Appeal by defendant—Court Fees payable on memorandum of appeal.*

A suit for sale was brought upon foot of a mortgage. One of the defendants pleaded that she held a

Court-Fees Act—(contd.) PAGE.

decree for dower against the mortgagor for the payment of which the property had been made a security. The plaintiff paid *ad valorem* court-fees on the amount of his claim. The court decided that the plaintiff's mortgage was prior in date. The defendant appealed and in her appeal sought that her security should have priority. She paid the same court-fees on her memorandum of appeal as the plaintiff had paid on his plaint:—*Held* that the defendant must pay *ad valorem* court-fees on the amount of her mortgage inasmuch as she was seeking a declaration with a consequential relief.

MOTI BEGAM v. HAR PRASAD ... 81

Criminal misappropriation—

Letter taken away from table—Ingredients of offence.

See Penal Code, section 403 ... 12

Criminal Procedure Code

(Act V of 1898), Section 4—*Complaint—Perjury—Sanction, want of—Trial illegal.*

S obtained a decree for Rs. 8-3 against B from the Revenue Court on May 2nd, 1917. He applied for execution of the decree on May 19, 1917, and in the application he stated the date of the decree as June 20, 1917 and the amount due as Rs. 16-11-0. Attachment was levied for Rs. 17-5-6 which was paid by B and S granted a receipt in full to B. Subsequently S filed an application in the court which had executed the decree stating that he had made a mistake and that the amount due to him was Rs. 8-3-0 and no more. Three days prior to that B had applied for sanction to prosecute S. No proceedings under section 476 of the Criminal Procedure Code were taken nor was any sanction granted but the Assistant Collector, 2nd class, wrote a letter to the District Magistrate in which he stated all the facts and concluded by saying, "I beg to solicit orders." The Sub-Divisional-Officer through whom the letter was intended to be submitted to the District Magistrate instead of doing so, himself ordered the proce-

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ction of <i>S</i> and issued process. The case was tried by him and <i>S</i> was convicted of offences under sections 193 and 210 respectively of the Indian Penal Code. The conviction and sentence were affirmed by the Sessions Judge:—<i>Held</i> that the letter written by the Assistant Collector to the District Magistrate in which the former did not ask that any action should be taken by the Magistrate nor intended that the Magistrate should proceed according to law against <i>S</i> did not come within the meaning of a "complaint" under section 4 of the Criminal Procedure Code, and there being no complaint, the trial was illegal.		say that the accused were not prejudiced and consequently the trial was illegal	
SHEOSAMPAT PANDE v. EMPEROR...	662	MATHURA v. EMPEROR ... 884	
—Sections 15, 350—Rules framed by Local Government, validity of—Honorary Magistrates—Absence of member—Hearing of case by one Bench and judgment pronounced by another.		—Section 107 —Accused convicted of riot by Magistrate first class—Conviction affirmed by District Magistrate—Security for good behaviour ordered—Particular individual ordered to be surety—Jurisdiction.	
The Local Government, by virtue of the power conferred on it by section 15 of the Criminal Procedure Code, appointed three persons as Honorary Magistrates, and also provided that two of them at one time might form a <i>quorum</i>. Certain persons were placed upon their trial under the Gambling Act, before a Bench consisting of two of such members. The case was heard by them but the delivery of the judgment was postponed. On the day on which judgment was pronounced one of the members who constituted the Bench on the former occasion was re-placed by another of the members appointed and he had not heard the evidence <i>etc.</i>, in the case. Judgment was given convicting the accused:—<i>Held</i>, in revision (1) that the rule appointing three persons to constitute a Bench of Honorary Magistrates was not <i>ultra vires</i>, and that the <i>quorum</i> would be vested with all the powers conferred on the Bench; (2) that as one of the members on the second occasion when judgment was pronounced did not hear the evidence <i>etc.</i>, it was difficult to		A District Magistrate has no jurisdiction in affirming a conviction for riot to order the accused to give security to be of good behaviour nor has he jurisdiction to order that a particular individual should be a surety.	
		MAHABIR v. EMPEROR ... 280	
		—Section 107 —Wrongful act—Jurisdiction of Magistrate to order security to be given.	
		Where there was already a cattle market and certain persons intended to open another cattle market upon their own land not far from the older market and the Magistrate apprehending that there would be a breach of the peace consequent thereupon bound over the latter under section 107 of the Code of Criminal Procedure, <i>held</i> that the order was illegal, the section being confined to cases where the Magistrate was informed that a person was likely to commit a breach of the peace or to do any wrongful act which may occasion a breach of the peace.	
		MAHU v. EMPEROR ... 279	
		—Section 107 —Notice, sufficiency of.	
		Under section 107 of the Criminal Procedure Code there may be cases in which a Magistrate of the first class upon mere information to the effect that a person is likely to disturb the public tranquillity without any information being given of that person's intent to do any wrongful act, may issue a notice in writing to such person giving the substance of the information received without	

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specifying any definite acts which that person intends to commit.		gerous character, within the meaning of section 110, it must be shown that he had such a reckless disregard of the safety of the person and property of his neighbours that his being at large would be detrimental to the community and the fact that a man had considerable influence with <i>patwaris</i> was not sufficient to raise that inference.	
JAGUJI RAI v. EMPEROR ...	567	ISHWARI DUTT v. EMPEROR ...	776
—Section 110 —Person ordered to produce sureties —Sureties not residents of the same police district and who helped accused in his defence—Sureties not improper.		—Sections 118, 514—Accused asked to furnish personal security and provide respectable surety—Surety offering house as security reported respectable and the house worth Rs. 500—Security not accepted—Revision.	
The mere fact that a person ordered to produce sureties under section 110 of the Criminal Procedure Code gives as security two persons who are residents of a different police district and who helped him in his defence will not make them improper as sureties and the Magistrate should not refuse to accept them.		A person was ordered, under section 118 of the Criminal Procedure Code to furnish a bond of Rs. 200 and a respectable surety. A surety came forward and offered security in the shape of house-property. The surety was reported to be respectable and the house worth Rs 500. The Magistrate rejected the security purporting to act under section 514 of the Criminal Procedure Code:— <i>Held</i> that the surety being respectable and the house worth Rs. 500 should have been accepted though it was true that only moveable property could be attached and sold during surety's life-time for recovery of penalty.	
GOBARDHAN v. EMPEROR ...	263	NANHE v. EMPEROR ...	503
—Section 110 —Security for good behaviour—Offence alleged must be proved by relevant evidence—Evidence of general repute not sufficient.		—Section 125 Security to keep the peace—Power of District Magistrate—Jurisdiction of High Court.	
In a proceeding under section 110 of the Code of Criminal Procedure any particular offence alleged against the person or persons called upon to furnish security must be proved by relevant evidence and not by evidence of general repute that he or they are habitual offenders.		A Magistrate of the first class ordered certain persons to execute a bond to keep the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over. He made a reference to the High Court with a recommendation that the order should be set aside:— <i>Held</i> that where the order was passed by a Magistrate subordinate to the District Magis-	
INDAR v. EMPEROR ...	208		
—Section 110 (d) and (f)—Security for good behaviour—Bad livelihood—Facts to be proved.			
Ishwari Dutt was called upon to furnish security for good behaviour on the charge of habitually committing extortion and of being so desperate and dangerous as to render his being at large without security hazardous to the community. All that was proved against him was that he promoted litigation and had considerable influence with <i>patwaris</i> . No instance of his having committed extortion was found:— <i>Held</i> that under the circumstances the order was not justified.			
In order that a man might be held to be a man of desperate and dan-			

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trate, the record should, under section 125 of the Code of Criminal Procedure, be laid before the District Magistrate to deal with the matter.		instance and where an order was only made under section 203 of the Code of Criminal Procedure the issue of a notice is unnecessary when the order is set aside.	
Where a Code gives a particular court jurisdiction to act in certain matters, it is that court which should be applied to and not the High Court.		LIAQAT HUSAIN v. EMPEROR ... 30	
LALJI v. EMPEROR ... 39		—Ch. XVIII, Sections 209, 250 and 253—Powers and duties of Magistrate—Offence triable by Court of Session—Magistrate discharging accused—Order directing complainant to pay compensation—Order illegal.	
—Proceedings under—Whether Government of India Act applies. See Government of India Act, section 107 ... 189		Several persons were charged before a Magistrate of the first class with an offence under section 494 of the Indian Penal Code. He discharged the accused and ordered the complainant to pay compensation :— <i>Held</i> that inasmuch as the Magistrate had no jurisdiction to try the case (it being neither a warrant nor a summons case) the order directing payment of compensation was illegal; all that the Magistrate could do was to follow the procedure laid down in Chapter XVIII of the Code of Criminal Procedure in which chapter neither section 250 nor section 253 found a place.	
—Section 195 —Sanction—Refusal by appellate court to revoke it—Computation of six months' period—Starting point—Date of original sanction. <i>Held</i> that the period of six months during which a sanction granted under section 195 of the Code of Criminal Procedure remains in force is to be computed from the date of sanction "given" by the court who first granted it and not from the date of the order of the court refusing to revoke it.		<i>Held</i> also that in a case triable by a Court of Session the Magistrate under section 209 of the Code of Criminal Procedure is not authorised to write a judgment; all that he is empowered to do is to record reasons for a discharge, if he make such an order and to pass the order.	
TILAK RAM v. DALIP SINGH ... 223		HARI RAM v. GANGA SAHAI ... 486	
—Sections 195, 487—Penal Code (Act XLV of 1860), section 174—Accused guilty of disobedience of order to appear—Magistrate convicting accused—Conviction illegal. A person was ordered by a Magistrate to appear before him which that person failed to do. He was thereupon convicted by that Magistrate under section 174 of the Indian Penal Code and fined Rs. 10 :— <i>Held</i> that having regard to section 487 of the Criminal Procedure Code the Magistrate whose order had been disobeyed could not try the case, it being a case within the purview of section 195.		—Section 250— Compensation order to pay when illegal. See Criminal Procedure Code, section 209 ... 486	
DRO SARAN TEWARI v. EMPEROR... 432		—Section 250— Compensation to accused in criminal case—Complete discharge or acquittal. The accused was charged under sections 506 and 500 of the Indian Penal Code but convicted under section 500 being acquitted under section 506. The Magistrate ordered	
—Sections 203, 437—Complaint summarily dismissed—Further enquiry—Notice to accused not necessary Where an accused person was not called upon to appear in the first			

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the complainant to pay compensation for bringing a frivolous and vexatious charge under section 508 of the Penal Code:— <i>Held</i> that the order directing payment of the fine was illegal inasmuch as section 250 of the Criminal Procedure Code could only operate where the trial or enquiry ended in the unqualified discharge or acquittal of the accused.		(b) of the Criminal Procedure Code to alter the finding, may record a conviction for an offence of which the trial court has found the accused not guilty.	
MUHAMMAD ALI KHAN v. RAJA RAM SINGH ...	499	DULLI v. EMPEROR ...	918
Section 304— <i>Fatal assault by three persons acting in concert.</i>		Sections 423, 435— <i>Procedure—Evidence of a witness not taken by first court—District Magistrate ordering a re-trial in appeal on this ground—Order not justified—Revision.</i>	
See Criminal Procedure Code, section 37. ...	731	Where a District Magistrate ordered a re-trial of an accused person on the sole defect in the procedure of the court of first instance that certain evidence had not been brought upon the record which ought to have been there, the High Court in revision set aside the order for re-trial and directed the District Magistrate to summon and examine the witnesses named by him.	
Section 350— <i>Validity of rules framed by Government.</i>		ISHWAR PRASAD v. EMPEROR ...	325
See Criminal Procedure Code, section 15 ...	844	Section 435 — <i>Revision—High Court, powers of.</i>	
Section 360— — <i>Ceases to exercise jurisdiction therein—Transfer—Magistrates—Case transferred from one Magistrate to another—De novo trial.</i>		Eight persons were charged with offences under various sections of the Indian Penal Code. Three of the accused had not been arrested when the proceedings were initiated but they surrendered at a late stage. The other five accused were acquitted by the trying Magistrate. The case of the three accused who had surrendered themselves later rested on the same evidence, and on the trying Magistrate asking for orders from the District Magistrate as to whether the prosecution against them should be continued or not, the latter ordered the continuance of the proceedings and transferred the case to another Magistrate, although it was held that the prosecution could not succeed upon the evidence on the record:— <i>Held</i> that the High Court was competent in revision to set aside the order of the District Magistrate and quash the proceedings.	
Section 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise jurisdiction so far as the particular case in question is concerned by reason of its transfer to another court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post.		JAI NARAIN LAL v. EMPEROR ...	458
RAM DASS v. EMPEROR ...	217		
Section 423 (b)— <i>Power of High Court—Altering conviction and section—Robbery—Three persons attacking one—Death caused by blows inflicted by all three—All guilty of murder.</i>			
Where three persons attack one and strike him blows with lathis which result in his death, all the three are equally guilty of the offence of murder. An appeal against a conviction opens out the entire case, and an appellate court being empowered under section 423			

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—Section 435
—*High Court, revisional powers of*
—*Quashing of proceedings not resulting in any advantage.*

The High Court in the exercise of powers vested in it under section 435 of the Code of Criminal Procedure, quashed the proceedings initiated in this case under section 182 of the Indian Penal Code inasmuch as no advantage would be gained by continuing them.

CHAITAN LAL v. EMPEROR ... 734

—Section 437
—*Accused discharged by Magistrate—District Magistrate ordering further inquiry—No notice issued—Judicial discretion in such matter.*

Nothing in section 437 of the Code of Criminal Procedure requires previous notice to be given to any accused person who has been discharged before further inquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge, or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the court to answer the facts alleged against him.

ABDUL LATIF v. EMPEROR ... 298

—Section 437
—*Further enquiry—Warrant case—Charge framed—Accused called upon to plead—Accused pleaded not guilty—Accused not convicted—Order tantamount to acquittal—Jurisdiction—Revision.*

Where in a warrant case the charge having been framed the accused was called upon to plead and he pleaded not guilty and the trying Magistrate did not convict him, held that the effect of the order was that the accused had been acquitted (though the Magistrate wrote "discharged") and that the District Magistrate had no jurisdiction to order a further enquiry.

CHHOTU LAL v. EMPEROR ... 388

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—Section 437
—*Summary dismissal of complaint—Further enquiry ordered.*

See Criminal Procedure Code, section 203 ... 30

—Section 438
—*Reference by Sessions Judge to High Court—Acquittal by Magistrate—Recommendation by Sessions Judge for re-trial—No appeal by Government against order of acquittal—Delay—Re-trial not ordered.*

Where certain persons having been tried for an offence under section 147 read with section 347 of the Indian Penal Code were acquitted by the Magistrate on 4th December 1916, and a revision having been filed against the order by the complainant (there being no appeal filed by the Local Government) the Sessions Judge referred the case to the High Court on 4th January, 1918, recommending a re-trial, held, that having regard to the long lapse of time, a re-trial was inadvisable.

RAM SAMBHARI TEWARI v. RAJMAN NAIK ... 373

—Section 439
—*Order refusing to grant sanction—Appeal to District Magistrate against order—Appeal temporarily dismissed—District Magistrate setting aside the order refusing sanction after dismissal of appeal—Order illegal—Revision.*

One L filed a complaint against B under section 406 of the Indian Penal Code. It was dismissed by a bench of Honorary Magistrates. B applied to them for sanction to prosecute L which application was refused. In the meantime L sued B to recover the money in respect of which he had complained against B. During the pendency of the suit B appealed to the District Magistrate against the order refusing to grant sanction. The District Magistrate dismissed the appeal till the suit was decided. When the Civil Court decided the suit against L, B again moved the District Magistrate who granted the sanction

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sought for and set aside the lower court's order:— <i>Held</i> , on revision that the order was illegal, the District Magistrate having become <i>functus officio</i> with respect to the appeal when he dismissed it. Temporary dismissals of appeals are unknown to the law.		with the trial and refused to grant an adjournment prayed for by the accused for the purpose of taking legal advice to put in his defence, and in consequence the accused refrained from making any defence, <i>held</i> that the court in so acting had acted hastily and irregularly in the exercise of its jurisdiction and the trial and conviction were bad in law.	
LAOCHI NARAIN V. BINDRABAN ...	210	HADIYAR KHAN V. EMPEROR ...	926
—Section 439 —Revenue appeal pending before Collector—Collector decides receipt filed in the case not genuine—No steps taken as Collector—Order for prosecution passed as District Magistrate—Illegal.		—Section 487 —Disobedience of courts order—Jurisdiction to try.	
The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no steps in this connection as Collector but acting as District Magistrate committed the case to a Subordinate Magistrate for trial:— <i>Held</i> that the High Court had jurisdiction to interfere in revision, the order passed by the District Magistrate being <i>ultra vires</i> .		See Criminal Procedure Code section 195 ...	432
RAM SAHAI V. EMPEROR ...	68	—Section 512 —Evidence taken against an accused person who has absconded—Condition precedent to the use of such evidence.	
—Section 477, scope of—Perjury—Sessions Judge refusing adjournment to accused—Summary trial—No defence by accused owing to refusal of adjournment—Revision—Irregular exercise of jurisdiction.		The mere fact that a Magistrate did not recite in his order a finding that there was no immediate prospect of the arrest of the accused who, he clearly found had absconded, does not render the evidence taken by him, under section 512 of the Criminal Procedure Code, inadmissible against them when arrested.	
Section 477 of the Code of Criminal Procedure gives to the court of Session power to charge a person for any offence referred to in section 195 and committed before it and also it gives that court power to try any person for the charge it has framed; but the section nowhere lays down that the trial is to be a summary one nor does it demand a decision which is to be more prompt and speedy than that of any ordinary trial.		BHAGWATI V. EMPEROR ...	902
Hence where a Magistrate charged a witness with having given false evidence before him in connection with a trial and at once proceeded		—Section 526 (e)—Transfer of case—Allegation that justice more likely to be done if case heard by another officer who did not know the parties—No ground.	
		Section 526 (e) of the Code of Criminal Procedure is no authority for the transfer of a case from one court to another when the ground alleged is that the transfer would be in the interests of justice if the trial were held by a court which knew nothing about either party	
		MEWA RAM V. NARAIN DAS ...	490
		—Section 537 —Calling upon the accused to enter on his defence—Omission by the Judge to do so—Mere irregularity.	
		The omission by the Sessions Judge to call upon the accused to	

Criminal Procedure Code—(concl'd.)	PAGE.	Criminal Tribes Act—(concl'd.)	PAGE.
enter on his defence is a mere irregularity and is covered by section 537 of the Code of Criminal Procedure, unless it is shown that the accused has been prejudiced thereby.		<i>Lurking house-trespass or house-breaking by night, ingredients for offence wanting—Accused previously convicted of dacoity—Sentence for transportation for life illegal.</i>	
PREMGIR v. EMPEROR ...	41	Where an accused person belonging to a criminal tribe with two previous convictions for dacoity finding the door of a dwelling-house open walked into it and abstracted certain things in a room upstairs but before he could remove them alarm was given by one of the occupants of the room and he was caught, held that he was guilty of theft and not of lurking house-trespass or house-breaking by night and he could not be sentenced to transportation for life under section 23 of the Criminal Tribes Act.	
Section 526 —Transfer—Penal Code (Act XLV of 1860), sections 409, 420, 211—Accused acquitted of charges made against him—Sanction to prosecute granted—Case filed before Joint Magistrate and transferred to Honorary Magistrate, first class—Case pending for four months—Case sufficiently important and serious to be tried by Sessions Judge.		EMPEROR v. BHAGWANA ...	283
Where a person was charged with offences falling within sections 409 and 420 of the Indian Penal Code of which he was acquitted on trial, and he obtained sanction under section 211 of the Penal Code to prosecute the complainant for falsely charging him with the aforesaid offences, and the case was filed before a Joint Magistrate who transferred it to the court of an Honorary Magistrate having first class powers where the case remained pending for four months, held that case was of a nature serious enough to be tried either in a Court of Session or by a more experienced Magistrate.		Criminal trespass—Intention to commit offence.	
MAGAN LAL v. GANESH PRASAD ...	294	See Penal Code section 447 ...	501
Criminal Tribes Act (Local Act III of 1911), section 10 (b)—Rules framed by Local Government for purposes of the Act—Rules 8 (a)—Change of residence to be notified—Temporary change for a day or two, whether to be notified.		Cross-objections—Who is entitled to file.	
Under Rule 8 (a) made by the Local Government for the purposes of the Criminal Tribes Act a registered member of a criminal tribe is not bound to notify a change of residence which is of a temporary character as one for a day of two.		See Civil Procedure Code, Order 51, rule 22 ...	587
GIRDHARI PASI v. EMPEROR ...	510	Crown—Escheat to—Right of zemindar—Residents in houses on the abadi in village Sakitra—Rights of such residents—Death without legal heirs.	
(XXVII of 1871), section 23—Accused entering dwelling-house through an open door and abstracting things—Theft—		Two persons, D and M, Sahukars by profession were owners and occupiers of a house situated within the limits of a village known as mauza Sakitra, and also within the limits of the town of Gobardhan. D and M died in that house without leaving any heirs. The Collector of Muttra representing the Secretary of State for India took possession of the house and its site as the ultimate heir to the property of a deceased person. The plaintiff the Bharatpur State, claimed the site as zemindar and asserted that D and M were owners of only the materials of the house with a right of residence therein, but had no right to transfer the site or the right of residence. The defendant on the other hand contended that the house being situ-	

Crown—(concl'd.)	PAGE.	Custom proof of—(concl'd)	PAGE.
ated in a town the owners of it were also owners of the site and consequently the house escheated to him. The plaintiff's case rested on two sets of documents namely, the Settlement Papers prepared in 1850 A. D., and the <i>wajib-ul-ars</i> of 1877 A. D. The <i>wajib ul-ars</i> provided that residents in houses of manza Sakitra, though their houses might form part of the town of Gobardhan, had no proprietary rights in anything except the materials thereof, and they could not sell the site or the right of residence on the site; and that in the event of the death of the occupier of such a house without legal heirs the proprietor of manza Sakitra, would be entitled to possession of the house along with the site. Under the documents of 1850 A. D., the Government conferred on the Bharatpur State Revenue-free proprietary rights over the soil of the 5 biswa mahal of manza Sakitra :—Held upon the facts and the evidence in the case that D and M were limited owners of the house and that the effect of the settlement of 1850 A. D., was to grant to the Bharatpur State proprietary rights in the <i>abadi</i> of manza Sakitra, and that therefore the Bharatpur State was entitled to the house and the site of the house		<i>useful even though all the requisite conditions are not proved in every case.</i>	
		When either party to a suit sets up "custom" as a rule of decision, it lies upon him to prove the custom which he seeks to apply.	
		No presumption in favour of custom as against the general or personal law is created by clauses such as section 26 of Bombay Regulation IV of 1827 or section 5 of the Punjab Laws Act: it is only when the custom is proved that it is made the rule of decision.	
		Custom binding inheritance in a particular family, although foreign to the spirit of English law, is recognised in India: and if the custom is well established in one particular family, the fact that it might or might not apply to other families will not make it void for uncertainty.	
		Special usages modifying the ordinary law of succession must be ancient invariable, established to be so by clear and unambiguous evidence	
		Where a large number of conditions have to be fulfilled to test a custom, and a number of instances are adduced in proof of that custom, it is necessary that one or more examples of each condition should be established, but it is not necessary that all the conditions should be proved in each instance. The latter requirement would greatly weaken the evidence by tradition to which in certain cases great weight is due.	
		The best evidence as to custom of inheritance is generally found in connection with the division of land, and Revenue Records may therefore be of great value.	
BHARATPUR STATE v. SECRETARY OF STATE FOR INDIA IN COUNCIL ...	653	ABDUL HUSSEIN KHAN v. BIBI SONA DEERO P C....	17
Cruelty—Restitution of conjugal rights.		Decree—Amendment, application for—Suit for sale—Decree passed by Munsif—Appeal by defendant—Munsif's decree affirmed.	
See Mohammedan Law—Restitution of conjugal rights ..	132	In a suit for sale on a mortgage the Munsiff granted a decree for the claim as "proved." The defendant	
Custom—Best evidence of.			
See custom, proof of ...	17		
———Burden of proof—Person setting up.			
See custom, proof of ...	17		
———Proof of—Burden of proof where custom set up—Alleged presumption in favour of custom—Bombay Regulation IV of 1827, section 26—Punjab Laws Act, (Act IV of 1872), section 5—Family customs—Recognised in India—Requisites to legal recognition of custom—Antiquity and certainty—Instance adduced in proof of custom—May be			

Decree—(conold.)	PAGE.	Defence of India—(conold.)	PAGE.
appealed and the decree of the Munsiff was affirmed. A decree absolute followed. The defendant then made an application to the appellate court for the amendment of the decree, and it was granted:— <i>Held</i> that the court was wrong in granting the application inasmuch as the defendant should have shown that the judgment of the appellate court was at variance with its decree and not that the judgment of the Munsiff was at variance with his decree.		— <i>Irregularity, in initiation of proceedings—'Dissuade or attempt to dissuade', meaning of.</i>	
BALGOBIND RAI v. SHEORAJ RAI ...	451	One <i>M</i> was a sub-tenant of two of the accused and worked as a ploughman of all of them. He was recruited in the Bandel corps for service in Mesopotamia and received an advance of Rs. 25. Subsequently the two accused whose sub-tenant he was sued him for arrears of rent amounting to Rs. 30-15-0. <i>M</i> made a statement before the District Magistrate of Mirzapur. This statement was not made on oath and was not signed by <i>M</i> . Then followed an order in the District Magistrate's hand and signed by him, directing warrants without bail to issue for the arrest of the four accused and an order for summoning certain witnesses. The District Magistrate took up the case himself, framed a charge and convicted the accused under Rule 29 of the Rules framed in accordance with section 2 of the Defence of India Act (No. IV of 1915). The accused were alleged to have contravened Rule 23:— <i>Held</i> , in revision, (1) that the proceedings in the court of the District Magistrate were irregular in their initiation because the Magistrate had not given the accused the option of being tried by another court as he was bound to do if he was taking cognizance of the offence upon information received under section 191 (c) of the Criminal Procedure Code, and if <i>M</i> 's statement was a complaint the Magistrate ought to have taken from him a sworn declaration of its truth before issuing warrants; (2) that rule 23 did not apply inasmuch as no person could dissuade or attempt to dissuade another from doing something which the latter had already done	
— <i>Exempting a defendant—Effect of.</i>		MAHADEO SINGH v. EMPEROR ...	895
See Civil Procedure Code section 47,	752	Deposit— <i>Payment under a compromise.</i>	
Defamation— <i>Privilege—Libel in judicial proceeding—Liability for damages in a civil action.</i>		See Compromise decree ...	472
Defamatory statements made by a party in a petition presented to a Criminal Court are absolutely privileged in a civil action for damages based on libel.		Discharge— <i>Order what to contain.</i>	
There is no statute in India dealing with civil liability for defamation. The rule to apply is that of justice, equity and good conscience. This has been interpreted by the Privy Council in <i>Wajihela Rajsanji v. Sheikh Mashidin</i> , L. R. 14 I. A., 89, to mean the rules of English Law if found applicable to Indian society and circumstances, and there is nothing in the circumstances, and society of this country that would make it improper or inadvisable to apply the English rule of privilege which is well-established in England to India.		See Criminal Procedure Code section 209 ...	486
CHUNNI LAL v. NARSINGH DAS F. B	360		
— <i>Privilege—Witness compelled to make defamatory statement.</i>			
See Penal Code section 499 ...	201		
— <i>Words uttered after quarrel.</i>			
See Penal Code section 500 ...	498		
Defence of India Act (IV of 1915), section 2— <i>Rules framed under the Act—Conviction of accused under rules 28, 29—Revision</i>			

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Dower — <i>Decree executed—Deposit by judgment-debtors of part of amount—Liability to pay interest on whole.</i>		Evidence Act —(contd.)	
See Interest—Decretal amount paid in part. ...	15	Act the Kotwal was entitled to depose that the accused came to him at the time and place stated and said "I have killed my wife; her corpse is lying in my house," and that in consequence of the statement the woman's corpse was discovered as indicated, but thereafter the defence were entitled to require the production of the whole record and to insist upon the proof of it.	
Due diligence — <i>Prosecution of proceedings—When does not amount to.</i>		SURENDRA NATH MUKERJI v. EMPEROR ...	478
See Limitation Act section 14 ...	429	Section 68— <i>Meaning of—Mortgage-deed—Attesting witness called but not examined—Document not admissible independently as mortgage—Admissible as interpreting rights and obligations of parties—Identified in another document.</i>	
Ejectment — <i>Person entering into possession without landlord's consent.</i>		A and B were members of a joint Hindu family with their father. They carried on saltpetre business and standing in need of money they executed what purported to be a mortgage-deed in favour of the plaintiffs on 15th May, 1909. It was duly signed and attested, but it was not registered till it was signed by their father on 31st May, 1909. The father's signature was not attested by either of the attesting witnesses. In this document the money was advanced on the security of property belonging to the executants and it provided for interest at the rate of -8/- per cent. per annum. The stipulation as to interest was a slip for -8/- per cent. per mensem made by the scribe, and in order to rectify the error on 21st July, 1909, another document was executed signed by the plaintiff, A, B and their father and attested by two witnesses. It was also duly registered. Default having been made by the defendants the plaintiff brought a suit on foot of both the bonds. The document of 21st July, 1909, referred to and embodied certain clauses of the deed dated 15th May, 1909. One of the attesting witnesses was dead and the other, though summoned, was not examined. The	
See Agra Tenancy Act section 24	249		
— <i>Suit decreed—Subsequent suit for declaration of right—Not maintainable.</i>			
See Agra Tenancy Act section 167	933		
Escheat — <i>Right of zamindar.</i>			
See Crown, escheat to ...	653		
Estoppel — <i>Agreement with mortgagee to pay rent—Denial of right when suit brought.</i>			
See Agra Tenancy Act section 10	212		
— <i>Representation causing another to change his position.</i>			
See Evidence Act section 115 ...	576		
— <i>Sale of house—Issue of exemption not raised.</i>			
See Civil Procedure Code section 60 (c) ...	691		
— <i>Taking benefit under compromise.</i>			
See Hindu Law—Succession ...	625		
Evidence Act, (I of 1872), sections 25, 27 — <i>Statement of accused to police—Discovery by reason of the statement—Admissibility in evidence of record.</i>			
S accused of having caused the death of his wife by strangulation, presented himself at a Kotwali police station and made a report a record of which was entered in the police register. In consequence of the report a police-officer proceeded to the house of S and discovered in a room a corpse of a woman. Upon a question as to the admissibility of the report so made, held that the provisions of sections 25 and 27 of the Indian Evidence Act apply to the circumstances of the case. Under section 27 of the Evidence			

Evidence Act—(contd.)	PAGE.	Evidence Act—(contd.)	PAGE.
court of first instance held that the deed dated 15th May, 1909, was not proved and it was rejected as inadmissible in evidence. A simple money decree was granted by that court. On appeal by the plaintiff held that the deed of 15th May, 1909, having been referred to and identified in the document of 21st July, 1909, was admissible in evidence for the purpose of interpreting the rights and obligations of the parties even though as an independent legal document it was itself inadmissible.		The estates of <i>B</i> a Raja, were taken under Government management under the Encumbered Estates Act. The manager appointed, who had power of sale under the Act, put up a village to sale. <i>B</i> bought it <i>benami</i> in the name of <i>K</i>, but the manager never executed any conveyance to <i>K</i>. Thereafter the management was removed and <i>B</i> restored to his estates. <i>K</i> having died <i>B</i> procured <i>K</i>'s heir <i>L</i> to convey the village to <i>B</i>'s illegitimate daughter <i>R</i>. After <i>B</i>'s death <i>R</i> conveyed to <i>S</i> who sued <i>B</i>'s heir <i>J</i> for possession. Held that <i>J</i> was estopped from denying <i>S</i>'s title.	
By the terms of section 68 of the Evidence Act, when its provisions are not complied with a document cannot be used as evidence at all as a document either requiring attestation or in fact attested: but this does not prevent it from being used in evidence as something else or for any other purpose. Section 68 is subject to the limitation, <i>vis.</i>, that if the document were tendered in some other proceeding for the purpose of proving the hand-writing of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it, it could not be used in evidence at all.		RAJKUMAR JAGANNATH PRASAD SINGH v. SYED ABDULLAH P. C. ... 576 —Section 126— <i>Vakil and client—Communication made to vakil in the course of his employment—Privilege.</i>	
MOTI CHAND v. LALTA PRASAD ... 121 —Section 105—<i>Alternate pleas.</i>		A suit was brought by one firm for the revocation of a patent granted to another firm. The question was the formation and the process of the working of a certain stove owned and used by the firm to which the letters patent had been granted for the purpose of manufacturing <i>banslochan</i>. A vakil was tendered in evidence by the applicant for revocation. This vakil had been employed by the other firm to defend them against a charge of creating a nuisance by smell in the preparation of <i>banslochan</i>. In his capacity as vakil the witness at their invitation visited the premises in order to make himself acquainted with the stove which it was alleged created the nuisance. The knowledge which the witness had acquired as to the formation and process of the working of the stove was acquired in the course of his employment:—Held that the evidence was not admissible. It is immaterial that a communication is verbal, that is to say, by word of mouth or by demonstration, and it is excluded by the rule of professional privilege.	
See Penal Code section 97 ... 169 —Section 115—<i>Estoppel—Estoppel by representation or action causing another to change his position—Conveyance by person entitled by estoppel—Gives transferee good title against those bound by the estoppel.</i>		English and Indian Law commented on. GOPI LAL v. LAKHPAT RAI ... 967	
The doctrine of estoppel is based upon the change of position brought about by the representations or actions of the person bound by the estoppel. Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representations or actions have created it, but all claiming under him by gratuitous title.			

Evidence Act—(concl'd.)	PAGE.	Execution of decree—(concl'd.)	PAGE.
Section 132—Compelled to make defamatory statement. See Penal Code section 499 ...	201	In a decree for sale on a mortgage both the mortgage deed and the decree misdescribed the property mortgaged and ordered to be sold as <i>muafi</i> . The property as a matter of fact was assessed to revenue. When the mortgagee applied for execution of his decree, the objector who had purchased the same property in execution of a simple money-decree pleaded that there was no <i>muafi</i> . The mortgagee's lien had been proclaimed at the time of his purchase. Held that the misdescription not having deceived the objector, when he purchased, the court was not debarred from doing what was right by correcting the error in the decree. BASANTI v. KUNJ BIHARI LAL ...	262
Excise Act (Local No. IV of 1910), sections 60, (a), 71—Presumption. The only presumption which arises under section 71 of the Excise Act is that an accused is in possession of an exciseable article and not that he has himself manufactured the liquor. SUKRU v. EMPEROR ...	488	Exproprietary Tenancy—Mortgage and then relinquishment—Same transaction. See Agra Tenancy Act section 10 ...	329
Section 64 (c)—Wilfully doing or omitting to do anything—Not keeping correct accounts. In order to secure a conviction of a license-holder under section 64 of the Excise Act the Legislature clearly means that it must be proved that a license-holder (accused of an offence thereunder) should have allowed the breach to be committed by his servant or that he should be cognizant of what the servant was doing. RAM DAS v. EMPEROR ...	474	False information—Application containing defamatory statements. See Penal Code section 182 ...	105
Exchange—Property valued over Rs. 100. See Transfer of Property Act section 64 ...	98	Gist of offence. See Penal Code section 182 ...	614
Execution of decree—Decree passed against a deceased person—Representative of the deceased can show in execution that the decree is void—No question of jurisdiction in such a case. A decree made against a dead man is a nullity and cannot be executed by the executing court. No question of the jurisdiction of the court arises in such a case. It is open to the representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made and that such a decree is void and incapable of execution as against the person so dead. SRIPAT NARAIN RAI v. TIRBENT MISRA ...	327	Family arrangement—Agreement executed under a wrong view of facts and law. Not binding—Hindu Law—Adoption by widow after estate has vested in an heir—Divesting of estate. N and P were brothers. N died leaving a widow L. Subsequently P died leaving a widow D. Upon P's death the two widows apportioned the whole property in equal shares between themselves. In the document which was executed for the purpose it was stated that the two brothers were "joint, in food, business and everything," but it was followed by the recital that the two widows were entitled to the property in equal shares. Disputes having broken out between the two widows, two cross suits were filed, one on behalf of L and the other on behalf of D. L alleged that she had been authorised by her husband to adopt a son, and that she intended to adopt one whereupon a dispute arose between her and D which was referred	
Mortgage—Misdescription of property in decree—Objector not deceived—Court has jurisdiction to correct error.			

Family Arrangement —(concl'd.)	PAGE	Further enquiry—(concl'd.) —Warrant	PAGE
to arbitration and that resulted in the former partition. She prayed for separate possession of her share allotted in the partition. <i>D</i> in her suit asserted that on <i>N</i> 's death her husband <i>P</i> succeeded to the whole estate by right of survivorship and on his death she acquired a Hindu widow's estate in the property and that the deed of partition was not binding on her, her signature thereto having been obtained by fraud and in ignorance of the nature of the deed and her legal rights. It was found by the court below that <i>N</i> and <i>P</i> were members of a joint Hindu family and on the former dying without issue <i>P</i> became owner of the whole by right of survivorship, and that the deed of partition was not binding on <i>D</i> . Held that the deed of partition, evidently had been executed by <i>D</i> under the mistaken belief that she and <i>L</i> were equal owners of the property left by her husband and that she would be divested of her rights by an adoption made by <i>L</i> , and consequently it was not binding on <i>D</i> .		Case—Acquittal order. See Criminal Procedure Code section 437 388	
		Gambling (Act I of 1917), sections 3, 4—Keeping a common gambling house—Facts necessary to be proved	
		In order to sustain a conviction of a person for keeping a common gambling house it is necessary for the prosecution to prove not only that he owned the house, or was the occupier of it and that instruments of gambling were kept or used in it, but that they were kept or used for the profit or gain of that person. Where a house is not proved to be a common gaming house, the presence of other persons therein will not raise a presumption against them; and even if there were one, no presumption will arise against such persons unless it can be shown that gambling was going on at the time when they were present.	
		RACHUNATH v. EMPEROR ... 760	
		—(III of 1867), section 13—Confiscation of money gained—Order illegal.	
		Under section 13 of the Gambling Act a Magistrate is not authorized to order the confiscation of money gained by an accused person in the gambling; only the instruments of gaming may be so seized.	
		MATURWA v. EMPEROR ... 428	
		Gift—Priest of a temple—Whether grant to idol.	
		See Grant—Priest and his heirs ... 394	
		Government of India Act, 1915 section 107—High Court's power of superintendence—Code of Criminal Procedure (Act V of 1898), sections 145, 435, (3).	
		Section 107 of the Government of India Act cannot be invoked so as to question proceedings which purport to be proceedings lawfully taken by a Magistrate under Chapter XII of the Code of Criminal Procedure.	
		SUNDAR NATH v. EMPEROR ... 189	
		Grant—Construction of.	
		See Hindu Law—Widow ... 564.	
Family Custom—Binding in one family—Whether void for uncertainty.			
See custom, proof of ... 17			
Fraud—Mortgage of property without title—Registration			
See Registration Act section 28 ... 871			
Further enquiry—Notice when necessary.			
See Criminal Procedure Code section 437 298			
—Ordered on revision—Notice to accused when not necessary.			
See Criminal Procedure Code section 203 80			

Grant—(concl'd.)	PAGE.	Hindu Law—(concl'd.)	PAGE
———Priest and his heirs— Grant not in favour of idol—Grantee capable of dealing with property as his own—One member of joint family alienating property—Other members may impeach—A stranger competent to do so. A grant of property under a deed made to a priest of a temple and his heirs for his services in connection therewith is not grant in favour of the idol of the temple, and the grantees are competent to deal with such property as their private property. Where a member of a joint family makes an alienation of property belonging to the family purporting to act on behalf of the family, the other members can call it in question on the ground that it was made without authority or without valid necessity or not for their benefit. But a person who is a stranger to the family and does not claim through the joint family is not competent to do so. BANARSEE DAS v. SHEODARSHAN DAS SHASTRI ... 394 Gratuitous payment—Money paid as interest on money left with vendee for payment to mortgage. See Contract Act section 70 ... 581 High Court—Jurisdiction to decide Revenue matters—Reference by Board of Revenue. See Stamp Act section 57 ... 49 Hereditary Office—Decree for—Execution. See Civil Procedure Code, Order 21, rule 32 ... 700 Hindu Law—Adoption—Divesting of estate by adoption—Limitations of widow's power to adopt—Impartible raj—Whether the rule that adoption must be to last male-holder applies to it. Hindu Law recognises the validity of an authority given to a widow by her deceased husband to make a second or even a third or fourth adoption on failure of the previous adoption to attain the object for which the power is given <i>viz</i>, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. Such a power		comes to an end as soon as any such adopted son attains full legal capacity to continue the line : nor does it subsequently revive on his death, whether or not he leaves a son of his own or a widow capable of adopting to him. The rule that adoption must be made to the last full owner applies just as much to an impartible raj (which is joint family property subject to an exception) as it does to separate property. MADANA MOHANA DEO KESARI v. PURUSHOTTAMA ANANGA BHEEMA DEO P. C. ... 725 ———Adoption—Deed postponing son's estate during widow's life—Transfer. See Transfer of Property Act, section 6 (a) ... 765 ———Alienation— Widow—Gift—Suit by remote reversioner—Declaration that gift invalid—Minority of presumptive reversioner—Suit not maintainable. The right to maintain a suit, that a gift made by a Hindu widow in possession of her husband's estate as heir is not binding upon the heirs of her husband, does not belong to any one having a possibility of succeeding to the estate of inheritance held by the widow for her life ; as a general rule the suit must be brought by the presumptive reversionary heir. It may be brought by a more distant heir if those nearer in the line of succession are in collusion with the widow or have precluded themselves from interfering. The minority of the presumptive reversioner does not enable a remoter heir to bring such a suit. GUMANAN v. JAHANGIRA ... 465 ———Alienation—Manager—Legal necessity—Mortgage of joint property by manager who is not the father—Burden of proving necessity—Whether a mortgage without necessity binds mortgagor's own share. The mortgage of joint estate made by the manager of the property, who is not the father of the other members of the joint family, can only be justified so far as it is	

Hindu Law—(contd.) PAGE.

wanted for the joint family purposes. If the necessity cannot be established by direct evidence it may be assumed, if it can be shown, that reasonable care was taken to ascertain if such circumstances existed and the transferee acted in good faith. In either case the burden of proof lies on the person who claims the benefit of the mortgage. There is no difference between the burden of proof when it is desired to support a mortgage made by a manager of a joint estate and that which is required to support the mortgage made by a widow who has only a similar limited power of disposition.

If the mortgage debt was not incurred for necessity, not even the mortgagor's own interest can be sold in enforcement of the mortgage.

When the mortgage is for a larger amount than the necessity warrants, it will only be upheld to the extent to which necessity has been proved.

A zemindar, manager of a joint family, mortgaged three joint villages for Rs 3,000 to pay the Government revenue. The lender suing on the mortgage, other members of the joint family contested the validity of the mortgage. It was proved that Rs. 1,698 odd were actually paid as revenue of two of the villages out of the money lent, but no evidence was given as to the disposal of the balance.

Held, that the mortgage was enforceable to the extent of Rs 1,698 only against the joint villages and that as regards the balance, not even the mortgagor's own share in those villages was bound.

ANANT RAM v. THE COLLECTOR OF
ETAH P. O. ... 245

—Alienation—Widow
—Sale of husband's estate in her possession in lieu of debt of husband
—Debt extinguished by contract whereunder the liability was taken over by another person—Legal necessity—Whether sale valid.

Where a Hindu widow in possession of her husband's estate as heiress executed sale-deeds to third persons

Hindu Law—(contd.) PAGE.

in lieu of her husband's debt which had been agreed to be discharged by a relative of the husband, with the creditor's consent but the obligation was not fulfilled by the relative, *held* that since the date when the liability to discharge the debt was undertaken by the relative, the debt had ceased to be the debt of either the husband or the widow, and the non-fulfilment of the obligation would not revive the debt so as to make it a good consideration for the alienation of the property.

NATHU v. MUSAMMAT TULSHA ... 448

—Alienation by widow
—Spiritual benefit of husband—To what extent alienation permissible—Whether spiritual benefit equivalent to *sraddh* of the deceased.

A Hindu widow succeeded to certain property as heir to her sons. She went on a pilgrimage to Jagannath, and there made an oral gift of a portion of the property in her possession in favour of the *pandas* of the temple. On her return home she executed a formal deed of gift in which after alluding to the oral gift she stated that she had made the gift and *shankalap* "for the salvation of her husband and his family members and for her own salvation." The portion endowed constituted no more than $\frac{1}{80}$ th part of the entire estate. After her death the next reversioner to her husband brought a suit for recovery of possession of the property from the donee and his lessee by cancellation of the deed of gift:—*Held*, that the gift was valid having been made with a view to the spiritual benefit of the widow's husband and her sons who were included in the expression "husband's family members." An alienation made by a Hindu widow for the spiritual benefit of the deceased will not be set aside merely because it was not made in connexion with a *sraddh* ceremony of the deceased.

There are ceremonies and duties incumbent upon a widow, in the sense that their performance is regarded as indispensable to the spiri-

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tual welfare of her late husband. These duties she is under an obligation to perform and these ceremonies she must carry out and for this purpose she has a power of alienation in respect of the <i>corpus</i> of the property in her hands, independent altogether of the proportion which the property alienated may bear to the whole. In the case of an alienation for a purpose regarded as indispensable to the spiritual welfare of the late husband, the question will not be what proportion does the property alienated bear to the entire estate but only, was the alienation a reasonable one under the circumstances, in the sense that the expenditure incurred was such as might be regarded as suitable to the position of the family. There may be alienations made by a Hindu widow for the purpose of doing pious acts for the benefit of her late husband which are not in the nature of spiritual necessities; and with regard to such alienations the question of the proportion borne by the property alienated to the value of the entire estate becomes pertinent		those heirs, though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed	
KUNJ BEHARI LAL v. LALTU SINGH.	996	SAUDAGAR SINGH v. PARDIP NARAYAN SINGH P. C. ...	61
——— <i>Alienation suit to set aside—Widow in possession of husband's estate—Gift in favour of daughter's son—Daughter alive—Suit by remote reversioner for declaration of invalidity of alienation by widow—Suit maintainable</i>		——— <i>Debts—Joint family property—Liability for father's debts—Waiver of creditor's claim to proceed against such property—Symbolical possession—Sufficient to interrupt adverse possession.</i>	
<i>Held</i> , that a decree, declaring that a gift in favour of a daughter's son made by the widow of the last male owner was of no effect after her death, might be given to a remote reversioner even though the daughter herself was alive at the date of the suit		The general rule of Hindu Law is that ancestral property in a joint family may be made liable for the father's debts, unless those debts are shown to have been for an illegal or immoral consideration; but this rule is not always applicable, <i>e. g.</i> , the creditor's conduct may evidence his intention not to resort to any such right.	
JAINT SINGH v. GOSAIN ...	453	Where therefore it appeared that the interest of the father had been taken in execution, but it was sought in the Privy Council to extend that interest beyond his life on the ground that his sons were liable under the aforesaid rule.	
——— <i>Alienation by widow—Presumptive heir—Declaratory decree—Declaration to protect his interests, whether permissible—Specific Relief Act, (Act I of 1877), section 42, illustration (b).</i>		<i>Held</i> , that such an argument was no longer open to the attaching creditor, as there might have been an answer to it if it had been raised in the courts below.	
When a deed is executed, the result of which may be to prejudice the interests of the reversionary heirs,		Symbolical possession is sufficient to interrupt adverse possession, if the adverse possessors are parties to the proceedings in which, it is given.	
		THAKUR SRI SRI RADHA KRISHNA CHANDERJI v. RAM BAHADUR P. C. ...	33
		——— <i>Gift to a Hindu female—Widow—Malk mustaqil, meaning of—Absolute estate.</i>	
		The word <i>malk</i> alone used in a deed of gift executed by a Hindu in favour of a female unless there were something definite to the contrary in the surrounding circumstances to qualify the meaning of the expression indicates an absolute estate.	
		Where <i>D</i> , a Hindu, executed a deed of gift in favour of his daughter,	

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ter-in-law and constituted her thereunder *malik mustagil* in respect of the property gifted to her, *held* that in the absence of any surrounding circumstances to indicate that the donor intended the lady to take a mere life-estate, the lady must be deemed to have taken an absolute estate.

A grant should be construed in favour of the grantee rather than in favour of the grantor.

NAULAKHI KUAR v. JAI KISHEN SINGH ... 564

— Gift—Mitakshara—
Issue as to joint or separate estate—
Blending of self-acquired and joint funds—Gift by managing member of joint family property.

A member of a Hindu joint family may convert his self-acquired property into ancestral family estate by throwing it into the common stock.

A Mitakshara family of five brothers separated in estate. *D* and *K* two of the brothers, continued to live together, *D* acting as guardian of *K*, who was a minor. Later on a son *R* was born to *D*. Later still *D* a third brother died, and property came to *D* and *K* from his estate. *D* kept only one account of the profits of this property, even after *K* came of age; and he kept only one account for all his receipts from this and other property and of all his expenditures. A *deorh* partition (i. e., partition by metes and bounds) was later made between *D* and *K* and mutual exchanges made whereby *D* gave up his share in certain ancestral property for *K*'s share in property acquired from *D*. *D*'s estate, and *vice versa*.

In a suit by *D*'s son *R* and grandsons (the appellants) after *D*'s death to set aside deeds of gift made by *D* in favour of the respondents on the ground that the property given was ancestral property and the gifts in consequence invalid.

Held, that even assuming that the property coming from *DD*'s estate was *D*'s self-acquired property; yet by blending the income of that

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property in the accounts with the income of the new joint family constituted on *R*'s birth by *D* and *R* and by the mutual exchanges with *K*, *D* had shown his intention to treat what came to him from *DD* as joint property and had converted it into ancestral estate: that the properties included in the deeds of gift were therefore joint family properties of which *D* had not the right to dispose, and that the appellants were entitled to recover them.

RADHA KANT LAL v. MUSAMMAT NAZMA BEGAM P. O. ... 537

— Joint property—
Alienation—Right of members to impeach.

See Grant—Priest and his heirs ... 394

— Joint property—
Blending of self-acquired property.

See Hindu Law—Gift ... 537

— Joint family—Decree against father, son exempted—
Effect on subsequent suit against son.

See Civil Procedure Code section 47. ... 752

— Joint family—Occupancy acquired by one member—
Profits thrown in common stock—
Effect of.

See Agra Tenancy Act section 20. 225

— Joint family—Self-acquired property—Gains obtained from an education received at the expense of the joint family—Partibility of—Science acquired at the expense of ancestral wealth—Special and general education.

Although the Mitakshara lays down that "what is earned by science acquired at the expense of ancestral wealth must be shared with the whole of the brethren and with the father," this does not apply to gains which are the result, not of the education received at the expense of the joint family but of the peculiar skill, mental abilities and individual effort in applying and improving such education-exercised by the person educated at the expense of the joint family. There is no authority in the

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Mitakshara for the proposition that gains made personally and without the aid of joint funds by a member of a joint family who received an ordinary education suitable to his position as a member of the family to which he belonged should in law be regarded as partible and not as his self-acquired property.		the first generation from the late Rajah can claim maintenance as of right: any special custom to that effect must be pleaded and proved.	
METHARAM RAMRAKHOMAL v. REWACHAND RAMRAKHOMAL P. C. ...	281	The grandson of the late Rajah of Pittapur, an impartible Raj, sued the devisee of the Raj for maintenance on the ground that by birth he had a right to maintenance out of the property constituting the Raj, which right followed the property into the hands of a third party.	
—Management—Right of—Devolution.		Held, that there was no legal basis for any such claim.	
See Hindu Law—Charitable purposes ...	118	SRI RAJAH RAMA RAO v. RAJAH OF PITTAPUR P. C. ...	833
—Maintenance of junior members—Basis of the right—Impartible <i>semindari</i> —Not the subject of co-parcenary—Right to maintenance out of impartible <i>semindari</i> —Founded on custom.		—Partition—Division made by mutual mistake as to property subject thereof—Re-partition.	
The right to maintenance of the junior members of a <i>Mitakshara</i> joint family, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases. Two other categories of persons have by special texts a right to maintenance under the <i>Mitakshara</i> law, viz:—		Where by mutual mistake the parties to a partition included in the division certain property to which a third person was entitled and who got his share in the property by suit from the parties who had made the original division, held that the partition was liable to be re-opened.	
1. Those who are debarred from inheriting by personal disqualifications <i>e.g.</i> , the idiot, the blind from birth, the madman, &c.		GANESHI LAL v. BABU LAL ...	339
2. Certain near relations, <i>vis.</i> , the widow, the parent, and the infant child.		—Religious endowments—Debottar—Asthali (math), nature of—Purchases out of asthal income—Alienation by guardian of minor mahant with leave of court—How for binding on asthal property.	
But these categories are exhaustive.		The Mahant of a Hindu asthal or math holds the property in trust for the institution itself. He can only alienate it in case of necessity.	
It is now definitely decided that in impartible properties there is no co-parcenary: hence in such properties no one can claim maintenance on the ground that but for the custom of impartibility he could sue for partition.		Acquisitions with the income of an asthal are subject to the same trust as the original property.	
Custom may and does affirm a right to maintenance out of an impartible Raj in certain members of the family. In the case of sons this custom is so well recognised that proof of it in individual cases is unnecessary. But there is no invariable or certain custom that any below		In the absence of a necessity which would render the debts contracted by him binding on the institution a Mahant has no power to alienate its properties for the purpose of discharging those debts, and if the asthal was not liable for such debts, his successor is entitled to have the sales set aside.	
		J, a Mahant, appointed the first respondent, a minor, his successor and left a will whereby he appointed C guardian of the first respondent.	

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J had mortgaged the aethal property. The mortgagees after his death brought or threatened proceedings on the mortgagees. To pay off these liabilities C obtained from the District Judge leave to sell certain of the aethal properties.	
<i>Held</i> that C's powers could not be larger than those of the actual mahant. In the absence of proof that the original debts were binding on the aethal, the sales were set aside.	
BASUDEO ROY v. JUGAL KISHWAR DAS P. O. ...	601

—Religious endowment
 —Charitable purposes—Private charities—Devolution of the right of management—Rule where the grant itself is silent.

The general rule of Hindu Law is that the right of management of private charities passes to the natural heirs of the original grantee, and if there is no other arrangement or usage and no scheme settled by the court will be exercised by the managing member of the family before partition or in turn by the several heirs after partition.

But this rule does not apply (1) when there is an express provision to the contrary in the original grant, or (2) when there is a sufficient indication in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee is inconsistent with the founder's purpose.

A Hindu sovereign granted certain lands to S, his *guru* or spiritual preceptor, some without condition and others for specified religious purposes. The original *guru*'s descendants in regular succession filled his office and enjoyed and managed the lands. The Raj was encheated. The then *guru*, who was the first to leave more than one son, subsequently died leaving three sons. The eldest of the three was installed as *guru*. Thereafter one of his younger brothers sued for a share in the non-religious properties, and in the management of the religious properties.

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<i>Held</i> , that as regards the non-religious properties there was nothing to take their descent out of the ordinary rule of inheritance, and that plaintiff was entitled to partition: but that as regards the religious properties it was the founder's intention that they should be administered by the <i>guru</i> as head of a <i>math</i> , an office not divisible among the members of a family, and this being so, the Indian Courts had no jurisdiction to settle a scheme, the only object of which would be to take away the sole power of management from the eldest son.	

SETHURAMASVAMIAR v. SRI MERU-SVAMIAR P. O. ... 113

—Reversioner, right of
 —A mere *spes successionis*—Not assignable or transferable—Not capable of being dealt with by the guardian of a minor.

A Hindu reversioner has no right or interest *in presenti* in the property which a female owner holds for her life until it vests in him on her death, should he survive her. Till that time he has nothing to assign or to relinquish or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is mere *spes successionis*. His guardian, if he happens to be a minor, cannot bargain with it on his behalf or bind him by any contractual engagement in respect thereto.

AMRIT NARAYAN SINGH v. GAYA SINGH P. O. ... 265

—Succession—Disputed succession—Compromise—A person taking benefit of compromise subsequently claiming as reversioner—Estoppel.

A, a Hindu governed by the Mitakshara died leaving a widow and a daughter by her. The widow's right to succeed was disputed by two widows of A's predeceased brothers and by the appellant, A's sister's son, who claimed to have been adopted by one of these widows to her deceased husband. A compromise, to which all four ladies and the appellant were parties, was

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made: under it each lady took one-fourth, and though appellant took nothing immediately, his adoption and his right to succeed to his adoptive mother's share were recognised. Later on appellant obtained possession of this share by relinquishment. Then A's daughter died, leaving a daughter of her own; later still A's widow died. Appellant and his brother claimed as next reversioners, the whole of A's property, save only the one-fourth share already in appellant's possession.			
<i>Held</i> : that the appellant having entered into and taken the benefit of the compromise was precluded from claiming as reversioner.			
KANHAI LAL v. BRIJ LAL P. O. ...	825		
—Succession—Inheritance—Exclusion from a share of the family property—Permanent blindness after birth.			
Under Hindu Law blindness, to cause exclusion from inheritance, must be congenital. Mere loss of sight which has supervened after birth is not a ground of disqualification. Incurable blindness if not congenital, is not such an affliction as, under the Hindu Law, excludes a person from inheritance			
The rule laid down in Rajkumar Sarbadhikari's Hindu Law of Inheritance, p. 956 adopted.			
GUNJESHWAR KUNWAR v. DURGA PRASHAD SINGH P. O. ...			
—Succession—Unchastity of widow in husband's life-time—Condonation by husband—Husband and wife.			
Under the Hindu Law a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's life time, if the husband condoned her unchastity.			
RADHEY LAL v. BHAWANI RAM ...	91		
—Widow—Alienation			
See Hindu Law—Alienation.			
—Widow—Power to adopt.			
• See Hindu Law—Adoption ...	725		
		Honorary Magistrate—Judgment by one who has not heard case.	
		See Criminal Procedure Code section 15 ...	884
		Impartible Raj—Junior members—Maintenance of.	
		* See Hindu Law—Maintenance ...	833
		Injunction—Decree for—Interference by police ordered—Illegal.	
		See Civil Procedure Code Order 21, rule 32 ...	700
		Insolvency—Annulment of insolvency—Suit by Receivers commenced before annulment—Suit maintainable after annulment.	
		One G. R. started a firm in which he associated his two brothers and his father as partners without contribution of capital. Subsequently a brother of G. R. sued him for partition. Instead of fighting that suit G. R. made an application to be adjudged an insolvent and a composition was accepted by the creditors. Thereupon the insolvency was annulled. Before this, however, the Receivers had commenced a suit against the brothers of G. R. in respect of their liability to G. R., in certain other concerns in which the brothers of G. R. had no interest. The suit was decreed and upon appeal to the High Court it was objected that the suit by the Receivers after annulment of the insolvency was not maintainable:— <i>Held</i> that the suit was maintainable.	
		MANNU LAL v. NELIN KUMAR MUKERJI ...	938
		Instalment Bond—Power to sue for whole.	
		See Limitation Act Article 75 ...	929
		Interest—Decretal amount paid in part—Judgment-debtor alleging it to be whole—Whether liability to pay interest on whole—Application of Civil Procedure Code (Act V of 1908), Order 24, rules 1, 2, 3.	
		A decree for dower for Rs. 5,000 with interest and costs was passed in favour of the widow of a deceased Mohammedan realisable from his estate in the hands of the heirs.	

Interest—(concl'd.)	PAGE.	Jurisdiction—(concl'd)	PAGE.
The judgment-debtors in execution proceedings objected that the widow could get the decree executed for three-fourths of the amount only, the decree holder being entitled to one-fourth of the estate as heir. The judgment-debtors deposited three-fourths of the amount with interest and costs while taking the objection. The objection was overruled up to the High Court. Upon the decree-holder claiming interest on the full amount until three months after the decision of the High Court, <i>held</i> that the amount deposited in court might have been immediately on deposit paid out to the decree holder in part discharge of her claim and the judgment-debtors were relieved from paying interest on that amount.		—Question of— <i>Representative showing that decree void.</i> See Execution of decree ... 327 —Question not raised —Effect of. See Provincial Small Cause Courts Act Art. 31 ... 679	
AMTUL HABIB v. MUHAMMAD YUSUF ... 15		Land Acquisition Act (I of 1894), section 9—Notice—Effect of non-issue of notice—Validity of proceedings. The plaintiff purchased certain plots of land from Imdad Husain and Altaf Husain. He did not apply for mutation of names and the result was that Imdad Husain sold his share to his wife Ahmadi Begum who applied for mutation of names. After this the plaintiff applied for mutation of names but the Revenue Court for certain reasons allowed his name to be recorded in respect of a half share only. The result was that there were two <i>Khata</i> s in the public records, <i>viz.</i> , No. 22 in the name of Ahmadi Begum and No. 23 in that of the plaintiff. The plaintiff, however, seems to have remained in possession and to have planted some trees, the boundary marks also between the plots were obliterated. With the object of acquiring some land for public purposes the Local Government issued a notification in which these lands were also included. In regard to <i>Khata</i> No. 22 no notice was issued to the plaintiff and no public notice was issued as required by section 9 (1) of the Land Acquisition Act. An award was made in respect of <i>Khata</i> No. 22, the persons who were recorded therein not objecting on the date fixed in the special notices. The plaintiff, however, did appear and made an objection to the special officer and laid claim to the compensation on the ground that he was the owner. He took no steps under section 18 of the Act for a reference to the court. The compensation was placed to his credit in the Treasury. In regard to <i>Khata</i> No. 23, public notice and special notice were issued but the full period of 15 days was not	
Interrogatories—Postponement of decision of their relevancy. See Civil Procedure Code Order 11, rule 6 ... 762			
Jail Regulations—Whether have force of law—Breach of. See Civil Procedure Code Order 6, rule 14 ... 64			
Joinder of Charges—One trial. See Penal Code section 408 ... 596			
charged with embezzlement. See Penal Code section 408 ... 596			
Joint Tenant—Notice to quit on one—Validity of. See Transfer of Property Act section 106 ... 969			
Jurisdiction—District Magistrate—Accused to furnish bond with one surety—Order illegal Where a District Magistrate was not trying a case as a court of appeal he had no jurisdiction to direct that each of the accused convicted should furnish a bond for a certain amount with one surety of a like amount. DOOBAR TEWARI v. EMPEROR ... 536 —Question of— Decision. See Civil Procedure Code Order 21, rule 89... 433			

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allowed. The plaintiff objected and applied for a reference under section 18 in respect of it. Award was made in respect to <i>Khata</i> No. 23. At the date of the suit the reference was pending before the District Judge. Formal possession on behalf of Government was taken of both the <i>Khata</i>s. The present suit was filed for a declaration that all the proceedings were null and void because of the irregularities of procedure. There was, however, nothing fraudulent or corrupt in the proceedings and it was also found that the plaintiff had knowledge of the proceedings resulting in the award :—<i>Held</i> that the land acquisition proceedings were not vitiated by the mere fact that no special notice had been issued to the plaintiff in regard to <i>Khata</i> No. 22 inasmuch as he had actual knowledge of all the proceedings. In regard to <i>Khata</i> No. 23 the plaintiff had less right to complain for notice was issued to him though only ten days before the date fixed, and he would be able to get full compensation for it when the reference which was pending before the District Judge would be disposed of after his objections had been heard. <i>Held also</i> that the proceedings would not be invalidated by reason of the fact that the two <i>Khata</i>s were treated separately, though there were no division marks upon the land itself. THE SECRETARY OF STATE FOR INDIA <i>v.</i> QAMAR ALI ... 669 Sections 23, 29—"Market value of land"—Compensation awarded on the basis of rent income—Compound appurtenant to house but in cultivatory possession of tenants with rights of occupancy—Mode of assessment In a case of compulsory acquisition of land, a plot of land appurtenant to a house as compound was acquired. The land in question was let to agricultural tenants who had acquired occupancy rights. The		sum awarded to the appellant for compensation was calculated at 16 years' purchase on the net rent income of the plot <i>plus</i> a sum of money paid as compensation to the tenants. The owner objected that compensation should have been given to him according to the market value of the land considered as a building site :—<i>Held</i> that the principle adopted for awarding compensation was correct inasmuch as that the land was not at the disposal of the owner for sale as a building site its value as such being diminished by the existence of occupancy rights ORDE <i>v.</i> THE SECRETARY OF STATE FOR INDIA ... 301 Landlord and tenant—Cutting down by tenant of trees on agricultural land—Suit for damages—Civil Court—Jurisdiction—Agra Tenancy Act (II of 1901), section 57 The plaintiff was the landlord and the defendants were occupancy tenants of a certain agricultural holding. The latter cut down two trees within the boundaries of that holding and a Munsiff exercising the powers of a Small Cause Court Judge granted the plaintiff a decree for damages in a suit brought for that purpose :—<i>Held</i> that the suit was cognizable by a Civil Court. The cutting down of trees does not raise a presumption that the act is detrimental to the land within section 57 of the Tenancy Act. MANSUKH RAM <i>v.</i> BIRJRAJ SARAN SINGH ... 621 Notice to quit—Validity of. See Transfer of Property Act section 106 ... 969 Lease—Registered—Priority over mortgage. See Priority ... 137	

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Legal Practitioners' Act (XVIII of 1879), section 36—Touts—List of—Person seen canvassing and introducing litigants to members of the Bar—Inference from—Removal of previous list—Effect of—Order declaring a person as a tout—Revision.	
It is a reasonable and legitimate inference of fact that if a man is shown to spend the greater portion of his working hours in canvassing and introducing clients to members of the profession he is not rendering gratuitous service such as a casual friend and an acquaintance may do.	
An order of a Judge declaring that the applicants are touts and putting up their names in list of touts is an order against which revision can be entertained. Mere removal of the list of touts exhibited in one Court or failure to exhibit them in one of the District has not the effect of cancelling the list altogether.	
KALKA PRASAD v EMPEROR ...	76
Letters Patent, section 10—Decree under that section—Review of judgment.	
Held that no application for a review of judgment is allowable where the decree was given in an appeal under section 10 of the Letters Patent.	
KALYAN SINGH v. ALLAH DIYA ...	964
Limitation—Mesne profits directed to be ascertained in execution department—Time, when begins to run	
See Mortgage—Suit for Redemption ...	88
—————Starting point for sanction to prosecute.	
See Criminal Procedure Code section 195 ...	223
Limitation Act (XV of 1877) —Schedule II, articles, 113, 141—Chaukidari Chakran Lands—Right of patnidars when such lands are resumed by Government and transferred to zemindar—Transfer "subject to contracts"—Village Chaukidari Act, 1870 (Bengal Act VI of 1870), section 51.	

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Limitation Act—(contd.)	
The word "contract" primarily means a transaction which creates personal obligations, but it may though less exactly, refer to transactions which create real rights. It is in this latter sense that it is used in section 51 of Bengal Act VI of 1870, and the rights thereby reserved to patnidars and others on the transfer to the zemindar of Chaukidari Chakran Lands comprehensively included in the word "contracts" are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession.	
Where therefore a patnidar sued the zemindar to recover possession of such lands	
Held that the Article of Schedule II of the Indian Limitation Act, 1877, applicable was not Art. 113 but Art. 144 and that the period of limitation accordingly was not three but twelve years.	
RANJIT SINGH v. MAHARAJ BAHADUR SINGH P. C. ...	964
Limitation Act (IX of 1908), Section 5—Admission of appeal after period of limitation without notice to respondent—Practice of Indian Courts—Stage at which question of limitation should be finally decided.	
The admission of an appeal after the period of limitation deprives the respondent of a valuable right for it puts in peril the finality of the decision in his favour. Where therefore an order for such admission is made <i>ex-parte</i> , it is open to re-consideration at the respondent's instance.	
The question of limitation should not however be left open till the hearing of the appeal, although this may have hitherto been the usage in India. The courts in that country should adopt a procedure which will secure at the stage of admission the final determination of any question of limitation affecting the competence of an appeal.	
KRISHNASAMI PANIKONDAR v. S. R. M. A. R. RAMASAMI CHETTY ... P. C.	57

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————Section 6, article 181—Civil Procedure Code, (Act V of 1908), Order XXXIV, rules 4 and 5—Suit on mortgage—Decree passed by High Court in appeal—Application for decree absolute—Limitation. An application for a decree absolute under Order 34, rule 4 of the Civil Procedure Code is beyond time when it is made more than three years after the date of the decree in appeal passed by the High Court and section 6 of the Limitation Act does not save limitation inasmuch as an application for a final decree in a mortgage suit is not an application in execution. NIZAMUDDIN SHAH v. BOHRA BHIM SEN 85 ————Section 7—Time beginning to run. See Limitation Act Art. 182 ... 633 ————Section 14—Due diligence—Joint tenants—Decree for arrears satisfied by plaintiff—Suit for contribution filed in the Small Cause Court—Plaint ordered to be returned for presentation to proper court—Plaintiff refusing to take back plaint—Revision to High Court dismissed—Plaintiff waiting for three months thereafter—Time between filing suit and taking back plaint not allowed. A decree for arrears of rent having been passed against the plaintiff and the defendants who were joint occupancy tenants, was realised from the plaintiff alone to a large extent on August 19th, 1910. The plaintiff thereafter brought a suit against the defendants for contribution. The suit was instituted on May 20th, 1913, in the Court of Small Causes. On November 27, 1913, the Small Cause Court ordered the return of the plaint for presentation to the proper court. The plaintiff refused to take it back, and on February 19, 1914, filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915, the plaintiff having applied for the return of		the plaint it was so returned to her on June 30, 1915 and was filed on the same day in the Mansiff's Court. The Mansiff dismissed the suit as time barred. The lower appellate court reversed the Mansiff's decree, and held the suit within time, allowing to the plaintiff the period between May 20, 1913 and June 30, 1915:—Held that the plaintiff was not entitled to the interval between May 20, 1913 and June 30, 1915, being allowed to her, inasmuch as she could not be deemed to have been prosecuting her case with due diligence in view of the fact that she waited for more than three months after the dismissal of the revision before she applied for the return of the plaint. HAMIDA BIBI v. FATIMA BIBI ... 429 ————Section 15—Exclusion of time—Order giving time. See Civil Procedure Code section 48 71 ————Section 20—Mortgage—Part payment—Payment by mortgagor. A mortgage was made to A on 8th January, 1891. A brought a suit on this mortgage on 7th November, 1914. He impleaded in this suit as defendants—(1), the mortgagors, (2) one set of subsequent mortgagees and (3) certain purchasers of a portion of the equity of redemption in the mortgaged property under a sale deed, dated 24th June, 1913. The third set of defendants only contested the suit on the ground that it was barred by limitation. A alleged that the suit was within time by reason of three payments made by the mortgagors on account of interest as such, the last of the payments being on 25th November, 1902. This payment was made by the mortgagors by means of a sale by the mortgagors to certain prior mortgagees of some property other than the third that was covered by the mortgage in suit. Held that the payment having been made towards interest as such by the mortgagors, who were liable to pay, took	

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effect against the third set of defendants, purchasers of a part of the property, and the suit was within time.		—Article 11—Objection dismissed—No suit within one year.	
RAUSHAN LAL v. KANHAIYA LAL.	790	See Civil Procedure Code Order 21, rule 58	... 256
—Section 49—Market value.		—Article 75—Bond—Payable by instalments—Power to sue for whole amount on default of payment.	
See Land Acquisition Act section 23	801	An instalment bond executed on February 23rd, 1909, was payable in five annual instalments. There was a provision that in default of payment of any instalment the creditor would have the power to sue for the entire amount in a lump sum. Nothing having been paid on account of the first two instalments, the creditor brought a suit for the recovery of the subsequent instalments. The Small Cause Court held that the suit was barred:—Held in revision, that the suit was within time.	
Limitation Act (IX of 1908), schedule I, article 2—Sale of plaintiff's property in execution of money decree—Tender of decretal amount by plaintiff—Sale held by Amin in spite of it in collusion with decree-holder—Sale set aside—Suit for damages—Limitation.		MOHAN LAL v. TIKA RAM	... 929
In execution of a simple money decree certain immovable property belonging to the plaintiff was advertised for sale. On the date fixed for the sale the Amin came to sell the property. Before the sale, the plaintiff alleged, he had tendered the decretal amount to the defendant, but in spite of it the defendant held the sale in collusion with the decree holder. The sale was subsequently set aside on plaintiff's application under Order 21, rule 89 of the Code of Civil Procedure. The plaintiff brought this action for damages against the Amin nineteen months after the date of sale. The defendant <i>inter alia</i> pleaded limitation in bar of the suit under Article 2 of Schedule I to the Limitation Act.		—Art. 116—Sale of property—Covenant to make good loss in case of vendee being compelled to pay off money in excess of sale consideration—Breach of covenant—Covenant of title—Limitation.	
Held that the suit was barred under Article 2 of Schedule I to the Limitation Act, inasmuch as the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the Code of Civil Procedure.		A sale deed was executed in favour of the plaintiffs on July 4th, 1901, purporting to convey the property free from encumbrances and containing the covenant that should any excess sum be charged against them the other properties of the vendor would be liable for the same together with damages and costs. At the date of the sale there was a prior simple mortgage existing on the property. That mortgagee brought a suit for sale on August 1st, 1902, and it was decreed. May 20th, 1915, was fixed for sale of the property and on May 19th, 1915, the plaintiffs paid off the decree. On July 10th, 1915, the plaintiffs brought the present suit for recovery of the amount which they paid on account of the prior mortgage, together with interest, from the estate of the vendor;—Held that the suit	
"The policy of the law is quite clear, namely, that suits of this nature should be brought and investigated as promptly as possible."			
Cases of this nature are distinguishable from cases where a defendant pleads in defence to an alleged illegal act that it was done in pursuance of a legislative enactment which requires notice of the action before the institution of the suit.			
MUKAT LAL v. GOPAL SARUP	... 1017		

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was not barred by limitation inasmuch as the plaintiffs were not suing upon a mere covenant of title, but upon a covenant of indemnity as set forth in the sale deed, and the cause of action arose on the date on which they suffered actual loss by reason of their being compelled to pay off the prior mortgage charge.		be exercised on occasions that is when the wood might fall or be cut from the trees, and not occurring every year or at stated times, and there having been disputes as to the right between the parties on two previous occasions, there could be no adverse possession.	
RAM DULARI v. HARDWARI LAL.	706	Query, whether section 28 of the Limitation Act applies at all to a case like this.	
— Article 120—Loan on security of moveable property—Suit to enforce payment of the money charged thereon—Personal decrees not sought for.		DEBI PARSHAD v. BADRI PARSHAD	345
Where a plaintiff who had lent money on the security of eight black buffaloes sought by his suit to enforce the payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, held that the suit was not barred by limitation, it being governed by article 120 of the first schedule to the Limitation Act.		— Article 148—Usufructuary mortgage—Redemption—Purchaser of equity of redemption in part of mortgaged property, suit by—	
DEOKI NANDAN v. GAPUA	449	A purchaser of the equity of redemption in a part of the mortgaged property is entitled to redeem his own portion of the property within sixty years of the date of the mortgage from another person who having purchased another portion of the mortgaged property has redeemed the entire mortgage and is in possession of the entire property. The limitation applicable to a suit of this description is that provided by Article 148 of Schedule I to the Limitation Act. All persons who have stepped into the shoes of a mortgagor are "co-mortgagors" for all purposes and the rule of limitation provided by Article 148 is applicable to a suit by a purchaser of the equity of redemption in a part of the mortgaged property.	
— Article 144—Right occurring on occasion—Adverse possession—Right to take wood from trees when fallen or cut—Right disputed on two previous occasions—No uninterrupted and continuous possession.		WAZIR ALI v. ALI ISLAM	740
Plaintiff's ancestor obtained leave in 1867 to plant trees on land belonging to Government. He was to do so at his own expense and to tend them; the only right he was entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions viz., once in 1900 and at another time in 1910, the defendant who had purchased the village got the proceeds of the sale of such wood. The plaintiffs on both the occasions asserted their claim to wood or the price thereof but remained unsuccessful. Within six years from the date of the last sale they brought the suit for declaration of their right to get the dry wood under the agreement of 1867. The defendant pleaded adverse possession:—Held that the right being one which could only		— Article 181—Application for decree under Order 34, rule 6.	
		See Civil Procedure Code Order 34, rule 6	437
		— Article 181—Application for final decree—Whether application in execution.	
		See Limitation Act section 6	85
		— Article 181—Suit on mortgage—Preliminary decree—Six months fixed for payment of mortgage money—Application for decree absolute—Dismissal of application for default—	

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Second application more than three years after accrual of right to apply.

Under Act No. V of 1908 (Code of Civil Procedure) a 'final decree' in a mortgage suit is a decree in the suit itself and an application for a final decree cannot be deemed to be an application in execution. A second application cannot be regarded as a revival of a previous application which was disposed of. A preliminary decree under Order 34, rule 4 of the Code of Civil Procedure, was passed on August 27, 1908, and six months were allowed to the defendant to pay the mortgage-money. No payment having been made the mortgagee applied for a decree absolute on August 26, 1911. It was dismissed for default on April 9, 1912. On September 10, 1912, a second application was made:—*Held* that the application was time-barred, inasmuch as the right to apply under Article 181 of the first schedule to the Limitation Act, accrued within three years after the expiration of the time allowed by the decree for the payment of the mortgage-money.

AHMAD KHAN v. GAURA ... 143

—Article 182, Expl.
1.—*Joint decree against several persons—Appeal by two out of such—Appeal dismissed with costs—Execution of decree for appellate costs against them—No further application within 3 years—Limitation.*

S obtained a decree for possession and costs against *K*, *D* and certain other persons jointly. Out of these defendants *K* and *D* appealed to the High Court and their appeal was dismissed with costs. *D* held a decree against *S* and in execution thereof he attached the decree in favour of *S* against himself and his co-judgment-debtors. *D* executed the decree from time to time and realised various sums, and eventually it was held that the first court's decree had been satisfied. *S* had applied for execution of his decree for costs obtained in the High Court in 1907. In this interval *S* had been

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adjudicated an insolvent and the official assignee transferred the decree in favour of *S* to *M*. *M* applied for execution on foot of the High Court's decree:—*Held* that the application was time barred having been made more than three years from 1907.

GHULAM MUHI UD-DIN KHAN v. DAMBAR SINGH ... 109

—Article 182 (5)
—*Execution of decree—Step-in-aid of execution.*

An application to the court executing a decree asking that certain objections to the execution of the decree be dismissed is a step-in-aid of execution and saves the bar of limitation.

TAMIZ-UN-NISSA BIBI v. NAJJU ... 704

—Article 182 (6)—
Decree—Execution—Date of issue of notice—Time runs from date of order by court to issue notice—Minority—Subsequent disability.

A decree under Order 34, rule 6 of the Code of Civil Procedure was passed on March 4, 1911. Application for execution was put in on March 3, 1914, and on the same date the court passed the order that notices issue to the judgment-debtors. The notices were actually drawn up and signed on March 4, 1914, and that was the date which the notices bore. The application for execution was struck off on March 24, 1914. The next application was made on March 5, 1917, by one of the original decree-holders and the legal representatives of two of the other decree-holders, the legal representatives being minors. March 4, 1917, was a Sunday. The court below held that the application was within time: *Held*, reversing the court below, that the application was time barred, the time running from the date on which the order of the court issuing notice was passed.

Held also that the time having already commenced to run from 1914 the decree-holders were not entitled to the benefit of section 7 of

Limitation Act—(concl'd)	PAGE	Malicious prosecution	PAGE
the Limitation Act by reason of the minority of some of the decree-holders		—(concl'd.)	
KALIKA BAKSH SINGH v RAM CHARAN F. B. ...	633	and the facts afforded sufficient evidence of malice.	
Article 182—In accordance with law—Application complying with Civil Procedure Code (Act V of 1908), Order 21, rule 11—Subsequent order for filing decree—Non-compliance with.		PUTTU LAL v. RAM SARUP ...	468
An application for execution of a decree was made on 1st March, 1916, but copy of the decree was not filed along with it. It however fulfilled all the requirements of Order 21, rule 11 of the Code of Civil Procedure. Time was given by the court for filing the copy of the decree but it was not filed whereupon the application was struck off. Another application was filed within three years of the application of 1916 but beyond three years of the previous application. Held that the application when filed having complied with all the requirements of Order 21, rule 11, was an application in accordance with law and saved limitation.		Mesne profits—Suit to recover for wrongful dispossession from a grove.	
		See Provincial Small Cause Courts Act Art. 51 ...	55
		Minor—Fraudulent representation as to age.	
		See Contract Act section 65 ...	592
		—Suit by next friend—Application by minor to be allowed to proceed with suit.	
		See Civil Procedure Code Order 32, rule 1 ...	737
		Mis-description—Property entered as <i>munafi</i> —Power of court to correct.	
		See Execution of decree—Mortgage—Misdescription ..	262
		Mohammedan Law—Guardianship—Mother—Minors—Power of <i>de facto</i> guardian—Immovables—Alienation—Validity—Legitimacy—Acknowledgments—Presumption of marriage—Documentary evidence—Admissibility—Code of Civil Procedure (Act V of 1908), Order 13, rule 1.	
		Under the Mohammedan Law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a " <i>de facto</i> guardian," has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the infant as trespasser.	
		A mother is entitled only to the custody of the person of her minor child, but is not the natural guardian and has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant.	
RAGHUNANDAN LAL v. BADAN SINGH ...	87		
Marriage—Christian and Bhangi—Person to solemnise.			
See Christian Marriage Act section 5 ...	414		
Acknowledgment of sonship			
See Mohammedan Law—Guardianship ...	600		
Malicious prosecution—Suit for damages—Complaint false to the knowledge of complainant—Process issued to accused—Acquittal of accused after evidence taken—Malice.			
Where a person was dragged into the Criminal Court by reason of a complaint which to the knowledge of the complainant was false from beginning to end, but after evidence taken the accused was acquitted of all the charges made against him, held that the cause of action for a malicious prosecution was complete			

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A father alone, or if he be dead, his executor (under the Sunni law) is the legal guardian of his minor child. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather, and should he also be dead, and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian devolves upon the Judge as representing the Sovereign. But the powers of even the *de jure* guardians to intermeddle with the property of a minor are confined within legal limits. If the mother is the father's executrix or is appointed by the Judge as the guardian of the minors, she has all the powers of a *de jure* guardian. If there is no legal guardian, the person in-charge of a minor (e. g., the mother) has power as *de facto* guardian to incur debts, or to pledge the minor's goods and chattels, for the minor's imperative necessities (such as food, clothing or nursing), but has no power to deal with the immovable property.

The Mohammedan Law makes a sharp distinction between "goods and chattels" and immovable property with regard to the powers of dealing by guardians.

Clear and reliable evidence that a Mohammedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother.

Documentary evidence which has not been produced at the first hearing of a suit in accordance with Order 13, rule 1, of the Code of Civil Procedure, 1908, may be admitted at any subsequent stage at the discretion of the Court.

IMAMBANDI v. SHEIKH HAJI
MUTSADDI P. C. ... 800

—Marriage—
Treatment, evidence of.

A Mohammedan lady brought a suit for dower as the widow of a deceased Mohammedan nobleman

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against his heirs. The lady was the daughter of a woman of questionable antecedents and she herself led a disreputable life before she was admitted by the said nobleman into his *harem*. The nobleman himself had illicit connexion with her. The lady alleged that she had been married to the Raja. The evidence in support of the marriage consisted of the depositions of two witnesses who were disbelieved and of long-continued and exclusive cohabitation:—*Held* that the connexion between the parties being in its inception an illegitimate one, it is difficult to infer a subsequent marriage from evidence of long-continued and exclusive co-habitation.

SHABBAN BIBI v. KHALIQ SHAH. 754

—Marz-ul-maut,
doctrine of—Applicability.

Where a transaction purports to be a sale, the doctrine of *Marz-ul-maut* does not apply to it; while if it is a *wagf* created when the *wagif* was suffering from death-illness it is valid to the extent of a third; and that if it is a gift it cannot take effect at all.

FAZAL AHMAD v. RAHIM BIBI ... 158

—Pre-emption
—*Right according to faith.*

See Pre-emption—Mohammedan Law ... 507

—Pre-emption
—Talabs—*Custom arising on sale*
—*Transaction in the form of a lease*
—*Issues to be decided.*

Where a custom of pre-emption prevails upon sale, the vendor and vendee cannot defeat the pre-emptor by dressing up the transaction in the garb of a lease. The same principle applies to the Mohammedan Law.

Where therefore a small piece of land was transferred, the transfer being in the form of a perpetual lease the premium being Rs 250 and the annual rent being two annas, and pre-emption was claimed in respect of the land, under the Mohammedan Law, on the ground that the transaction was really a sale in the garb of a lease made to defeat pre-emption:—*Held* that on the issue as to

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the nature of the transaction being raised by the plaintiff, the court was bound to determine its real nature, and if after considering all the circumstances, namely, sum which was paid down, the smallness of the rent, and the value of the property, it came to the conclusion that it was a sale, it must hold that the right of pre-emption arose and determine whether the demands were performed or not.		second of these instruments he provided that on his death the defendant, a minor who was a son of a son of his, would be the <i>mutawalli</i> under the guardianship of the plaintiff; it referred to his will as laying down the manner in which the income of the property was to be spent or invested. The third document was the "will" and under it provision was made for religious and charitable purposes; but reading it as a whole the manifest intention of the testator was to dedicate the income of the property estimated at Rs 20,000 per annum to the advancement of the members of his family, to tie up the property against the possibility of waste, to make such investments after defraying all expenses that the estate would go on augmenting steadily; while the provision in regard to the charitable and religious purposes was ten per cent of the total income:—	
MOHAMMAD NIAZ KHAN v. MOHAMMAD IDREES KHAN ... 233		<i>Held</i> that having regard to the course of rulings of the Privy Council and of the High Courts prior to the passing of Act No. VI of 1913, no valid <i>waqf</i> was created.	
<i>Restitution of conjugal rights, suit for—Legal cruelty.</i>		NAIMUL HAQ v. MOHAMMAD SUBHAN-UL LAH ... 841	
In a suit for restitution of conjugal rights by the husband the court found that the husband and the wife (both Mohammedans) were on the worst possible terms, that the husband though not actually ill-treating her physically yet ill-treated her in other ways that is to say, mentally, and that by her return to his custody her health and safety would be endangered <i>held</i> that the wife could not be delivered over to the husband.		<i>Waqf created by trust-deed—Shia—Ownership in property not divested from date of execution of deed—Validity of waqf.</i>	
HAMID HUSAIN v KUBRA BEGAM 132		Where a Mohammedan and his wife <i>Shias</i> by persuasion, purported to create a <i>waqf</i> by means of a trust-deed, but the deed did not divest the ownership of the executors from the date of execution <i>held</i> that the <i>waqf</i> was invalid.	
<i>Waqf—Deed providing for support of grantor's family and descendants—Nominal dedication for charitable purposes—Waqf illusory—Muslimans Waqf Validating Act (VI of 1913), whether retrospective.</i>		SYED ALI RAZA v SANWAL DAS ... 876	
Neither section 3 nor section 4 of the Muslimans <i>Waqf</i> Validating Act is retrospective in its operation; consequently if a <i>waqf</i> created before the passing of that Act was illusory, and therefore invalid in the eye of the Mohammedan Law, it would not be validated by reason of any retrospective operation of that Act.		<i>Mohunt—Suspension of—No suit filed—Jurisdiction of Judge</i>	
A Mohammedan executed three documents purporting to make a <i>waqf</i> . By the first of these he made no substantial and effective dedication of the property nor did he specify the objects of the endowment; there was no effective alienation of the rights of ownership; by the		See Civil Procedure Code section 92—Public endowment ... 742	
		<i>Mortgage—Execution prohibited by law—Validity of.</i>	
		See Civil Procedure Code 1882 section 920 ... ?	

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—Sale in execution of decrees—Sale of sixteen annas zemindari.—Whether groves comprised therein transferred by sale or not

One A. M. owned an entire sixteen annas mahal. In execution of decrees against certain persons he purchased shares in certain groves. Subsequently he mortgaged his entire sixteen annas zemindari together with all appurtenances. In execution of the decree under the mortgage the entire sixteen annas were ordered to be sold and were purchased by the plaintiff:—*Held* that the sale was not exclusive of the shares in the groves.

HASAN ALI KHAN v. AZHARUL HASAN ... 900

Mortgage—Suit for redemption
—Mesne profits directed to be ascertained in the execution department
—Time begins to run from date of such ascertainment.

In a suit for redemption of a mortgage where the decree directs the mesne profits due to the mortgagor to be ascertained in the execution department, time begins to run when the profits are so ascertained.

NARSINGH DASS v. DEBI PRASAD 88

Motor Vehicles Act (VIII of 1914), sections 11, 16—Rules framed under the Act—Rule 12 cl. (1)—Conviction for violating rule—Lamp affixed on each side in front, meaning of.

Rule 12 of the Rules framed by the Local Government under section 11 of the Indian Motor Vehicles Act provides that "no person shall drive a motor vehicle during the period commencing half an hour after sunset and ending half an hour before sunrise unless such vehicle is provided with lights as follows:—(1) in the case of vehicle other than motor cycles (a) one lamp showing a white light in front affixed on each side of the front portion of the vehicle; (b) one lamp showing a red light at the rear and showing a white light at the side affixed at the back of the vehicle in such

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manner as to illuminate with the white light and render easily distinguishable the signs and numbers on the plates" Accordingly when a person drives in a motor with two lamps affixed on each side of the front portion of his car showing a white light in front, *held* that the rule was fully complied with and the conviction of such a person for violation of the rule was bad in law.

The words "front portion" in clause (a) must be read as contradistinguished from the rear and the back of the vehicle mentioned in clause (b). It does not mean the extreme end of the bonnet or the extreme end of the front portion, but means the portion which is outside the seats and the steering wheel.

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Moveable property—Loan on security of—Limitation.

See Limitation Act Art. 120 ... 449

Muafi Zabti Sarkari—Mortgage—Mortgagor claiming proprietary interest—Suit for sale on mortgage decreed—Formal possession obtained by mortgagees after purchase—Mortgagor recorded as tenant—Mortgagee's application for entry of name rejected by Revenue Court—Suit for possession—Whether mortgagor entitled to plead that his interest not saleable according to law—Mortgagor barred.

A owned some land known as *muafi sarkari*. This was resumed and became *muafi sabti sarkari*. He sold half of it and the other half passed to his heir B. B sold half of his share to plaintiff and made a mortgage to him of the remaining half. A admittedly claimed proprietary interest in the land. Plaintiff brought a suit on his mortgage and obtained a decree for sale. He applied in execution for sale of this property and B pleaded that it was ancestral. It was accordingly sold by the Collector and purchased by the plaintiff. The plaintiff obtained formal delivery of possession. In the *khatauni jamabandi* B was recorded as a tenant the entry being

Muafi-Zubti Sarkari —(concl'd.)	PAGE.	Municipalities Act—(contd.)	PAGE.
in the words "sir khud." The plaintiff then applied to the Court of Revenue for the entry of his name in place of B. B successfully pleaded there that the land was his Sir and he had become ex-proprietary tenant. The plaintiff having failed there brought this suit claiming to be maintained in possession or in the alternative for recovery of possession. He treated B as a proprietor and this was not denied. B also pleaded in the alternative that the land was his Sir and he had become an ex-proprietary tenant:— <i>Held</i> that the plea that B's original interest in the land was not saleable ought to have been raised in the course of the previous litigation and not having been so raised B was precluded from raising it in the present litigation.		The liability to a daily fine in the event of a continuing breach has been imposed by the Legislature in order that a person contumaciously disobeying an order lawfully issued by a Municipal Board may not claim to have purged his offence once and for all by payment of the fine imposed upon him for neglect or refusal to comply with the said order. The liability is to be enforced by the institution of second prosecution in which the questions will be (1) how many days have elapsed since the date of the first conviction during which the offender is proved to have persisted in the offence, and (2) the appropriate amount of daily fine, subject to the maximum prescribed.	
DEODATT SINGH v RAM CHARBIT-TAR JATI ...	557	AMIR HASAN KHAN v. EMPEROR ...	527
Municipalities Act (II of 1916) <i>section 155—Octroi duty—Person introducing article chargeable with duty liable—Agent.</i>		—Section 326— <i>Application to prosecute for cattle trespass.</i>	
A person, acting as broker for another, took delivery of certain bags of sugar within the Municipal limits, but did not pay the octroi due thereon. He was convicted under section 155, of the Municipalities Act:— <i>Held</i> that the conviction was right inasmuch as he was the person who had introduced the goods into the municipal limits.		See Cattle Trespass Act section 22 ...	148
BABU RAM v. EMPEROR ...	632	—Section 326 (4) — <i>Suit for establishment of title and injunction—Notice—Suit not maintainable.</i>	
—Section 307— <i>Disobedience to notice—Continuing breach—Daily fine, object of.</i>		A <i>chabutra</i> belonging to the plaintiff projected on to a public road. The plaintiff applied to the Municipal Board of Benares for leave to re-build that <i>chabutra</i> which was refused. The Municipal Board then caused a notice to be served on the plaintiff in June, 1916, requiring him to remove the <i>chabutra</i> . The plaintiff then served a notice of action on the Municipal Board on 14th July, 1916, but commenced the present action on 4th August 1916, i. e., before the expiration of the two months provided for in section 326 of the Municipalities Act as being necessary for a suit to be instituted. The reliefs originally sought were—(1) the establishment of the plaintiff's title; (2) injunction. The Municipal Board contended <i>inter alia</i> that the suit could not be maintained as no legal notice had been served by the plaintiff. The plaint was then amended in respect of that relief only. Even after the amendment	
Where under section 307 of the United Provinces Municipalities Act a Magistrate of the first class not only imposed a nominal fine on a person for not complying with a notice directing him to execute a certain work in respect of a drain but by same order made him liable to pay a daily fine until the notice should be satisfactorily complied with, <i>held</i> that the latter part of the order was illegal.			

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the relief was for a declaration that the platform and the <i>saiban</i> were ancestral property of the plaintiff that he and his ancestors had been in possession thereof for a long time and that the Municipal Board had no right to get the same demolished and he also asked for an injunction. The first court held that the suit could not be instituted as no valid and legal notice had been given. The lower appellate court held that the notice was not necessary and remanded the suit:— <i>Held</i> that the injunction not being the only relief claimed service of notice as provided in section 326 of the Municipalities Act was necessary and the suit having been commenced before the expiration of two months of the notice could not be maintained.		————— <i>Non-issue of—Effect on proceedings.</i>	
THE MUNICIPAL BOARD OF BENARES v. GAJADHAR	793	See Land Acquisition Act section 9	689
Musalman Waqf Validating Act—Retrospective effect		————— <i>Sale to pawnor—Meaning of</i>	
See Mohammedan Law—Waqf ...	841	See Contract Act section 176 ...	390
Negotiable Instruments Act (XXVI of 1881), sections 61, 76—Non-presentment by holder—Liability of drawer—Onus of proof.		————— <i>Service of—Proof—Records of court whether.</i>	
<i>N</i> who had sold potatoes to <i>H</i> drew a <i>hundi</i> payable at sight on the latter which was in favour of <i>M</i> . <i>M</i> sold it to plaintiffs who sent it in an unregistered letter to their agent at Cawnpur. The letter miscarried, and the loss, owing to the carelessness of the plaintiffs was not discovered till after fourteen months of the loss. The plaintiffs did not present the bill to <i>N</i> but brought a suit on foot of the <i>hundi</i> against <i>N</i> and <i>H</i> . The suit was dismissed against <i>H</i> but decreed against <i>N</i> :— <i>Held</i> that <i>N</i> was not liable under the <i>hundi</i> inasmuch as the plaintiffs had not shown that <i>N</i> could not suffer loss by reason of non-presentment for payment		See Regulation XVII of 1806 section 8	877
NANHEY MAL v CHAIT RAM ...	899	————— <i>Suit for title and injunction against Municipal Board.</i>	
Notice—Breach of—Daily fine.		See Municipalities Act section 326 (4).	798
See Municipalities Act section 307	527	Oudh Land Laws—Tenures recognised in Oudh—Proprietor, under-proprietor, and tenant—No other kind of tenure recognised—Incidents of tenure attached by law—Cannot be varied by consent of tenure-holder—Oudh Rent Act (Act XIX of 1868), sections 3, 52, 102.	
		The Oudh Rent Act, 1868, recognises three classes of persons, and three only, as having an interest in and entitled to hold land for the purposes of the Act in the province of Oudh viz., "proprietor", "under-proprietor" and "tenant."	
		The law attaches to the status of under-proprietor certain rights, among them the right to transfer, and while he retains that status he cannot be divested of any of those rights.	
		When therefore at the time of a settlement a land-owner applied to be recorded as an under-proprietor, and under pressure from the Settlement Officer consented to be recorded as an under-proprietor without right of transfer:—	
		<i>Held</i> , that this was creating a tenure unknown to the law, and that no effect could be given to the words "without right of transfer" in the Settlement Officer's decree.	
		LAL SRIPAT SINGH v. LAL BASANT SINGH P. O.	817
		Oudh Rent Act, section 3—Tenures recognised.	
		See Oudh Land Laws	817

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(Act XXII of 1886), Ch. 7A—Land Law of Oudh—Thekadar—Enhancement of rent.		the plaintiffs' share and the defendants were allowed to purchase it. The court also disallowed the plaintiffs' application for permission to withdraw the suit:— <i>Held</i> (1) that the court had acted in accordance with sections 2 and 3 of the Partition Act when the parties were not at issue on the point that a division could not be reasonably or conveniently made; (2) that the court had exercised a sound discretion in disallowing the application for withdrawal of the suit inasmuch as it had been made at a stage at which the defendant had become entitled to the benefit of section 3 of the Partition Act and because the application did not satisfy the requirements of Order XXIII, rule 1 of the Civil Procedure Code.	
Chapter 7A of the Oudh Rent Act, 1886 (Act XXII of 1886) applies to <i>thekadars</i> , and consequently a "favourable rent" payable by a <i>thekadar</i> or person to whom the collection of rents in a <i>manza</i> has been leased is liable to be enhanced in the circumstances and subject to the condition therein provided.		UMRAO SINGH v. UMRAO SINGH ...	584
PARVATI KUNWAR v. THE DEPUTY COMMISSIONER OF KHERI P. C. ...	865	Partnership—Accounts, suit for rendition of—Death of one partner—Suit against his minor legal representative—Whether suit maintainable.	
Punjab Laws Act (IV of 1872), Custom—Presumption in favour of		<i>Held</i> that a suit for rendition of accounts of a partnership business is maintainable by the surviving partner against the minor son of a deceased partner who in his life-time was manager and had the account books in his keeping.	
See Custom, proof of ...	17	SHANKAR LAL v. RAM BABU ...	805
Parda-nashin lady—Signature on mortgage deed—Lady behind parda—Attestation.		of Dissolution—Right	
See Transfer of Property Act section 59 ...	409	See Contract Act section 252 ...	513
Partition Act (IV of 1893), sections 2 and 3—Construction—Parties not at issue on the question that a dwelling-house could not be reasonably or conveniently partitioned—Application for withdrawal of suit—Application rejected as having been made at a late stage—Discretion of court—Civil Procedure Code (Act V of 1908), Order XXIII, rule 1.		Part payment—Payment of interest—Saves limitation.	
Plaintiffs and defendant were co-owners of a certain dwelling-house, the plaintiffs having $\frac{8}{9}$ th share and the defendant $\frac{1}{9}$ th share. Plaintiffs sued for partition and stated that as the house could not be reasonably or conveniently divided the house might be sold by auction and in the alternative offered to purchase it. The defendant contended that the house might be partitioned without inconvenience to either party; but in the alternative he also offered to purchase the plaintiff's share at a valuation, should the court be of opinion that the partition could not be effected. The defendant subsequently withdrew his contention that the house might be conveniently partitioned. The court, thereupon, appointed Commissioners who valued		See Limitation Act section 20 ...	790
		Party—Suit to enforce a mortgage—Whether person claiming paramount title necessary	
		See Civil Procedure Code section 11 ...	639
		Patent—Novelty—Specification—Combination of old materials.	
		The plaintiffs patented a process of turning out <i>banslochan</i> (a medicinal powder manufactured by a calcining process from the interior of bamboo found in Singapore) of which the essential features were the treatment of the substance at a	

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red heat, with sulphuric acid inside a closed crucible or retort made entirely of earthenware. The advantages involved were (a) no iron or other metal being used in the composition of the crucible there was no danger of any deleterious action on the part of the furnace of the acid upon the metal aforesaid; (b) the retort or crucible was entirely closed from the time when the acid was added until the process of calcination was complete; the result being that the necessity of a chimney communicating with the retort for the purpose of carrying off the fumes was dispensed with. This process was one of a new combination of admittedly old materials:— <i>Held</i> that it was a good subject-matter for a patent.		<i>section 105—Practice—Alternate pleas</i> The right of the accused to defend himself upon a criminal charge can only be limited by the provisions of the statute law and the provisions to be considered are those of section 105 of the Evidence Act. The law does not prevent a man on his trial on a charge of culpable homicide from setting up the defence in the alternative, <i>vis.</i> either that he was not present at the occurrence or that he was acting in the exercise of the right of private defence.	
LAKHPAT RAI v. SRI KISHAN DAS ...	941	YUSUF HUSAIN v. EMPEROR ...	169
Penal Code (Act XLV of 1860), sections 37-304—Murder—Culpable homicide not amounting to murder—Fatal assault committed by three persons acting in concert.		Section 173—Tender of a summons—Refusal to receive—Whether an offence.	
Three men attacked two others with lathis. A free fight took place with the result that considerable injuries were inflicted on both sides. One of the persons attacked received several severe injuries which culminated in his death—the evidence for the prosecution was that some of the injuries were inflicted after the deceased had been felled to the ground. It did not appear however, which of the injuries had been caused by which, of the assailants, but the weapons used were lathis (lethal weapon)—and the three persons were acting in concert:— <i>Held</i> that the accused were guilty of culpable homicide not amounting to murder under section 304 of the Indian Penal Code, inasmuch as the matter was sudden and the injuries had been inflicted in the heat of passion.		Under the Code of Criminal Procedure the mere tender to a person of a summons is sufficient, and a refusal by him to receive it does not constitute the offence of intentionally preventing service thereof on himself under section 173 of the Indian Penal Code.	
EMPEROR v. GULAB ...	731	SAHDEO RAI v. EMPEROR ...	453
Section 97—Right of private defence—Onus of proof—Indian Evidence Act (I of 1872),		Section 174—Disobedience—Who can try. See Criminal Procedure Code section 195 ...	432
		Section 182—False information—Defamation—Petition of resignation to Collector as officer-in-charge of the Court of Wards.	
		Where a person submitted a petition of resignation to a Collector as the officer-in-charge of the Court of Wards and such petition contained an untrue account of an affray and defamatory statements and the District Magistrate ordered the petitioner's prosecution for giving false information under section 182, Indian Penal Code, <i>held</i> that the ingredients of an offence under that section were wanting and the conviction was bad.	
		DEVI v. EMPEROR ...	105
		Section 182—Gist of offence—Giving false information to public servant—Construction.	
		Section 182 (a) of the Indian Penal Code, applies to a case in	

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which it is intended that a public servant should do or omit to do something which he would be legally justified in doing or omitting to do if he knew the true facts. Asking a public servant to do an act which would be an illegal act, even if true facts were stated to him would not come within the purview of the section.		causing death by a rash or negligent act but of voluntarily causing grievous hurt.	
MANOHAR. v. EMPEROR 614		KURE v. EMPEROR 615	
Section 302—Murder—Poisoning by arsenic—Intention—Knowledge.		Sections 304, 325—Common intention—Several persons attacking one—Doubtful evidence as to who struck the fatal blow—Whether guilty of culpable homicide.	
Where accused, knowing its effect administered arsenic to a boy nine years of age with the object of preventing the father of the boy from appearing as a witness against himself in a criminal case, but in such quantity that the boy died in the course of three days:—Held that he was guilty of murder, though his intention might not have been to cause death.		Where several persons attack one, and the evidence is doubtful as to which of the assailants struck the blow which caused the death of the man attacked, the accused could not be guilty under section 304 of the Indian Penal Code, of culpable homicide, but of having caused grievous hurt under section 324, because it was not the common intention of all of them to cause death.	
GAURI SHANKAR v. EMPEROR ... 178		CHANDAN SINGH v. EMPEROR ... 11	
Section 304A, 325—Causing death by rash and negligent act—Rioting—Grievous hurt.		Section 325—Death caused—Doubtful evidence as to who dealt the fatal blow.	
Section 304A. of the Indian Penal Code must be read along with sections 336, 337 and 338; and all these sections are confined in their operation to acts done without any criminal intent, apart from the rashness or negligence which is their essential ingredient.		See Penal Code, section 304 ... 11	
The accused who were five in number attacked the complainants with <i>lathis</i> . In the course of the affray severe injuries were inflicted and suffered by both sides. On the side of the complainants there was a girl of tender years who was sitting very close to her father and she received a severe blow on the head which subsequently resulted in her death. The accused, in addition to being convicted of an offence punishable under sections 147 and 323 of the Penal Code, were also convicted of an offence under section 304A, the sentences to run consecutively:—		Section 325—Death caused without criminal intent.	
Held that the offence of which the accused were guilty was not that of		See Penal Code, section 304A ... 615	
		Section 303—Accused convicted—Commitment to sessions.	
		See Practice—Procedure ... 311	
		Sections 303, 308—Kidnapping—Lawful guardianship.	
		A Jat girl under sixteen years of age was ordered by her father to take food to the bullocks. As she was coming home, one of the accused came to her and persuaded her to accompany him. Her hair was cut and she was dressed in boy's clothes. She lived for sometime with both the accused. After this both the accused were taking away the girl when they were discovered by the <i>chowkidar</i> . She was crying and told the <i>chowkidar</i> that she was a girl and not a boy. The <i>chowkidar</i> then arrested the accused. Held that the accused were guilty of the offence of abduction having removed	

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the girl from the lawful guardianship of her father without his consent.		Section 408—Embezzlement as servant or clerk—Three items charged—Joinder at one trial illegal.	
HAR KESH v. EMPEROR ...	445	One R was a station master. Under an agreement with the Railway Company he employed K as a marksman. R also allowed him to write the registers. On R taking leave he was succeeded by R. L. and he allowed K to receive cash payments and enter them in the cash registers. The Railway Company did not sanction nor were they aware of this state of things. The charge against K was that he demanded an over-charge of Rs. 5-10 and appropriated it and that he misappropriated two other sums which he had received from two other persons. He was charged with three offences under section 408 of the Penal Code and tried at one trial:—Held (1) that no offence under that section was committed in respect of Rs. 5-10 the money over-charged not belonging to the Railway Company, (they having repudiated the demand), and it not being entrusted to K, who was neither their clerk nor servant; (2) that the offence of embezzlement not having been committed in respect of it, the joint trial of it for all the three sums was illegal.	
Section 403—Criminal misappropriation—Property—Dishonest retention—Wrongful gain or wrongful loss.		KARIM-UD-DIN v. EMPEROR ...	596
A letter was addressed to A. It was received and read by him and then thrown on a table at which he and the accused were seated. The accused apparently picked up the letter and it was produced from his custody in court in a proceeding between A and his wife for judicial separation. The court refused to receive it and returned it to the accused. It was contended that the letter was 'property' of A which the accused had misappropriated:—Held that the essential ingredient for the offence of criminal misappropriation under section 403 of the Indian Penal Code being proof of dishonest misappropriation or conversion to the use of the accused, the offence was not made out.		Section 409—Accused acquitted—Application for sanction.	
Query—Whether the letter the subject of the charge was, under the circumstances, 'property' at all.		See Criminal Procedure Code section 526 ...	294
ASHBEY CLARKE HARRIS v. EMPEROR ...	12	Section 441—Possession—Meaning of.	
Section 406—Criminal breach of trust—Moveable property attached in execution of decree—Property entrusted to accused—Non-production of property at time of sale.		See Penal Code section 447 ...	501
Where the accused were entrusted by a court officer with certain moveable property attached in execution of a decree, but at the time of sale they did not produce the property and evaded the service of notice held that they could not be guilty of criminal breach of trust inasmuch as they did not misappropriate the property or convert it to their own use or dispose of it in any manner contrary to the terms of the trust.		Section 447—Criminal trespass—Intention to commit offence or to intimidate or annoy.	
HARNAM SINGH v. EMPEROR ...	600	A zemindar brought a suit in the Revenue Court for the ejectment of certain persons from a certain holding on the ground that they were non-occupancy tenants. The suit was decreed and formal possession	

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of the holding was given to the zemindar. The tenants who contended that they were occupancy tenants preferred an appeal and during the pendency of the appeal entered on the land and tried to plough it. They were prosecuted and convicted under section 447 of the Indian Penal Code. The appellate court subsequently set aside the order for ejectment, holding that one of the accused was an occupancy tenant:— <i>Held</i> that the conviction was illegal inasmuch as there was no <i>mala fides</i> on the part of the accused and they entered on the land in the belief that it formed part of their occupancy tenancy and consequently they did not intend to commit an offence or to intimidate, insult or annoy the zemindar.		ever, the accused pleads and establishes, either by direct evidence or by way of reasonable inference from proved facts, that he had some specific intention in entering the house, and that the intention in question was neither to commit an offence nor to intimidate, insult, or annoy any person in possession of the house, then the provisions of section 106 of the Indian Evidence Act should be referred to	
<i>Seemle</i> .—Whether the possession mentioned in section 441 of the Indian Penal Code means actual possession or formal possession delivered by a court.		Where, again, an accused person has forcibly or clandestinely entered a house which he knew to have been definitely closed and barred against him by the owner thereof, in that case the court may find that the intention to insult or annoy, under such circumstances, was so clearly inherent in the acts of the accused as to form an essential part of the purpose with which entry into the house was effected.	
BHAGWAN DIN v. EMPEROR ...	501	<i>Per</i> WALSH, J.—If there is an invitation (to enter a house) combined with an intention (on the part of the accused) to preserve strict secrecy, then it is difficult to say that there is any intention to annoy a third person, but if that third person has expressly prohibited the accused then his act becomes a direct defiance to an express order and an intention to annoy the author of the order may be inferred from it.	
Section 456— <i>Lurking house-trespass by night—Intent—Facts from which intent may be inferred—Burden of proof.</i>		A person was found inside the house of another at night and he pleaded in defence, first that he had entered the house at the request of one of the inmates and, secondly, that he had no intention of insulting or annoying the complainant. It was found that he had taken the precaution of keeping his presence in the house entirely secret from the owner thereof, and it was not found that he was forbidden to enter the house by the owner:— <i>Held</i> that the conviction of the accused without enquiry into the truth or otherwise of the defence, set up was bad in law.	
<i>Per</i> PIGGOTT, J.—When the evidence shows that a man has been found lurking at night inside the house of another person, a perfect stranger to him, or a person in whose house he has no apparent business, the prosecution will be entitled to ask the court to infer from these facts that there was a guilty intention on the part of the accused sufficient to bring his action within the purview of section 441 of the Indian Penal Code.		CHHOTÉ LAL v. EMPEROR ...	153
In dealing with cases of this sort (lurking house trespass), Magistrates should not overlook the existence of section 509 of the Indian Penal Code when they are considering the allegation on the part of the prosecution that the entry by the accused into the premises in question must presumably have been with intent to commit some offence. When, how-			

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—Sections 480, 482— <i>Using false trade-mark—Intent to defraud.</i> According to an agreement between the different Oil Companies it was settled that one company could use the tins of another company, provided the company so using the tins put on the cap a distinctive mark showing that the oil was not the manufacture of the company whose tins were being used. In pursuance of this agreement the Burma Oil Company could use the tins of the Standard Oil Company (U. S.) by putting on the cap the word "Victoria." The accused sold eight tins of Kerosine Oil but only two of the tins had the word "Victoria" on the tin caps and the other six had plain tin caps. At the time of selling he had told the purchaser that the tins contained oil of the Burma Oil Company and the price agreed upon was the price of the Burma Oil Company as prevailing in the market:—<i>Held</i> that although the accused was guilty of using a false trade-mark so far as the six tins with plain caps were concerned, yet (in the absence of a conspiracy between the purchaser and the accused) the accused could not be convicted, under section 482 of the Indian Penal Code of using a false trade-mark, as he had acted without intent to defraud. ABDUL RASHID v. EMPEROR ... 476 —Section 409—<i>Defamation—Witness—Evidence—How far witness protected—Indian Evidence Act (1 of 1872), section 132—"Compelled," meaning of.</i> The ninth exception to section 499 of the Indian Penal Code is intended primarily to apply to statements which the accused cannot prove to have been true in fact, or which are mere expressions of opinion, or otherwise of such a nature that the question whether they are or are not true in fact does not arise. Ordinarily the first exception would apply to statements made by witnesses in the course of the judicial proceedings, provided those statements are true ;		and if the statements are true in fact, and relevant to the matter under investigation it is obviously for the public good that they should be made. If section 499 were the only provision, the position of a witness would be a difficult one, but under section 132 of the Evidence Act if a witness "is compelled" to make a defamatory statement a prosecution will not lie. The protection afforded by section 132 of the Evidence Act must be claimed expressly by a witness before he makes the statement. KALLU v. SITAL ... 201 —Section 500—<i>Words of an obscene and insulting nature—Words addressed when quarrel had ended to persons other than the person in respect of whom they were used—Defamation.</i> There was an altercation between R and M. The latter was a respectable Mukhtar. After the altercation R used language in respect of M which was of an obscene and insulting nature. The words were not addressed to M but to third persons:—<i>Held</i> that the words complained of not having been used in the course of a quarrel, and not being addressed to M they were calculated to harm M's reputation and R was rightly convicted under section 500 of the Indian Penal Code. RAJA RAM SINGH v. EMPEROR ... 498 <i>Pleader's fee—Calculation of.</i> See Rules for Subordinate Court rule 21. ... 426 <i>Police—Statement to—Discovery by reason of statement.</i> See Evidence Act section 25 ... 478 <i>Practice—Interference by High Court—Remedy open.</i> See Civil Procedure Code, Order 21, rule 95 ... 150 —<i>Issue not decided by lower court—Decision of High Court.</i> See Pre-emption—Acquiescence. 779 —<i>New plea in Privy Council.</i> See Hindu Law—Debts—Joint family property ... 33	

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———<i>Postponing decision of question whether interrogatories relevant.</i> See Civil Procedure Code, Order 11, rule 6 ... 762 ———<i>Privy Council—Point not taken before High Court—Point taken in grounds of appeal to High Court but not pressed—Cannot be raised before Privy Council.</i> It is a well settled rule of practice of the Judicial Committee that an appellant will not be allowed to question the decree of a High Court on the ground that it has wrongly accepted a decision of the Subordinate Court, if he himself has never brought that decision before the High Court for its consideration. And the same rule applies when the appellant though he has mentioned a point in his memorandum of appeal to the High Court, elects not to advance it for the High Court's determination. KALYAN DAS v. SHEIKH MAQBUL AHMAD P. O. ... 693 ———<i>Procedure—Two persons convicted by Magistrate of offence of kidnapping—Appeal by one to Sessions Judge—Sessions Judge alters charge—Magistrate directed to commit accused to Court of Sessions—Reference of the case of non-appealing accused to High Court—Magistrate committing both accused while the other's case pending in High Court—Jurisdiction—High Court's powers in revision</i> Two persons were tried for the offence of kidnapping under section 363 of the Penal Code and convicted. One of them appealed to the Sessions Judge against the conviction the other did not. The Sessions Judge acting under section 423 of the Criminal Procedure Code set aside the conviction and sentence and ordered the accused to be committed for trial for an offence under section 366 of the Penal Code. As regards the other accused he referred the case to the High Court. While the latter's case was pending		in the High Court the Magistrate committed both the accused to the Court of Sessions for trial for an offence under section 366 of the Penal Code :— <i>Held</i> that so long as the conviction and sentence against the non-appealing accused on the trial under section 363 of the Penal Code stood, the Magistrate had no jurisdiction to commit that person to the Court of Sessions, and the High Court set aside that order in revision. EMPEROR v. BHAGWANI ... 311 ———<i>Remand—Decision—Could be arrived at on materials before court.</i> See Transfer of Property Act section 59 ... 409 ———<i>Stage when limitation questions can be raised.</i> See Limitation Act section 5 ... 57 ———<i>Suit for possession and damages—Suit brought within six months of dispossession—Suit based on title—Suit dismissed in toto as being one in which upon plaint as framed no relief could be given—Dismissal wrong.</i> Plaintiff was a mortgagee with possession of certain zemindari for a period of five years. He entered into possession and had the land cultivated. His sub-tenants were dispossessed, as alleged by him, by the defendants. Within six months of the dispossession he brought the suit for recovery of possession by declaration of his title and also asked for recovery of damages. He purported to bring the suit under section 9 of the Specific Relief Act. The plaint was subsequently amended by striking out the claim for declaration of title. The Munsif granted him a decree for possession under section 9 as prayed, but dismissed the claim for damages as being improper in conjunction with a claim for possession under the said section. Upon appeal the District Judge dismissed the suit <i>in toto</i> because in his opinion upon the	

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plaint as framed no relief could possibly be granted to the plaintiff. Upon second appeal, <i>held</i> that the suit being one for possession based upon title inasmuch as a claim for damages had been made in the plaint, it could not be dismissed <i>in toto</i> but ought to have been remanded for a decision on the merits. NARAIN DAS v. HET SINGH ... 611 Pre-emption — Acquiescence — <i>Pre-emptor and vendee co-sharers with vendor—Pre-emptor brother of vendor—Acquiescence — Issue not decided by lower appellate court—High Court entitled to decide it.</i> Certain property was sold. The pre-emptor and the vendee were co-sharers with the vendor; the pre-emptor was brother of the vendor. In the suit for pre-emption the vendee pleaded, among other defences that the pre-emptor had acquiesced in the sale being made to him. It was admitted by the pre-emptor that he was in debt, that he had no money and that at the time of the sale he also was selling his own property. The court of first instance held the custom proved; but that the facts did not give rise to an inference of acquiescence on the part of the plaintiff. The suit was decreed, the lower appellate court held that the custom was not proved but did not decide the issue of acquiescence. The suit was dismissed:—<i>Held</i> that the lower appellate court not having decided the issue of acquiescence, it was open to the High Court in second appeal to decide the question; <i>held</i> also that the facts proved that the plaintiff knew of and acquiesced in the sale. ANCHAL v. DALIP SINGH ... 779 Cause of action— <i>Wajib ul-arz—Mortgage made after—Mortgage by conditional sale—Decree for foreclosure.</i> In 1895 a mortgage was made. In 1906 a suit was instituted on this mortgage treating it as a mortgage by way of conditional sale. A decree for foreclosure was obtained and in 1911 the decree was made		absolute. Shortly after possession was obtained under it. In 1914 a suit was brought claiming to get possession by virtue of a custom set forth in the <i>Wajib-ul-arzes</i>. The clause relating to pre-emption was as follows:—"If a <i>pattidar</i> wishes to transfer his share by sale or mortgage, he should do so first, to another <i>pattidar</i> of the same <i>thok</i>, and in case of his refusal, to the <i>pattidars</i> of another <i>thok</i> of the village. If the <i>pattidar</i> wants to sell his share to a stranger by entering an excessive and fictitious price, the <i>pattidar</i> having the right of pre-emption shall be entitled to acquire the property on payment of the price awarded by the arbitrators." <i>Held</i> that having regard to the whole context of the <i>Wajib-ul-arzes</i> the "sale" mentioned therein for the purpose of giving rise to a right of pre-emption according to custom meant a voluntary sale, and the <i>Wajib-ul arzes</i> did not give him a right of pre-emption under the circumstances under which the mortgagee became the owner of the property. <i>Held</i> also that if the plaintiff intended to take advantage of the custom then he should have brought a suit to step into the shoes of the mortgagee as soon as the mortgage was made. SUNDAR KUNWAR v. RAMGULAM... 561 Consideration — <i>Onus of proving—Whether vendee bound to prove every detail of the consideration.</i> <i>Prima facie</i> the consideration stated in a sale deed is to be taken as the true consideration in a suit for pre-emption. Where however, the plaintiff shows that the price is a very excessive price, he can shift the <i>onus</i> on to the vendee of showing that the consideration stated in the deed was actually given. A court is not justified in treating a suit for pre-emption as if it were suit by a reversioner seeking to set aside a sale deed made by a Hindu widow, by casting on the vendee the <i>onus</i> of proving every detail of the consideration. MAKHAM SINGH v. JAHAN KUAR... 583	

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————— <i>Custom admitted</i> <i>—Pre-emptor at the date of sale a co-sharer in the patti in which property sold was situate—Pre-emptor acquiring right by imperfect partition—Right not lost.</i> By means of an imperfect partition of a village made in recent years a <i>patti</i> was formed and the plaintiff became a co-sharer therein. He claimed a right of pre-emption in respect of the sale of certain property situate in that <i>patti</i>. The custom of pre-emption was admitted. The <i>wajib-ul-arz</i> gave the right to a <i>hissadar-i-kurabi</i>. The courts below interpreted the expression to mean a co-sharer in the same subdivision as the vendor. The lower appellate court dismissed the suit on the ground that the pre-emptor had become a co-sharer in the <i>patti</i> by reason of imperfect partition :— <i>Held</i> that the custom being proved if the plaintiff could prove that he came within the custom at the time of the sale, he was entitled to the benefit of the custom and the mere fact that he was not within the custom prior to partition would not bar him from subsequently acquiring the right. LALTA PRASAD CHAUDHRY v. GOKUL PRASAD ... 509 ————— <i>Extension of time</i> <i>—Pre-emptor to be ready to pay when entitled to get possession.</i> In a pre-emption suit a plaintiff is presumed to be ready and willing to pay the purchase-money whenever he can get possession of the property. If for any special reason a plaintiff in pre-emption suit wants to have a more extended time, he should instruct his pleader to ask the court to make a special term in the decree and to give the court good reasons for giving an extended time. CHITAN SINGH v. BALDEO SINGH. 506 ————— <i>Extension of time fixed for payment—Decree becoming final.</i> A decree in a pre-emption case in its very terms becomes a decree in		favour of the defendant vendee when the conditions imposed on the plaintiff have not been complied with and no court has any power to alter the terms of the decree, when it has become final so as to extend the time allowed for payment. HIRDEY NARAIN v. ALAM SINGH.. 897 ————— <i>Mohammedan Law</i> <i>—Shias—Property owned by more than two co-sharers—Wajib-ul-arz—Vague entry as to custom.</i> Upon a sale of property by a <i>Shia</i> Mohammedan no right of pre-emption arises when there are more than two co-sharers in such property. <i>Held</i> by RICHARDS, C J., that a plaintiff is not entitled to claim the right of pre-emption when he produces in proof of his right a vague entry in the <i>Wajib ul-arz</i> to the effect that in matters of pre-emption the rights were according to faith. SAIYED MUHAMMAD RAZI-UD-DIN v. RAGHUBIR PRASAD ... 507 ————— <i>Purchase made by vendee on different dates—Suit to pre-empt first sale—Vendee claiming to be co-sharer in virtue of second purchase—Suit not maintainable.</i> <i>Held</i> that a vendee becomes a co-sharer of the property purchased by him from the date of his purchase. Consequently where a vendee purchased shares in a village on two different dates, and a suit was brought to pre-empt the earlier sale and no suit was brought in respect of the second sale, <i>held</i> that the suit was not maintainable even though limitation for a suit for pre-emption in respect of the second sale had not expired. CHABRAJ SINGH v. MAHESH NARAIN SINGH ... 627 ————— <i>Refusal to purchase—Sale of property under the management of the Court of Wards by auction—Price insufficient—Plaintiff present—No bid by him—Sale cancelled—Second sale—Suit for pre-emption—Plaintiff's knowledge</i>	

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<i>of sale—Invitation to purchase—Refusal—Suit not maintainable.</i>	
Certain property was under the management of the Court of Wards. It was sold and the sale was duly advertised. The highest bid was Rs. 1,000. The plaintiff was present but did not bid. The price was considered inadequate and the property was withdrawn from the sale. It was advertised for sale a second time and at the second sale it fetched Rs. 950. It was not clear whether plaintiff was present at the second sale. In a suit for pre-emption, held that the plaintiff having known that the property was being sold and having every opportunity to purchase, his absence of protest at the sale being made again and the delay in bringing the suit was tantamount to his refusal to purchase and the suit was not maintainable.	
CHITHRU SINGH v. BHAGWANT SINGH	492
<i>Refusal to purchase, what is—Custom—Wajib-ul-arz—Property to be sold to co-sharer first—Sale to stranger.</i>	
Where the custom of pre-emption as evidenced by the <i>wajib-ul-arz</i> is to the effect that a co-sharer wishing to sell his property must first offer it to a co-sharer, and if the co-sharer refuses then he may sell to a stranger, in such a case the fact that the co-sharer vendor offered the property to another co-sharer and the latter declined to purchase on the ground that he had no money or for any other reason was unwilling to purchase would entitle the owner to go to a stranger and to sell it to him and that the owner would not be obliged after he has made a definite agreement with the stranger to return and offer the property a second time to the co-sharer on the other hand the going to a stranger and making a bargain with him before offering the property to a co-sharer would be acting contrary to the custom.	
SHAMSHER SINGH v. PEARRE DATT SUBEDAR	683

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<i>—Sale to a stranger—Re-sale to vendor subsequently to institution of suit—Vendor no co-sharer at date of re-sale.</i>	
Where after the institution of a suit for pre-emption the vendee (a stranger) re-sold the property sought to be pre-empted to the vendor who by selling all the rights he was possessed of had ceased to be a co-sharer at the date of re-sale, held that the pre-emptor was entitled to a decree for pre-emption.	
TOTA RAM v. GOPAL SINGH	505
<i>Wajib-ul-arz—Custom or contract—Interpretation of document.</i>	
When considering the existence or non existence of a custom of pre-emption the language of the particular <i>wajib-ul-arz</i> ought to be taken into consideration.	
Consequently, where the only evidence in proof of a custom of pre-emption was the <i>wajib-ul-arz</i> which recorded that when property was bought or mortgaged by a stranger, the co-sharers were entitled to take it in the event of sale at sixteen years' purchase and in that of a mortgage at eight, and it then recorded a statement that a person had a right to redeem a mortgage in which he had no interest:—Held that the entry in the <i>wajib-ul-arz</i> on the very face of it disproved the existence of a custom.	
SURAJBALI SINGH v. MOHAMMAD NASIR	879
<i>Preferential payment—Winding up proceeding.</i>	
See Companies Act section 169	70
<i>Priority—Occupancy holding—Usufructuary mortgage—Mortgages in possession—Proceedings for compulsory registration of mortgage—Lease granted by mortgagee during pendency of those proceedings—Lease registered—Lessees entitled to recover possession of leased plots without payment of mortgage-money.</i>	
Where an occupancy tenant made a usufructuary mortgage of certain	

Priority—(concl'd.)	PAGE.	Provincial Insolvency Act	PAGE.
plots of land, but during the pendency of proceedings to get the mortgage-deed registered granted a registered lease of some of those plots of land, and no fraud or collusion on the part of the lessee was proved, and the lessee sued to recover possession from the mortgagee who had been put in possession, <i>held</i> that the lessee was entitled to possession without having to pay the mortgage-money.		(concl'd.)	
HABIB-UL LAH v. MANRUP	... 137	Section 16 (2), cl. (a)—Code of Civil Procedure (Act V of 1908), section 60—Application praying half salary of insolvent be attached rejected—Rejection of application illegal.	
Private defence—Right of—Burden of proof.		When an appropriation of the income of an insolvent is made for the benefit of creditors, the court usually acts on the principle of giving to the creditors the surplus after allowing sufficient portion thereof for his proper maintenance according to his position in life. The statute-law of this country fixes this amount by section 60 of the Code of Civil Procedure read with section 16, Sub-section (2) of the Provincial Insolvency Act. Consequently an order, rejecting a creditor's application praying for the attachment of half the salary of an insolvent on the mere ground that his pay is not large enough to allow half of it being attached, is illegal.	
See Penal Code section 97	... 169	DEVI PRASAD v. J. A. H. LEWIS.	107
Profits—Basis of calculation—Co-charer in possession of excess share.		Section 22 — Insolvency — Property taken by Receiver as insolvent's property—Objection of third person claiming title thereto—Court's decision that property belongs to insolvent—Suit by third person—Suit maintainable.	
See Agra Tenancy Act section 164	... 146	Where in a suit a plaintiff does not complain of any act of the Receiver in insolvency, but complains that the court executing the decree, held by a certain person against certain insolvents, disallowed her objection and decided that the property attached belonged to the insolvents and not to her, <i>held</i> that the suit is not barred by section 22 of the Provincial Insolvency Act	
—Fresh suit for — Decree silent.		MOHNI v. BAIJ NATH	... 456
See Civil Procedure Code section 11, p. 5	... 182	Section 23—Attachment of property—Judgment-debtor subsequently adjudicated insolvent—Attachment inoperative—Property vests in Receiver—Locus standi to maintain appeal.	
Provincial Insolvency Act (III of 1907), sections 6, 15, 16—Petition for insolvency—Petitioner examined and evidence taken—Case adjourned — Petitioner absent on adjourned date—Petition dismissed for want of prosecution — Order illegal.		After an adjudication in insolvency, an attachment of property though	
On a debtor's petition of insolvency presented under section 6 (3) of the Provincial Insolvency Act, the duty laid upon the court after completing the necessary enquiries is to come to a decision on the various matters spoken of in section 15 and either to dismiss the petition or to make an order of adjudication. There is no warrant in the Act for dismissing such a petition for want of prosecution if the debtor does not appear on a subsequent date when the court on a previous date had examined the petitioner and taken some evidence.			
LACHMI NARAIN DUBE v. KISHUN LAL	... 703		

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—(concl'd.)			
made before the adjudication, ceases to have any effect, and the property of the insolvent vests in the Receiver who is the person to maintain all proceedings.		then brought a suit in the Small Cause Court against the brother for contribution, the brother being liable for $\frac{2}{3}$ of the debt proportionately to his share:— <i>Held</i> that the suit was cognizable by the Small Cause Court and article 41 to the Small Cause Courts Act did not exclude it from the cognizance of the court.	
Where no Receiver is actually appointed the court is the Receiver under section 23 of the Provincial Insolvency Act.		MAHMUD ALI v. TAMIZ-UN NISSA BIBI	787
Provincial Small Cause Courts Act (IX of 1887), section 25 — <i>Jurisdiction—Suit for compensation for breach of contract—Revision—Issue as to whether suit properly instituted decided—Whether case decided.</i>	32	—Schedule II, article 13— <i>Suit for realisation of dues—Wajib-ul-arz—Landlord and tenant—Haqqe—Small Cause Court, jurisdiction of.</i>	
A suit for compensation for breach of a contract was brought in the Court of Small Causes at Agra. The defendant pleaded (1) that the suit did not lie at Agra, the contract having been broken at Allahabad; (2) that there was no breach of contract on the part of the defendant. On the first issue as to jurisdiction the court took evidence and held that the suit had been properly instituted at Agra. Upon an application in revision, <i>held</i> that no revision lay as the case had not been disposed of within the meaning of section 25 of the Provincial Small Cause Courts Act.		A suit instituted by a zemindar in the Court of Small Causes to realise from his tenant, an oilman, the price of the quantity of oil which the latter was bound to render to him under the provisions of the <i>wajib-ul-arz</i> is not cognizable by such court under article 13 of the Provincial Small Cause Courts Act.	
MAKHAN LAL PARSOTTAM DAS v. CHUNMI LAL BIRJ LAL	777	BALDEVA v. PANNA LAL	644
—Section 25, Art. 41— <i>Jurisdiction—Suit for contribution arising out of satisfaction of a joint debt.</i>		—Article 31— <i>Rent of house paid to one person—Suit by another to recover his share—Money had and received—Jurisdiction of Small Cause Court—Question of jurisdiction not raised in court below—Revision—High Court not to interfere.</i>	
A Mohammedan died leaving two brothers, a sister and a daughter as his heirs, and also certain property. He also left debts due by him to one J. Each of the heirs was entitled to shares in the property according to the Mohammedan Law. The daughter having purchased the shares of the sister and one of the brothers, her share was augmented to $\frac{8}{15}$ and the other brother's share was $\frac{2}{15}$ in the property. The daughter paid off the debt due to J, and		A nephew sued his uncle in the Court of Small Causes for his half share of the rent of a house which the latter had realised from the tenant of the house. It appeared that the entire rent used to be paid to the uncle. No question of jurisdiction was raised. The court tried the suit and gave the plaintiff a decree for the amount claimed:— <i>Held</i> that the suit was one for money had and received and the Court of Small Causes had jurisdiction to try it. <i>Held</i> also that the question as to the court's jurisdiction not having been raised by either party and the court having tried the case and it being doubtful whether	

Provincial Small Cause Courts Act—(cont'd)	PAGE.	Provincial Small Cause Courts Act—(concl'd.)	PAGE.
the suit was not one for money had and received, the High Court refused to interfere in the exercise of its discretion as justice had been done.		Article	
SUKH LAL v. NANNOON PRASAD	679	41—Contribution suit.	
Sch. 11,		See Provincial Small Cause Courts Act, section 25	787
art. 31—Suit for mesne profits for wrongful dispossession from a grove—Jurisdiction of Small Cause Court		Purchase money—Suit for refund by vendee who deprived of possession.	
A suit for recovery of mesne profits of a grove from which the plaintiff had been wrongfully dispossessed is not a suit of Small Cause Court nature and the Small Cause Court cannot take cognizance of such a suit.		See Civil Procedure Code, Order 21, rule 92	511
DRIG PAL SINGH v. KUNJAL	55	Rateable distribution—Assets suit for refund of.	
Section 35		See Civil Procedure Code, section 73	530
—Suit in Small Cause Court—Transfer of Judge.		Receiver—Insolvency annulled—Suit by.	
See Civil Procedure Code section 24	548	See Insolvency—Annulment	938
Art 41		—Right to continue suit	
—Decree for maintenance against three persons—One of them made liable—Liability of the other two in the event of the former's default—Suit to recover the amount paid by the former—Amount below Rs 500—Suit cognizable by Small Cause Court—Contribution.		—Permission to sue in forma pauperis granted—Suit filed before insolvency—Subsequent insolvency.	
A decree for maintenance was passed in favour of a certain lady against three brothers. Under some arrangement one of the brothers alone was made liable for the payment of the amount, and neither the property on which the maintenance was charged nor the other two brothers were made liable unless the first man made default in complying with the decree. The first brother having paid the maintenance brought a suit against his other two brothers to recover a sum below Rs 500:—Held that the suit was not under the peculiar circumstances, one for contribution, and it was cognizable by a Court of Small Causes; hence no second appeal lay.		Where a person obtains leave to sue in forma pauperis in a suit commenced before his insolvency the Receiver appointed on an adjudication of insolvency is entitled to continue the suit as the insolvent might have done.	
ANT RAM v. MITHAN LAL	44	MOHAMMAD ZAKI v. THE MUNICIPAL BOARD	440
		Redemption—Sir land, sale of—Right of mortgagor to redeem usufructuary mortgage.	
		See Transfer of Property Act section 91	796
		Refund—Money paid for sale where no property sold.	
		See Civil Procedure Code, Order 21, Rule 93	236
		Registration Act (XVI of 1908),—Section 17—Reversioner—Agreement to forego right to sue for declaration in court—Document not compulsorily registrable.	
		Certain reversioners executed an agreement whereby they agreed to forego their right to sue for a declaration that a deed of gift executed by a widow in favour of certain persons was not binding after her death:—	
		Held that the document did not convey any right, title or interest	

Registration Act—(contd.)	PAGE.	Registration Act—(contd.)	PAGE.
nor did it purport or operate to extinguish any right <i>etc.</i> , and therefore was not compulsorily registrable within the meaning of section 17 of the Indian Registration Act		this power-of-attorney presented it for registration before the Sub-Registrar. On February 8, 1912, <i>P</i> died. The mortgagor having failed to appear to admit execution, the Sub-Registrar refused to register the document. Thereupon the widow of <i>P</i> acting as the natural guardian of <i>P</i> 's sons who were minors applied to the Registrar to have the document registered, and on June 28, 1912, a certificate was granted by the Registrar ordering the same to be registered. On July 23, 1912, (within thirty days of the certificate) the Collector as manager of the Court of Wards (which in the meantime assumed the superintendence of the estate of the minors) sent the document by a messenger with a covering letter accompanied by the Registrar's certificate to the Sub-Registrar for registration and it was duly registered. On a suit being brought on the document, it was objected, <i>inter alia</i> , that the document had not been validly registered:— <i>Held</i> , that under section 75 (2) of the Act the document had been duly presented when on the 23rd of July, 1912, the Registering Officer received it under cover of an official letter from the Collector of Moradabad, no matter who the messenger might have been who carried the document in question; <i>held</i> also that when the Sub-Registrar endorsed due authentication on the power-of-attorney on the 3rd February, 1912, and the mortgage deed was presented for registration on the 5th February by the person holding such power of-attorney, there was no defect in the presentation.	
MUSAMMAT BHANA v. GUMAN SINGH 191			
Section 28— Registration—Validity—Jurisdiction of registering officer—Property included in mortgage deed within jurisdiction of registering officer—Vendor having no title to it—Fraud.			
Where in a mortgage-deed certain immovable property was included which actually existed within the jurisdiction of the registering officer but the mortgagor had no title thereto, and the deed was duly registered, <i>held</i> that the registration was not vitiated by the fact of the mortgagor's want of title when there was no knowledge on the part of the mortgagee and no collusion between the mortgagor and mortgagee.			
PAHLADI LAL v. MUSAMMAT LABAITI 871			
Sections 32, 75—Mortgage-bond—Registration—Presentation by person under a duly authenticated power-of-attorney on behalf of mortgagee—Failure to appear on the part of mortgagor—Refusal to register—Death of mortgagee—Application by his representative—Registrar's certificate ordering same to be registered—Presentation on behalf of Collector as manager of Court of Wards for the mortgagee's representatives by a messenger along with a letter from Collector accompanied by Registrar's certificate—Validity of such presentation.			
Certain persons executed a mortgage-deed in favour of <i>P</i> on November 20, 1911. Before the deed could be registered <i>P</i> fell ill, and on February 3, 1912, a special power-of-attorney as required by section 33 of the Registration Act was executed in favour of <i>N</i> authorising him to present the document for registration on behalf of <i>P</i> . On February 5, 1912, <i>N</i> acting under			
		In the provision about presentation in section 75 there is an absence of imperative language and that distinguishes cases under that section from cases under sections 32, 33, and 34 of the Act.	
		<i>Per</i> WALSH, J.—Part VI and Part XII (of the Registration Act) deal with totally different circumstances and contemplates a totally different situation. Part VI is a collection of	

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sections dealing solely with "of presenting documents for registration" Part XII is also self-contained and deals with a situation created by what is called "of refusal to register," and a case of refusal to register and of another kind of presentation in consequence thereof has to be dealt with. Consequently, it would be to attribute totally superfluous particularity to the legislature if one were to hold that the provisions in section 75 superimpose upon the solemn proceeding and final decision, a duty upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary before the registration by the Registrar has taken place. What takes place after the Registrar's order as provided by section 75 is pure machinery. Any form of presentation, if it is supported by an application, which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. If some other form of presentation is intended the mistake is merely a defect in procedure which is covered by section 87.		mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The service of the notice was sought to be proved by means of certain records of the court:— <i>Held</i> that the records of the court were not <i>prima facie</i> proof of the fact of service of the notice and consequently the right to redeem was not lost.	
THE COLLECTOR OF MORADABAD v MAQBUL-UL-RAHMAN ...	318	RAM BABAN RAI v. HAR SEWAK DUBE ...	377
Registration Act—Section 75 (2)—Document received from Collector—Due presentation		Repute—Evidence of—Security cases.	
See Registration Act section 32...	313	See Criminal Procedure Code section 110 ...	208
Section 87—Presentation—Form.		Residence—Change of—Only temporary.	
See Registration Act section 32 ...	314	See Criminal Tribes Act section 10 (b) ...	510
Regulation XVII of 1808, section 8—Mortgage by way of conditional sale — Redemption — Right when lost—Service of notice on mortgagor—Foreclosure proceedings.		Res Judicata—Cross decrees—One judgment—Appeal against one decree.	
In a suit for redemption of a mortgage by way of conditional sale made in the year 1866 it was pleaded that the right had been extinguished, inasmuch as in the year 1876 the mortgagee had served a notice, under the seal and official signature of the District Judge, upon the mortgagor warning him that the		See Civil Procedure Code section 11—Cross decrees ...	782
		Decree silent as to profits—Fresh suit for profits.	
		See Civil Procedure Code section 11 ...	182
		Previous decree deciding question of title—Suit of Small Cause Court nature.	
		See Civil Procedure Code section 11—Cross decrees ...	782
		Suit dismissed in presence of one plaintiff.	
		See Civil Procedure Code Order 9, rule 3 ...	462
		Suit for sale—No plea that interest not saleable.	
		See Muafi Zabti Sarkari ...	557
		Re-trial—Lapse.	
		See Criminal Procedure Code section 438 ...	373
		Revenue Records—Value as evidence.	
		See Custom, proof of ...	17
		Review—Letters Patent Appeal.	
		See Letters Patent section 10 ...	964

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Reversionary right—Transfer of.		Revision—(concl'd.)	
See Hindu Law — Reversioner, right of	265	Order declaring a person a tout.	
Revision—Application for delivery of possession over land made subsequently to conviction of the accused—Application rejected by trying Magistrate—District Magistrate on appeal ordering the same to be delivered.		See Legal Practitioners' Act section 36	76
Where certain persons were convicted and subsequently to the conviction the complainant applied through the police under section 522 of the Criminal Procedure Code, for an order for possession over certain land which application was refused by the trying Magistrate but on appeal the District Magistrate directed that such possession should be given, held that the order was a proper one and should have been made long ago.		Small Cause Court suits.	
KHUMI V. BAKHTAYAL	489	See Provincial Small Cause Court Act, section 25	
Code giving jurisdiction to District Magistrate—Power of High Court.		Wrong decision of point of jurisdiction.	
See Criminal Procedure Code section 125	39	See Civil Procedure Code section 115	717
Ejectment suit under section 58, Agra Tenancy Act—Landlord and tenant—Appeal to District Judge dismissed—Power of High Court.		Rules for Subordinate Court, rules 21, 25—Pleader's fee calculated at 5 per cent—Plaint returned for presentation to proper court—Question of jurisdiction raised by defence—Question decided in favour of defendant — Costs awarded to defendant.	
A suit for ejectment was filed in the Revenue Court. The defendant pleaded that no relationship of landlord and tenant existed between him and the plaintiff. The suit was decreed by that court. An appeal to the District Judge was dismissed on the ground that no appeal lay to him :—Held, in revision that no revision lay to the High Court.		A suit was brought in the court of the Subordinate Judge. The defendant raised the plea that the court had no jurisdiction to entertain the suit. An issue being raised it was decided first at the instance of the plaintiff. The plaintiff was ordered to be returned for presentation to the proper court, and the Subordinate Judge gave the defendant costs, calculating the pleader's fee at 5 per cent—Held on appeal to the High Court, that the pleader's fee had been properly calculated under Rule 21 of the Rules for the Subordinate Courts, the decision having been given after contest, and on the merits of that contest.	
JAMNA PRASAD V. KARAN SINGH	859	GAURI SAHAI V. A. O. BAHRE	426
Irregularity in proceedings under Defence of India Act.		Sale—Power of court to set aside—Decree—Execution of decree—Property sold and purchased by one decree-holder—Application by judgment-debtor with consent of decree-holder to set aside sale—Court refuses to set aside sale.	
See Defence of India Act section 2	895	In execution of a decree certain property belonging to the judgment-debtor was sold and purchased by one of the decree-holders. In the court below judgment-debtor and the decree-holders (one of whom was also the purchaser) applied to get the sale set aside on the	

Sale—(conold.)	PAGE.	Sanction to prosecute—Given	PAGE
ground of inadequacy of price. The court refused to set aside the sale on the ground that it had no power in law to set it aside when the judgment-debtor and the decree-holders consented:— <i>Held</i> that the court had power to set aside the sale as there was no opposition on the part of the decree-holders or the purchaser.		<i>by Small Cause Court Judge—Revision.</i>	
MUHAMMAD ABDUL RASHID ALI KHAN v. BUDH SEN ...	750	See Civil Procedure Code section 115 ...	921
Sanction—Trial of perjury without—Legality.		Search—Under Arms Act without warrant—Legality of.	
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		<i>D. K.</i> adopted <i>B</i> by means of a deed of adoption which provided that the latter would from that day acquire all the rights which an	

Transfer of Property Act —(contd.)	PAGE.	Transfer of Property Act —(contd.)	PAGE.
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Under section 85 of the Transfer of Property Act, 1882, a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit.		<i>tenant raises presumption of notice reaching others—Delivery of notice to quit by post—Presumption in favour of its reaching addressee—Effect of registering the notice.</i>	
On the making of an order absolute for sale under section 89 the mortgagee's security as well as the mortgagor's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.		The principles governing the sufficiency of notices to quit served by landlords upon their tenants are the same in India as in England. Such notices may be good and effective in law even though not strictly accurate or consistent; the test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer, but what they would mean to tenants presumably conversant with such facts and circumstances. Such notices are to be construed so as to effectuate the intention of the parties, "ut res magis valeat quam pereat."	
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—Section 89		In the case of joint tenants service of a notice to quit upon one is <i>prima facie</i> evidence that it has reached the others.	
—Order absolute—Substitutes right to sale.		There is a presumption that a notice to quit posted in a letter properly addressed to the person intended to be bound reaches that person. Such presumption applies with still greater force to letters which are registered, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by somebody else.	
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EDITOR:

TEJ BAHADUR SAPRU, M.A., LL.D.

SUB-EDITORS:

MOHAN LAL NEHRU, LL.B.

SARAT CHANDRA CHAUDHRI, M.A., LL.B.

REPORTER:

BINOY KUMAR MUKERJI, M.A., LL.B.

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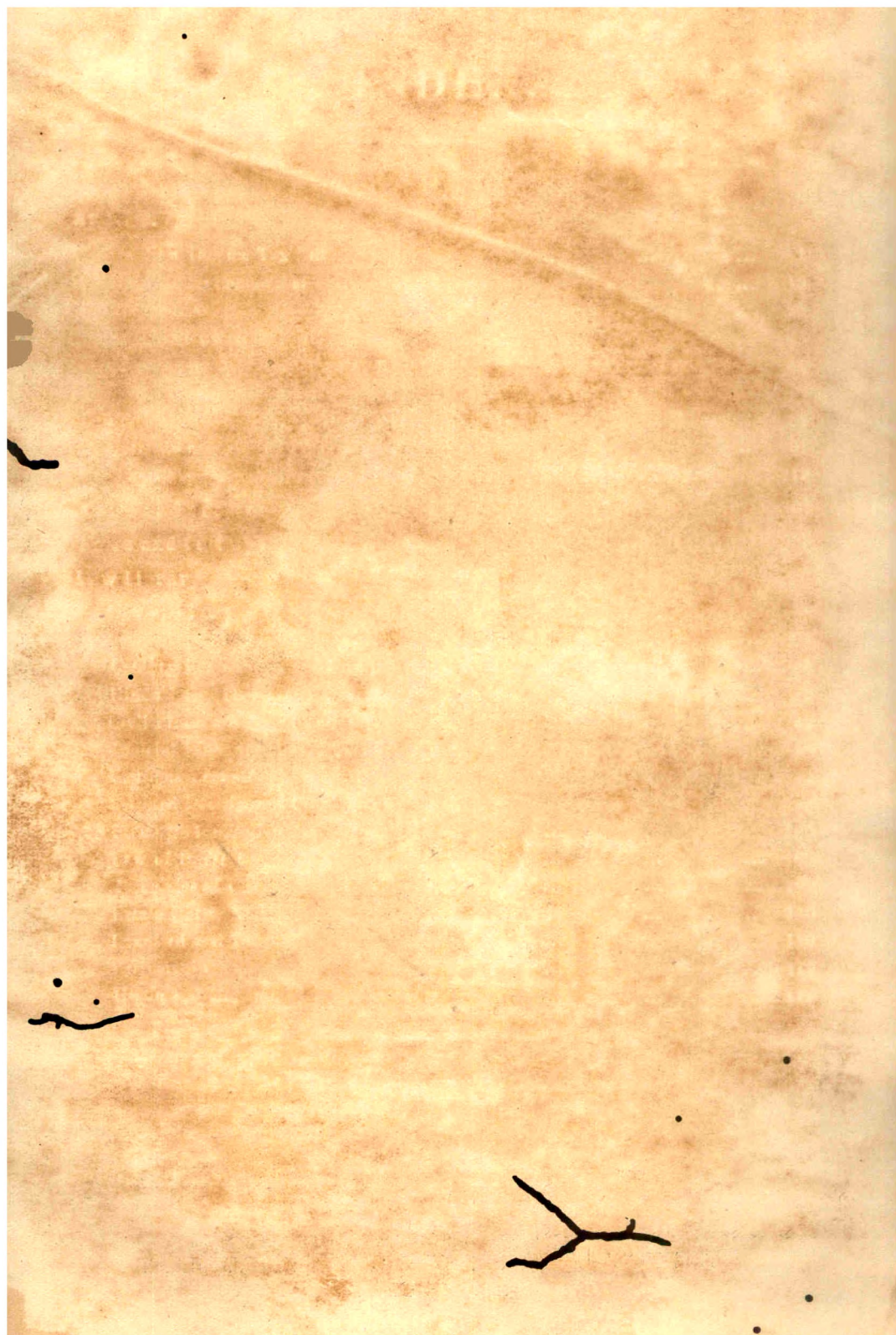
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THE HON'BLE ~~DR.~~ SIR SUNDER LAL, Kt., C.I.E., LL.D.
(Born 1857—Died 1918.)

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THE NEW INCOME-TAX BILL.

As was to be expected the great European War has brought in several important amendments of far reaching effect in the Income-Tax Act. By Act V of 1916 a graded scale of Income-Tax rate was introduced which must have resulted in substantial increase in the Income-Tax Revenue. Another amendment was made by virtue of which the Collector was to issue notices to all the proposed assesseees to file verified statements of their incomes and the failure was liable to be punished with a daily fine. Now a consolidating and amending Bill has been introduced and probably it will be taken into consideration and passed in February, 1918. before the assessments for 1918-1919 are made.

At a time when the Government stands so badly in need of money it is idle and useless to question the justice or the propriety of the increase made by Act V of 1916 and retained in the new Bill. But at the same time it is necessary to see that the machinery provided for assessing or realising the tax is not made oppressive.

The introduction of clauses dealing with the ascertainment of incomes under different heads for purposes of assessment is a move in the right direction. Up to this time the practice must have differed in different provinces, and different assessing officers adopted standards which they considered proper. It has now been made plain that the tax is to be assessed on the actual income.

- Assessing officers sometimes used to include interest which had accrued due but had not been actually paid or realised in the assessable income, but such a mistaken procedure should no more be possible in future.

In clauses 9 (VIII), 10 (2), and 11 (2) the words "Capital Expenditure" are used but they are nowhere defined. It would be better if these important words are properly defined. I do not see why capital expenditure should not be deducted in estimating the assessable income. If a house is built for a factory or other professional purposes or furniture or books *etc*, are purchased by a medical or legal practitioner for the purpose of his profession there does not seem any valid reason for not making some allowance at least for these. Similarly there seems no justification for not making allowance for

Municipal Taxes under clause 8. It is not just that houses in Municipalities should pay both house-tax and Income-Tax and in addition to this no deduction be made from the income in respect of either, in assessing the income for taxation. The most important amendments made by the last Amending Act and now amplified relate to the issue of notices under clauses 17 and 18 and the consequences of non-compliance therewith. Every one living or carrying on any business in British India is directly or indirectly concerned with the Income-Tax Act and it is necessary that an Act which is enacted for fiscal or Revenue purposes should not be sued as to entail unnecessary hardship. The provisions as they are now sought to be enacted appear to be very drastic, and unduly oppressive. Clause 17(2) requires the Collector to issue notices to all the proposed assesseees to put in duly verified statements of their income. If the Collector doubts the accuracy of the statement he can call upon the assessee to produce accounts, documents and other evidence in support of the statement. In case of failure to file statement or to comply with all the terms of the notice issued under clause 8 the Collector can under clause 19 not only make such assessment as he deems proper, but such assessee will not virtually be entitled to file objections. This is really very hard. Under clause 23 the Commissioner can on objection reduce the assessment, but he can also enhance it. Clause 25 authorises levy of double tax on incomes found in excess of those entered in the returns filed. Under clause 35 Collector can in his discretion in case of default in payment of tax realise double the amount assessed. Clause 38(b) makes failures to file returns and accounts punishable with a daily fine of rupees ten and clause 39 makes wrong verifications of returns punishable under section 177 of Indian Penal Code. This resume is enough to show the severity of the provisions of the Act. Probably it is taken for granted by the framers of the Bill that every person whatever his income and expenditure, and whatever be his position in life, keeps a regular system of account books. I don't think this is a true or valid assumption in case of any country and much less so in case of India where illiteracy and poverty are rampant. I can confidently say that a great majority of persons who are assessed or would now be assessed to Income-Tax, possess no accounts whatever and out of those that keep accounts there are but few who keep regular account books which can be produced in courts or which can be accepted by courts as reliable and correct. The question therefore naturally arises what these numerous proposed assesseees are to do. Without any accounts it is very difficult to make a correct estimate of annual income and submit a verified return and in case one is submitted no corroborative evidence can be produced. In fact if a person dares to make an estimate and to file a return, it will be difficult for him to convince the Collector that he has no account books, and so the result in either case will be that not only will he be heavily assessed but he will also become liable to a daily fine besides being debarred

from filing objections. Is this fair and equitable? Of course in clause 22 the words "knowingly and wilfully are used," but in questions of revenue, these words are liable to be overlooked especially when the matter is to come up not before a Civil Court but the Commissioner who is the Revenue Officer of the Division. It would beget public confidence if the objection is allowed to be filed before Civil Courts but this is hoping against hope. The chances are that practically a person who has not filed a return or has no account books will go without any redress. The Collector would in such cases probably find either that the default is wilful or that the return filed is not correct or that the account book is not genuine or reliable. Can there be such hope of the Commissioner going against the finding of the Collector? Besides this bar against filing objections the assessee may be made to pay double tax under clause 25. With all these disabilities and penalties it seems improper to impose the further penalty of a daily fine under clause 38. This should, in any case, be done away with.

Under the Act now in force objections are filed before the Collector. Under clause 22(1) of the New Act they will have to be filed before the Commissioner. The filing of objections and the production of necessary evidence before the Commissioner will entail heavy expenditure and this will of itself act as a bar against filing of objections. In support of the change it is urged that all evidence now produced before Collector in objection proceedings will be available to him at the earlier stage, so it will be no use filing objection before him and so the objection will have now to be filed before the Commissioner. The argument put forward sounds well but if we look to the facts its futility becomes apparent. Under the existing Act also the assessments are presumed to have been made by the Collector but every one knows what hand he actually has in the matter. Can we hope that in future all the work connected with ascertainment of incomes, scrutiny of returns and account books and the taking of evidence and recording findings will be done by him? If he has to do all this work practically his full year will be occupied with it and he will have no time to do any Revenue, Criminal or Executive work. Sooner or later such work will have again to be done by Tehsildars and Sub-Divisional Officers as heretofore and the amendment will prove merely illusory. The definition of the word Collector as including a person who is empowered to do the work of the Collector, lends support to this view. So the changes sought to be effected will make the work of assessment very cumbersome and the provisions relating to filing of objections before Commissioner will prevent many assesseees from filing them. They will rather bear the extra burden than go to the Commissioner and incur greater expense and worry, the more so as the relief obtained by a successful objection can avail only for that year, the next year bringing its round of notices and penalties;

assessments and objections. Curiously enough clause 23 does not provide for production of evidence before the Commissioner.

Clause 18 (3) leads one to think that the *onus* of proving the correctness of the return is thrown on the assessee, while in justice it ought to just the other way. When a person files a duly verified return, and subjects himself to the risk of a criminal prosecution if it is found to be wrong, the return should be taken to be correct and assessment made accordingly unless and until there is clear evidence that the return was incorrect. It is difficult to understand what evidence a person not keeping regular account books can possibly produce. Oral statements of witnesses cannot be more reliable than the verified return, as nobody can estimate another's income better than he himself can.

Even those persons who keep some sort of account books do not like to produce them for various reasons. Not unoften persons carrying on business employ borrowed capital, but they naturally do not like that others should know their assets and liabilities. The difficulty in getting a fair report from the persons appointed to inspect the Bahi Khatas unless they are adequately paid is another reason. It is also well known that in these days there is much corruption in the Amla and no work can generally be done there without spending something. Moreover there is a strong apprehension that if on Mubassar Bahi's report the Bahi is held unreliable it will on account of this stigma become mere waste paper and in case it has afterwards to be produced in Civil Courts it will not be held to be of any weight at all. In genuine and regular account books the items paid to different officials and Amla people must be entered though under different heads or names. This is another reason why even those persons who possess Bahi Khatas dare not produce them. Under all these circumstances the non-filing of returns and the non-production of account books should not be punished with such severe penalties as the Bill provides.

It is also worth notice that in clause 38(b) the words "knowingly or wilfully" which occur in clause 22(1) are intentionally or otherwise omitted. This makes the position very serious indeed. Is the Magistrate trying the case bound to convict without entering into the question whether the accused had account books or not and whether his omission to file the return or the account books was wilful or it was due to his inability? If the penal clause is to remain, and I earnestly hope that it will not, then the words "wilfully and fraudulently" should be added.

It may not be out of place to say that the majority of shopkeepers and traders do not take any periodical or yearly stock of their goods or capital, and so it is very difficult to say definitely or even quite approximately what their income has been during a particular year. In case of many trades and professions it is very

difficult to find out the correct income during a certain period. Take for example the case of dealers in Moradabad inlaid wares. It may first be stated that there is no uniform rate at which profits are charged in this or in any other trade. Many of such dealers get wares made in their own factories by their own servants and labourers. The wares pass in different hands and no detailed account is kept or can be kept as to how much time was taken by each workman over a certain piece. So the cost itself can only be very roughly estimated, to say nothing of the profits. The profits made are different in cases of different sorts of wares. Some wares sell at very small profit, others give good profits, and the prices vary according to the demand. So unless a very detailed account is kept, which is almost an impossibility, of the cost of production and sale of each article, no reliable estimate of income can be formed. Similarly in case of merchants selling cloth and other goods it is not easy without thorough stock taking to find the income with any amount of certainty, and even with stock taking the income can only be approximately estimated. As I have said before the majority of these dealers do not keep any account, or at least none that can be called regular or worth production in court. About cash sales very few indeed keep any accounts. It is therefore not safe for them to file a verified return and so it is not proper to subject non-filing of returns to such severe penalties. I dare say that human genius cannot easily make further addition to this huge list of bars, disqualifications, penalties and punishments provided for in the Bill.

A useful provision exists in the Income-Tax Act II of 1886 in Section 31 under which the Tax may be compounded for a number of years. This has remained practically a dead letter owing to the aversion of the Officials, but this is a provision which should have been put in force and its operation should have been encouraged but it is now proposed to delete it altogether. This is not a move in the right direction. The assesseees have to bear considerable worry, anxiety and trouble every year in the course of assessment proceedings. For the greater part of the year the terror of assessment proceedings hangs over their heads. It would be a very good thing if assessments could be held operative for a number of years and liable to change during the period in case business is given up or new business is started.

In short to obviate trouble and hardship to the public the following simple procedure is submitted for the consideration of the Imperial Council.

1. Notices should be issued by Sub-Divisional Officers to every proposed assessee to file return of his income.

2. In case he files a return assessment should ordinarily be made in accordance with it.

3. In case there are substantial grounds to doubt the correctness of the return he may be ordered to file the account books if he has got any. However unless and until there are such grounds there should not be a general order for every such person to file his books, nor need they be called in every case.

4. On production of books if an account can be made of the income from it, assessment may be made on such income.

5. If no return is made or account books are found to be unreliable the assessing officer may after making such enquiry as he deems necessary make such assessment as he considers just.

6. The assessee should be allowed to file objections before Collector, but he may reject it without entering into merits, if he finds that though regular account books are kept yet the returns or the account books were not filed. Non-filing of the returns by a person not keeping accounts should not be visited with this penalty.

7. Appeals should be to Commissioners. If appeal be not allowed in all cases, it should at least be allowed in cases of all assessments exceeding one hundred rupees or when tax is enhanced or newly assessed.

8. Persons wilfully filing wrong returns be liable to conviction under Section 177, Indian Penal Code. There should be no other penal clauses regarding non-filing of returns or accounts.

9. The assessment should be operative for at least three years and during this period liable to change only in case of business being giving up or a new business being started.

Before concluding I wish to draw attention to two useful provisions of the English Income-Tax Act which may with advantage be adopted here. In English the Tax is assessed on the average of the last three years' income. This is not only convenient and just, but would prevent sudden rises and falls on assessments and Income-Tax Revenue. The English Law allows a reference to be made to the High Court in certain cases and I think the Act here should also provide for reference or application being made to the High Court by an assessee either directly or through the Commissioner where the case involves a question of law or general principle. Clause 52 does provide for reference by the Chief Revenue Authority but there is no provision enabling an assessee to get a reference made.

It is sincerely to be hoped that the Bill will receive due consideration at the hands of the peoples' representatives so that it may not be an engine of operation.

MORADABAD:

December 1917.

BRIJ NANDAN PRASAD.

CASES AND COMMENTS.

*Alluvion—Gradual, slow and imperceptible accretion—Meaning of
“slow and imperceptible.”*

The Secretary of State for India in Council v. Rajah of Vizianagram,
[1917] 40 Mad., 1083.

Their Lordships of the Privy Council have in the case of *Srinath Roy v. Dhinabandhu Sen*, [1915] 42 Cal., 489 pointed out that before “applying the juristic rules of a distant time or country to the conditions of a particular place at the present day, regard must be had to the physical, social, and historical conditions to which that rule is to be adopted.” It is well-settled law in England that land to be an accretion must be formed by gradual, slow and imperceptible degrees, that is, imperceptible in its progress and not imperceptible in the result after a long lapse of time. And in many Indian cases it would seem to have been laid down that the law was the same in India. See *Krishna Chandra v. Saeedan Bibi*, [1905] 2 A. L. J. R., 821; *Narendra Bahadur Singh v. Achchaibar Shukul*, [1906] 3 A. L. J. R., 453. But, as the Privy Council observe, the conditions in India are widely different than those prevailing in England. The rivers here are deep and broad and would, by reason of their resistless force and ever-shifting courses, seem to have almost a personality of their own. It is therefore not necessary, as is indicated by the language of Bengal Regulation XI of 1825, that the land, claimed as an accretion, should be formed by “slow and imperceptible” degrees as well as “by gradual accession.” Thus, in the case under notice, large alluvial islands formed in the bed of the river Godavari not slowly and imperceptibly but rapidly were held to belong as accretions to the adjoining owner. The decision, though it is apparently opposed to the *dicta* in several earlier cases, is, it is submitted, correct and well-founded in principle.

Mortgage from lessee—Whether liable for rent to lessor.

Thethalan v. The Eralpad Rajah, Calcutt, [1917] 40 Mad., 1111.

Dissenting from the decision in *Vithal Narayan v. Shriram Savant*, [1905] 29 Bom., 391, their Lordships (WALLIS, C. J., and SPENCER, J.) hold that a mortgagee with possession from the lessee is not liable to the lessor for rent as there is neither privity of estate nor of contract between them. Though the question is not free from difficulty the case, we think, was correctly decided. In *Ghose on Mortgages* (Vol I, 313) it is stated that “where the subject

of mortgage is leasehold property and the mortgagee is put in possession of it, he becomes liable as a rule, to pay the rent." Under section 65 of the Transfer of Property Act, it is the duty of the mortgagor, *so long as the mortgagee is not in possession of the mortgaged property*, to pay the rent reserved by the lease, but section 76, which deals with the liabilities of a mortgagee in possession, does not provide for the payment of rent by the mortgagee at all. His liability is confined to payment of Government revenue and other charges of a public nature in default of payment of which the property may be summarily sold. Section 108 (j) does not touch the point at all. There is of course no privity of contract between the lessor and the mortgagee from the lessee and it seems difficult to see how the lessor can claim rent direct from the mortgagee, unless he has entered into an express undertaking to pay the same. In the latter case the rule in *Debnarain Dutt v. Chunni Lal*, [1914] 41 Cal., 137 may possibly apply, though a different view even on that point, was taken in Allahabad, see *Mangal Sen v. Mohammed Hussain*, [1915] 13 A. L. J. R., 73. Where there is an absolute assignment of the lease by the lessee, there the assignee becomes, under the English law, by reason of privity of estate, liable for the rent to the lessor. The English rule has been frequently applied in India, though it must be said that there is nothing in the Transfer of Property Act to countenance such a view.

Caste Disabilities Removal Act (XXI of 1850)—Descendant of Hindu Convert to Christianity—Whether Relieved by the Act.

Vaithlinga v. Ayyathoral [1917] 40 Mad., 1118.

The decision in the case of *Bhagwant Singh v. Kallu*, [1889] 11 All., 100, had been so much doubted by eminent text-book writers that it is not surprising to find it definitely dissented from by the Madras High Court. The learned Judges hold that the Act would only apply to persons who themselves renounced, or had been excluded from the communion of, Hinduism, and the descendants of such converts cannot take advantage of the rules of Hindu Law and have, therefore, no interest in the property of their unconverted relatives. To the same effect see Mayne, *Hindu Law*, 8th Ed, 833; Sarkar, *Hindu Law*, 328; Bhattacharya, *Hindu Law* Vol. I, 70; *Contra*, J. C. Ghose's *Hindu Law*, Vol I, 214. It is anomalous that a person should be able to take benefit of a purely personal law like the Hindu or Mohammedan Law when he has himself actually renounced it. The Legislature has thought fit otherwise, but it is only just that the Act, which is on the face of it so contrary to reason and justice, should be strictly construed, and the operation of the Act should not be extended by too liberal a interpretation. The language of the Act, having regard to its natural meaning, would apply to those persons only who themselves become converts to other faiths and not to their descendants. Of course the argument on the

other side is that the law regards and ought to regard relationship only and not the religion professed by those relations, that the devolution of the estate of the deceased is to be governed by his personal law and the heirs determined by reference to that law, but the fact that such heirs are not of the same persuasion as the deceased is immaterial. If in a given case the Hindu Law says that the nephew or the grand-nephew is the heir he is so, whether he is a Hindu or Mohammedan. In other words, blood relationship is not affected by differences of religion. Logically this view may be right but it is repugnant to reason and good sense. Another point made by the learned Judges is noteworthy. From the point of view of strict Hindu Law a Christian marriage would be void and ineffectual and the offspring of such marriage illegitimate, and therefore a Hindu may well refuse to regard the descendants of his Christian brother as relations at all. This may be so under systems of law where marriage is treated as a sacrament. But under the Mohammedan Law marriage is entirely a matter of contract, and the same difficulties would not arise. Can therefore, the descendants of a Mohammedan convert to Hinduism, claim their shares under the Mohammedan Law in the estates of their Mohammedan relatives?

Interference with natural course of stream—Extraordinary rainfall
—Vis-major

Greenock Corporation v. Caledonian Railway, (1917) A. C., 556.

A municipal authority in laying out a park, constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and as the result of the operations of the authority, great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two Railway Companies. Held that the extraordinary rainfall was not an Act of God which absolved the authority from responsibility and that they were liable in damages to the Railway Companies.

It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel, he will be liable.

"A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower level as secure against injury as they would have been had nature not been interfered with. And this is so although the water accumulated suddenly, or the fall was extraordinary or even unprecedented in quantity." (*Per* Lord Shaw.)

NOTES AND CUTTINGS.

[We have received the following from a learned contributor. His arguments deserve careful attention and thoughtful consideration.—Ed.]

In the case of *Khedu Rai v. Sheo Parson Rai*, (I. L. R., 39 All., 423), the learned Judges have decided an important question concerning the law of adverse possession between a mortgagor and the mortgagee. The facts are that the mortgagor purported to divest himself of the ownership of equity of redemption in favour of the mortgagee by means of a compromise petition. But it did not in law pass any title to the mortgagee on account of Registration Law with the result that the title was left outstanding in the mortgagor. The decision which was in favour of the mortgagee is made to rest on three grounds.

- (i) The compromise has been acted upon for a long time.
- (ii) The character of the possession of the mortgagee has been changed from that as a mortgagee into one as a full owner.
- (iii) The mortgagee defendant, 1st party, has transferred portions of the properties mortgaged to strangers like the defendant, 2nd party.

Ground No. (iii) it is submitted can really afford no support. Suppose a mortgagee during the continuance of the mortgage sells the mortgaged property claiming to be full owner would that by itself preclude the mortgagor from recovering the same, if his suit being one for redemption is within time under article 148, Limitation Act? It is quite possible for a transferee from a mortgagee who purports to transfer the entire property to take shelter under article 134, Limitation Act, provided the requirements of the article are complied with. Presumably the present case was not brought within the purview of the article. This ground therefore cannot support the conclusion.

Ground No. (i) appears to be equally untenable. A transaction which at its inception is void in law cannot by its being acted upon by the parties be converted into a legal one. Is it to be put on the basis of estoppel? It has been held in numerous cases that a title cannot be acquired by estoppel. To hold otherwise would result in enabling a man to evade the provisions of a statutory enactment like the Transfer of Property Act or Registration Act (*Vide* I. L. R., 38 Mad., 374; I. L. R., 38 Cal., 512; 20 C. W. N., 370).

The learned Judges rely on a ruling of the Privy Council in 42 Cal., 801. That is distinguishable. In the first place the compromise petition in O. S. No. 87 of 1873 being a pleading of court required no registration. (*Vide*, the Privy Council Ruling in I. L. R. 20 All., 171 and also I. L. R., 33 Mad., 102, 27 M. L. J., 396).

There is therefore no question of its being inadmissible in evidence to show that the mortgage-debt had been extinguished which makes all the difference between that case and the present case where the compromise petition was admittedly inadmissible in evidence for want of registration.

In the second place the compromise petition in that case was not compulsorily registrable having regard to the then Registration Law.

Thirdly no written conveyance was necessary to pass title. The compromise itself providing for a conveyance to be made, their Lordships thought they could take one as having been made though not in writing in the circumstances of the case. But in the present case the compromise itself operates as a conveyance. The decision is no authority for the position that where a document is inadmissible in evidence for want of registration and therefore does not pass any title you can nevertheless prove *alimunde* that title passed. It would be useful in this connection to refer to a later decision of the Privy Council reported in 44 Indian Appeals, page 15 (*Maung Shwe v. Maung Inn*). There the question was whether a contract of sale unaccompanied by a completed conveyance as per section 54 of the Transfer of Property Act would convey title. Their Lordships' opinion that a contract of sale of real property does not make, as under English Law, the purchaser the owner in equity. The Madras High Court quite recently had occasion to consider the effect of the Privy Council Ruling in 42 Calcutta 801, in a Full Bench case reported in 33 Madras Law Journal, page 252. The majority of the Full Bench agree that the actual decision in the case was not that the requirements of the Transfer of Property Act can be ignored, (*vide*, the Judgment of NAPIER, J., at page 272 with which SADASIYA AYYAR, J., agrees). It is therefore submitted that whereas in the present case the compromise petition of 1876 by itself could convey no valid title, mere conduct or acts of the parties will not be enough to supplement a statutory requirement. The first ground also appears to fail. Then there remains the only other question which is, where the relationship of mortgagor and mortgagee has not been legally extinguished whether the possession of the latter can during the subsistence of the mortgage be deemed to be adverse to the former.

The language of Article 148 of the Limitation Act is very significant. Without doing violence to the language it seems impossible to take the case out of the operation of the article. It speaks of a suit by a *mortgagee* to redeem or to recover possession and prescribes a period of 60 years from the date when the right to *redeem* or to *recover possession* accrues. How can we say that the

plaintiff in this case has *ceased to be a mortgagee*. When the equity of redemption has not legally passed away from the plaintiff?

Article 144 cannot apply when there is a specific article applicable to the case. The Privy Council has held in 7 Bombay Law Reporter, page 1, that *nothing short of a release of the equity of redemption will be a bar or a defence to a suit for redemption*. A release obviously must be a *valid* one.

In I. L. R., 14 Mad., 38, the Madras High Court has held that in the absence of a valid sale by the mortgagor to the mortgagee the possession must be taken *to retain its original character*. This ruling is distinguished in I. L. R., 37 Mad., 545, but with due respect, it is submitted that there is no difference in principle. The ground of invalidity would appear to make no difference. If the question of adverse possession depended upon the *animus* alone why should it not be supposed that the mortgagee in the 14 Madras Case, intended to prescribe as full owner.

There is another point which distinguishes the case in I. L. R., 37 Mad., 545, from the present. The principle of law up to the enactment of the Transfer of Property Act, 1882, was that the right to redeem was absolute and such a right could not be fettered by any agreement between the parties. This right was very zealously guarded by courts in this country. (*Vide*, I. L. R., 1 Mad., 1; I. L. R., 4 Mad., 179; I. L. R., 15 Mad., 230). That a mortgagor can put an end to such a right was recognized for the first time only by section 60 of the Transfer of Property Act. In the 37 Madras Case, the arrangement purporting to extinguish the right to redeem took place in 1885. In the present case the arrangement was in 1876. Reference, in this connection, may with advantage be made to the recent decision of the Madras High Court in 32 Madras Law Journal, page 317. It does not appear from the report in the present case when the period fixed for redemption expired. But the remarks of AYLING, J., at page 319 of the 32 Madras Law Journal case are very apt and cover the point. "If no agreement of parties to a mortgage can operate *ipso facto* to clog or restrain the equity of redemption and that is the law.....up to the passing of the Transfer of Property Act. I find it difficult to understand how consistently with this view agreement of parties to a mortgage can affect the character of the mortgagee's possession so as to convert it from that of a mortgagee into that of a person prescribing for a full title."

Reference also may be made to a decision of the Bombay High Court in 18 Bombay Law Reporter, page 980, (F. N.) where it has been held that a right of redemption under circumstances like the present is not extinguished.

It is therefore submitted that the second ground stated also cannot really support the conclusion.

J. VARADARAJIENGAR.

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THE LATE SIR SUNDARLAL LL.D., Kt., C. I. E.

Who that knew Sir Sundarlal and of his extremely regular and well-ordered life could ever imagine before the 10th of February last, the day on which he was suddenly seized by the disease, which ended fatally three days later, that his end was so near? Though just over sixty, he seemed to every one to be in the possession of perfect health, as active as ever, full of interest in his work, and with no apparent signs of fatigue or exhaustion. And yet we must record the painful fact that the Fates have robbed the country of one of its foremost sons, one who by his wisdom and sagacity, learning and industry, character and influence, rose in his profession and in the public life of the country to heights attained by few, and scarcely surpassed by any one else. There have been great leaders before him, men who achieved great distinction in the profession of Law, whose names were and still are honoured names throughout the country. In individual qualities, some of these earlier leaders were perhaps superior to Sir Sundarlal; but in the combination of so many rare qualities, in the many-sidedness of his life, and in the actual output of work, solid and substantial, and as unceasing as it was unostentatious—we venture to think that none before his day or in his own time ever excelled him, or even equalled him.

He was born on the 21st of May, 1857. He was educated at the Muir Central College Allahabad, and while yet a student in the College, he passed the Vakils Examination in 1880, and was enrolled as a Vakil on the 21st of December of the same year. Next year he sat for the B. A. Examination of the Calcutta University and was successful. He did not achieve any particular distinction in the examination—though some of his contemporaries who are happily still in our midst say that he showed in his College career that aptitude for hard work, and regularity of life which in later years accounted so much for his success in the exacting profession of law. Sir George Knox whose connection with Allahabad goes back to the seventies of the last century told us the day after his death that Principal Harrison of the Muir College—who is reported to have been a shrewd judge of men—foretold a great future for young Sundarlal—and it is not unoften the case that the qualities which

make for success in what has been said to be 'the great University of Life' are somewhat different to those which secure brilliant academic honours. Pandit Sundarlal possessed the former in a superabundant measure, and his entire career as a lawyer, and a public man bore witness to it. The first two years of his professional life were spent in the District Court, Allahabad, and in 1883 he settled down to practice in the High Court. Both the branches of the profession comprised at that time some very eminent and able leaders. Men like Sir Walter Colvin, Mr. Conlan, Mr. Hill and Mr. Ross, among the Barristers and Munshi Hanooman Prasad, Pandits Ajodhya Nath and Bishambar Nath, Munshi Jwala Prasad, and Mr. Dwarka Nath Banerji among the vakils occupied the front rank of the profession in those days. It is not difficult to imagine what an uphill task it must have meant to any junior joining the profession to build up a decent practice in those days and yet, we are told, that within three years of his joining the profession, every body felt sure of his great future. He had been a pupil of Mr. Hill, at one time Professor of Law at the Muir Central College, and the teacher found in the pupil a junior of great promise, of uncommon industry and application, and of highly methodical and business like habits. His early association with a senior counsel of the position of Mr. Hill was, as he himself used to admit, of the greatest advantage to him. It was in 1889 that Mr. Hill accepted a judgeship in the Calcutta High Court and by that time Pandit Sundar Lal had succeeded in establishing a fairly large practice. Between 1889 and 1892 his practice was still further rising, and when Pandit Ayodhya Nath died in 1892, Pandit Sundar Lal easily rose to the top of the profession and during the last twenty-five years of his career enjoyed a most lucrative practice. His name was a household word among the litigant public and during the last quarter of a century there was scarcely any case of note in the High Court in which his services were not eagerly sought for by one party or the other. It was in 1896 that in recognition of his great talents and position in the profession, the High Court raised him and three other leaders to the rank and status of an advocate. During his long career he enjoyed the respect and confidence of the Judges in an unbounded measure, and, as a retired Chief Justice once said to the present writer, when Pandit Sundar Lal had argued a case it was felt that there was nothing more to say on it. His reading was not only very extensive but also very deep and his knowledge of the case-law, Indian and English, was almost unequalled. Whether he had to deal with an intricate point of Hindu Law or Mohammedan Law or the law of mortgages, or the law of wills, or the law of procedure, or accounts, he was equally at home with the subject, knew almost every important case on the point and every change in the statutory law or the judicial decisions. But it would be a great mistake to suppose that he was a slave of the case-law. He possessed a firm mastery of the underlying principles of law and the

manner in which he skilfully and adroitly applied those principles to the cases that he had to argue afforded the best instruction to his juniors. He was equally great on facts. Indeed, the marvellous skill and lucidity with which he unravelled a tangled mass of facts and analysed the evidence, the resourcefulness which he showed in meeting the observations from the Bench, the sense of perspective that he always displayed and the great knowledge that he possessed of human nature extorted for him unqualified admiration and respect from his opponents. There was very little of rhetoric in him. He was a matter-of-fact speaker but he had a persuasive manner and a self-confidence born of knowledge and thorough preparation, for, above everything else that distinguished him in life, either as an advocate or as a public man, was his thoroughness.

It was in 1909 that he accepted a seat on the bench of the Judicial Commissioner's Court in Lucknow for a few months and in 1914 and 1916 he for very brief periods officiated as a Judge of the Allahabad High Court. During this brief space of time as was to be expected, he won the golden opinion of every one and some of his judgments bear ample testimony to his great learning and remarkable thoroughness. His devotion to law won for him a unique position in these provinces and in his death we have lost a leader of the highest distinction, a lawyer of profound learning and an advocate of rare skill and power.

But it is not merely as a great lawyer that his loss will be felt in these provinces. He was a great educationist. No one in his generation occupied the same position as he did in the internal affairs of the Allahabad University. By solid work unostentatiously done he rose to be the Vice-Chancellor of that University in 1906. He was again appointed to that office in 1912 and yet again in 1916. Those alone who knew his work in the University can appreciate the position which he occupied in that learned body. His best work was done in the syndicate and the faculties, where his intimate knowledge, his clear-sightedness, his keen appreciation of practical issues frequently turned the scale in the midst of a conflict of arguments. If the Allahabad University has lost in him a pillar of strength what shall we say of the new-born university at Benares? The moment it was announced that Dr. Sundar Lal had accepted the office of Vice-Chancellor of the Hindu University every one felt that in the critical years of its infancy his great experience, his wonderful patience with critics friendly and hostile, his transparent sincerity of purpose, his influence with the Government, the princes, and the people, his devotion to the cause and above all his faith in its future would be assets of the greatest possible value to it—even more than the munificent gift of one lac which he made to its funds. It is pathetic to recall that even in his dying moments the thought which was uppermost in his mind was that of the Hindu University, and he talked of it to his life-long friend Pandit Madan Mohan Malaviya. Well

may the Hindu community go into mourning over the loss of one whose place it is impossible to fill.

For nearly fourteen years of his life he was a member of the Provincial Legislative Council and for a few months he sat in the Imperial Legislative Council to assist at the passing of the Hindu University bill. It is true he did not take much part in the debates of that assembly but his real work was done in the meetings of the various committees. He had nothing of the orator in his nature; he believed more in quiet work and he did a considerable amount of such work. His presence in the Council-chamber was felt as an influence rather than as an active force. He was an old Congress-man and acted as the chairman of the reception committee when the Congress was held here last in 1910 under the Presidency of the late Sir William Wedderburn. He was examined as a witness both by the decentralization commission and the Royal commission on the public services and he supported and advocated unhesitatingly many of the reforms which his countrymen are now urging upon the Government. He possessed a most disciplined intellect; he had not the fiery temperament of a restless politician. He had ideas and ideals but he would march towards them with caution. We think his position in the politics of the country has been best defined by Mr. Louis Stuart of the Lucknow Court. He was, to use Mr. Stuart's phrase "a constructive statesman and a patient idealist." We venture to think that if three years ago an Executive Council had been established in these provinces and Sir Sundar Lal, whose appointment to it was practically announced at the time, had taken office, he would have proved a tower of strength both to the people and the Government.

But it is not of him as a great lawyer or a great educationist or a distinguished public man only that we desire to speak. His entire life should be an object-lesson to his sorrowing countrymen and to none more than to the younger generation. He was a student all his life. He did not study law only; his intellectual interests were far wider. To realize the wealth of his knowledge and the variety of his information one had to know him at close quarters. During his career as a college student he was devoted to chemistry but subsequently he developed a remarkable fondness for history. His reading was of the most varied description and one could have some measure of it only in private conversation. In private life, he possessed all that one is accustomed to associate with the name of a gentleman—gentle and courteous to everyone, high and low, willing to help where help was needed, singularly free from all show or pomp—the very soul of honour in business, a practical moralist, whose life was a life of abstinence and purity. It is men of this type who by their public work and private life, intellectual attainments and stainless character raise the level of the nation. His worst critics could not accuse him of being a self-seeking person. Honours came

to him thick in life but he never worked for them. The Allahabad University could never have chosen a worthier person on whom to confer the highest degree in its power and the Crown never conferred the honour and dignity of knighthood upon any Indian more deserving of it. It is the loss of such a leader that we are mourning to-day. But while we mourn his loss we cannot forget the loss of her whose company sustained him in the great work of his life—we mean, Lady Sundar Lal. Nor can we forget what a blow it must be to his two brothers—Pandits Baldeva Ram and Kanhaiya Lal. In tendering our respectful sympathies to them we can assure them that their sorrow is shared by the nation at large.

T. B. S.

(By Mr. Justice Promoda Charan Banerji.)

I first made the acquaintance of Sir Sundar Lal in 1881 shortly after he had entered the profession of law. He used often to tell me that the first case in which he appeared was before me. After practising in the District Court for a short time he joined the High Court and by dint of industry and exceptional ability acquired an extensive practice in the course of a few years. Upon the retirement of Mr. Justice Mahmood fears were entertained that, an Indian might not be appointed in his place. Sir Sundar Lal was particularly anxious that the successor of that eminent Judge should be one of his own countrymen. When I came to the High Court he was at the height of his practice and decidedly one of the leading members of the profession. His knowledge of law in all its branches was vast and wide and he presented his cases with great lucidity and considerable ability. He never occupied more time than was absolutely necessary and was always fully prepared in all his numerous cases. He had an exceptionally retentive memory which enabled him to have the case-law at his fingers' ends. His death is undoubtedly a great loss to the Court and to the legal profession.

To the cause of education he was ardently devoted. To the Senate, the Syndicate and the faculties of the Allahabad University none rendered greater or more valuable services. He was fully acquainted with the affairs of the University and his retentive memory enabled him to bear in mind all the rules and regulations of the University and all past resolutions of the Senate and the Syndicate. He was a member of most of the Sub-committees of the Syndicate and the faculties and although his professional work demanded a good deal of his attention he did not, in the performance of his duties as such member, spare either time or energy. Every work which he undertook to do was done by him cheerfully and ungrudgingly. The loss to the Allahabad University is very great, but that sustained by the Benares Hindu University is greater and I fear irreparable. In matters of education he was generous to a degree.

To his great industry and ability he added an amount of tact rarely to be found. His views on all public questions were moderate, practical, and sound and he knew how to impress them on others in his usual modest manner. As a lawyer, as an educationist, as a citizen, he was undoubtedly the most prominent man in the Province and his sudden and untimely death has created a void which cannot easily be filled. We used to consult each other on various subjects and I had the privilege of knowing him intimately. To me, therefore, his death is a personal loss and a great blow. He commanded the confidence, respect and esteem of every one who knew him to a degree almost unknown.

I may mention that the Right Hon'ble Sir John Edge, had the highest opinion of him and he showed his great appreciation of his merits by moving the High Court to enrol him as an Advocate of the Court—an honour not bestowed before on any Vakil. Only the other day I received a letter from Sir John in which he wished to be remembered to Sir Sundar Lal, but the message remained undelivered on account of his sudden demise. One can hardly exhaust saying what one feels about him. We have lost a truly great man.

(By the Hon'ble Mr. Justice Walsh)

As one sadly left the Bund and turned to watch the bier with its pathetic burden disappearing into the clouds of white sand which swept across the banks of the Ganges, it was hard to realise that Sundar Lal had passed for ever from the eye of mortal man, at an age when great English Lawyers are raised to the Bench. It is hard even now to realise that his voice is still and that we shall never see again the familiar figure in black cassock, and neat white *pagri*, pass rapidly, but quietly, to his place in Court.

His movements about the High Court were characteristic of the man. He moved quickly, but he never seemed to hurry. He went straight to his place, without turning to right or left, concentrated on the business of the moment, but totally unassuming, and without thought of self. He looked in deadly earnest, but there was no sign of bluster; always the same dignified, easy carriage, the same courteous happy smile. He just took his seat, and began making notes, or took up a small much-worn volume of the 'Lawyer's Vade Mecum,' and waited his turn to rise. From the Bench he appeared to be an opponent of exceptional patience and courtesy.

I have been asked to say how he impressed me, as a stranger, after 20 years of the Law Courts in the Strand. It was only by degrees that I came to know him as an advocate. I had heard much of him, and perhaps after a certain age one is pre-disposed to be disappointed by men whose praises have been much sung. His qualities

were not of the showy, or brilliant order, which strike one instantaneously. He had none of the grand manner, the glowing periods, and the epigrammatic liveliness of the Oxford Union. His address was reposeful and confident, but not commanding. His diction was simple, and his enunciation was imperfect. He conversed even better than he spoke in Court. He was a signal example of the triumph of intellect over what one might almost count as physical handicaps. The only similar case I remember in England was that of A. L. Smith, who never took silk but became Master of the Rolls. Sundar Lal had no oratorical gifts, and he was not even what is generally known as a "great advocate" in the sense that Coleridge, Halsbury, and Russell were great advocates. Of course he had no jury practice. Yet he was a great case-winner, and with his subtle mind, his grasp of facts, and his unerring accuracy, he would have been a wonderful cross-examiner. As soon as he began to develop an argument, or to deal with a knotty point of law, one recognized the hand of a master. Even in the most trivial cases that "infinite capacity for taking pains" which has been called genius, made itself evident.

I happened to be his colleague on the Bench for the best part of three months in the heat of 1916. There are few better ways of getting to know a man, and there are few incidents in my professional career upon which I look back with greater pleasure. His reputation was more than justified. One came to realise the profundity of his learning. His wonderful memory, and his acquaintance with case-law were proverbial. But the points that struck me most were the wide range of his reading, his firm grasp of principles, his mastery of detail, his dogged determination to dig down to the depths of the most tedious and complicated case, his untiring industry and power of concentration, his wide sympathy and his innate sense of justice. He was no black-letter lawyer, though I found in an insolvency case that he knew the contents, and even the numbers, of sections of the English Bankruptcy Act as well as I did. In the realm of legal lore he was another Danckwerts, a veritable giant; in his imperturbability and sweetness of temper, he was the equal of Rufus Isaacs.

He was a glutton for work. When it was necessary to reserve judgment he insisted upon doing the spade work himself. He would take away with him the most complicated record, and go through it all. He took nothing for granted. He would return sometimes next day, seldom after an interval of more than two days, with the whole thing carefully written out, having discovered what had eluded the counsel engaged in the case. He made light of the heaviest task, and treated it as a personal favour to be allowed to do it. With all his kindness of heart he would show his dislike of unpreparedness at the Bar, and more than once he put back a case to compel the junior to master the facts. He

felt it keenly, but he never showed it by anything but a kind and persuasive word or two. He expected from others the same standard that he set himself. With all his gentleness, he was strong and firm of purpose, and he knew how to insist when his mind was made up. No man could have reached his attainments without an iron will, and though everything seemed to come easily to him he could never have achieved such facility without having mastered himself. He was something of a fatalist in his treatment of the failings of others. He was not above criticising, and criticising severely if he felt he ought, but he was the first to find an excuse.

It always seemed to me that he might have done anything. If he had been an Englishman and had entered the Church, he might have been Archbishop of Canterbury; if he had followed the law, he would probably have become Lord Chancellor. In all he did he was animated by one idea, a sense of duty. Not even his learning and industry could have won for him the love and esteem in which he was held, and the wide influence which he exercised over his contemporaries. The secret of his greatness was his high principle both in character and in conduct. It shone out through all he did like the smile which radiated from his countenance. It inspired his action and illuminated his thought. Those of us who knew him are not likely to forget his winning personality; let us never forget his example.

THE LATE HON'BLE SIR SUNDAR LAL.

Death has exacted a heavy toll from these Provinces by taking away the Hon'ble Sir Sundar Lal from our midst. Upon no single life perhaps did so many interests and results depend as on his. *Primus inter pares* in his vocation, it would, however, be a mistake to think of him as a mere lawyer. He was a man whose activity spread out over many fields. His death consequently is in every sense an imperial as well as a national loss. He was the type of man whom but to know was to love. Cool and self-possessed, unpretending and good-tempered, covering with a perennial glow of genial humour an earnest soul, a never-failing figure in the court-room, he had become to us a familiar institution, a peculiar possession which time made more our own but never warned us we were to lose. It was a strange thrill, a shock of incongruous emotion that followed the announcement on Thursday morning, the 14th of February, that he was no more. The blow was sudden and unexpected, absolutely stunning in its effect, because people were wholly unprepared for it.

The time has not come yet to review in cold blood the life and character of our great countryman. When the sense of loss is recent, grief gets the better of judgment. The task will, we firmly believe, be performed in due course by abler hands. At the same time we feel that we should be wanting in our duty to him as well as to ourselves were we to pass without our tribute of admiration and gratitude the memory of one who for thirty-eight years was, like Achilles, in the front of the conflict, and for a long period held in his strong grasp the fortunes of the fight. Of mere success he was a conspicuous example, and if we were to confine our attention to that alone we could present to the world a dazzling picture of our distinguished friend. But he was far above that; it was his happy lot to teach us moral lessons so elevated in their nature as to carry us to a higher atmosphere. Nature was lavish to him of many gifts, and few indeed brought to the public service that strong will, that iron constitution, that unruffled temper and that charm of manner which stood him in such stead throughout his life. Let us attempt to trace the various steps and the means by which he attained to the position he came to occupy among us. Such a retrospect is not a memorial merely of personal devotion or personal sentiment; it is full of interest and instruction. Indeed there could be no better school for the younger generation than an attentive study of Pandit Sundar Lal's rise to greatness.

The incidents of his early life are soon told. He was born at Agra on the 21st day of May, 1857. He was descended from a family of Nagar Brahmans who had migrated over a century ago from Gujrat, their home of origin, and settled at Agra. He pursued his youthful studies in a school at Agra. Having been admitted into the Muir Central College at Allahabad, he graduated in due course in 1880. With what reputation he left college is not precisely known, but

he was a worthy *alumnus* of that institution. Choosing the law for his profession he prosecuted his studies under Mr. C. H. Hill, a learned lawyer and afterwards a Judge of the High Court of Calcutta. Having passed the Vakilship examination, he entered upon practice in the local subordinate courts, and in 1883 he joined the High Court. His old teacher was in the High Court then and he received the new comer with open arms. He worked early and late with remarkable assiduity and made a permanent impression on Mr. Hill's mind. Pandit Sundar Lal had his early failures and disappointments as usual. Despite all discouragements he steadily pushed forward. His abilities could not be ignored and his industry was untiring. He was in 1896 almost on the topmost rung of the ladder, and, with three other colleagues, was chosen for the honour of being made an Advocate. Of these only the Hon'ble Pandit Motilal Nehru happily continues to be in active life still, and may he live long as a link between us and the past !

Pandit Sundar Lal twice officiated on the High Court Bench and was the first Indian to be appointed the Judicial Commissioner of Oudh. He was also an extremely useful member of the Allahabad University, and after the death of Mr. Conlan he represented it on the local Legislative Council. He afterwards filled with distinction the office of the Vice-Chancellor of the University which he resigned only last year. The Benares Hindu University began of late to engross all his attention, and in order that he might be able the more efficiently to perform the duties pertaining to his office of Vice-Chancellor to that University, he gave up the Vice-Chancellorship of the Allahabad University although he could be ill spared. He had been granted the title of C. I. E., and his honours reached their high-water-mark when a few months back he was given the knighthood in recognition of his many and meritorious services.

Such in brief is the sketch of a life so many-sided and so attractive. Let us enquire now what contributed to his marvellous success. We heard it said sometimes, and the remark is in some respects true, that he owed his success not so much to any surpassing ability as to a rare combination of ordinary qualities. But the remark is merely superficial. Probably his greatest intellectual peculiarity was the equipoise of his powers which gave them an air of complete symmetry and somewhat baffled an estimate of them in detail. He had two qualities, quite ordinary in their nature, namely, industry and simplicity of character. In fact the first sprang from the second. There hardly was another man in his elevated position who was so free from conceit or self-assertion. He was essentially modest in his estimate of himself. The result of this temperament was, to preserve him entirely from that snare of clever men,—the notion that he knew anything by intuition. Whether the matter in hand was great or small, he was never satisfied till he had mastered all its details, and he never imagined that he knew

more about it than other men until he had ascertained that he really did so. This habit of thorough investigation stored a retentive memory with a vast amount of information, and it also gave his mind close and rapid powers of generalisation; he was never led astray because his generalisation always worked on secure materials. Those of us who had worked with him could not fail to be impressed by the rare and remarkable power of sifting which he employed to come to the kernel of a complex case when once he had the materials in his grasp. He could be technical at times, but his was a mind intensely practical and he, as a rule, brushed aside technicalities. This combination of qualities, none of them individually very striking, lay at the foundation of all the success which he achieved. We mention them because they teach us that there is no royal road to greatness.

In his especial line he exhibited all these qualities in the most marked manner. The characteristic of his advocacy may be described in the words of Lord Bryce speaking of Cairns,—namely, that it was “broad, massive, convincing with a robust urgency of logic which seemed to grasp and fix you, so that while he spoke you could fancy no conclusion possible save that toward which he moved.” So firm and sure was his grasp, his confidence so unbounded, and so cheerful his disposition that he was seen on many an occasion to lead a forlorn hope to entire and complete success. As a speaker he will be differently estimated according to the standard or ideal by which he is judged. Fluent he was not, and as fluency counts first in the popular catalogue among the qualities of a speaker, he was not an orator. He was slow and hesitating and his language was not of the choicest to satisfy fastidious ears; in fact, he disdained to profit by the showy graces of rhetoric or eloquence. If, on the other hand, the object of oratory or advocacy be to impress, to convince, to sway the mind and to overpower the tendencies of hostile thought, surely there was none so great as he was. Not a day perhaps passed in court on which he was not seen to perform some feat which astonished his colleague as well as his adversary. As an opponent he was a man to beware of. Like the Knight in Ivanhoe, he accepted of no favours and hit back with strength and good will, and his imperturbable good humour gave him an advantage of which he was fully conscious. He was a generous opponent, and above taking a paltry advantage, even under strong provocation. Essentially a man of few words, he was more alive than any other leader to the truth that eloquence consists as much in what is left unsaid, as in that which is expressed. He always said what he meant to say. He never said what he did not intend. He always used the words he meant to use, and he never spoke without meaning his words to bear fruit. That accounts for the weight which his utterances carried not only in the High Court but also in the Council Chamber. He was never known to

be betrayed into those windy sentences which he would have soon after to regret or to withdraw, and he was therefore listened to with attention and respect whenever he spoke.

No sketch of his career would be complete which omitted to notice his labours in the cause of the Benares Hindu University. The working has just commenced and it is not for us to forecast the future. All we can do at present is to wish it a prosperous career as a seat of liberal education which may challenge comparison with the greatest seats of learning in Europe. But it is a brave spectacle to look back on, to see the skill and courage with which, nearly single-handed, he fought and baffled the most formidable opposition arrayed against it. He might say with Coriolanus, "Alone I did it." By what means was this great result achieved? We say by great powers, exerted with care and caution, and unmarred by impulse, fear, or vacillation. His mind was a store-house of details, and the materials for argument came at his call so that he was never at a loss. Add to these his profound knowledge of men and manners, his insight into the springs of human action and his command of the means to sway men's judgments, and the question is quite answered.

Two other traits of his character we may mention—elements very necessary to a leader of men. Pandit Sundar Lal was never known to be angry. His mind came to a conclusion slowly, deliberately; in fact his passivity was sometimes the despair of his friends who wished to move forward. He thought without excitement, without passion; there was nothing of the impulsive in the gradual evolution of his ideas. He was slow to be convinced. But the conviction once reached, the resolution once formed, there was no looking back, and when the blow fell it did so with a sledge-hammer force under which petty opposition and carping criticism were pulverised into dust.

Such were some of the salient characteristics of the man whom we laid on the pyre on Thursday. We laid him there with pride and sorrow. Much yet remains to be said; but this is not the time for it. The thought that naturally comes to the mind is, how enviable was his lot! Was there anything which had been denied to him or anything wanting which successful ambition could desire? Length of days, full vigour of health, uninterrupted success, unceasing honour, a name endeared to his countrymen and famous everywhere, a distinguished part in all the great events of nearly a quarter of a century, and a life closing at last in the zenith of power not equalled by any private individual in these Provinces, were surely all beyond even the most alluring dreams of any man living. He did not outlive his popularity, his faculties or his enjoyment of life; there was no cloud which darkened the clearness of his sky. And when he sunk to his everlasting rest he did so in the full blaze of his glory, without a blot

on his escutcheon, with scarcely a defeat to chronicle. He is gone to his rest. Peace to his ashes! It is indeed sad to think that we shall never see that pleasant face, never hear that cheery trumpet-voice, no more learn from his graver wisdom, no more meet that old familiar smile. Physically no doubt we have lost him for ever. But how little of what is good and noble is ever lost! He lives and will continue to live in the many recorded proofs of his influence over the affairs of his province, in the example he has afforded us of a well-spent life and in the deep-engraved lines of public gratitude. Famous men, in the immortal words of Pericles, have the whole world for their tomb. They are commemorated not in their country alone; they are a precious possession everywhere and of every man. And surely the death of none has touched the imagination and the heart so widely. We dare not allude to the sacred sorrows of his household; but outside that domestic circle there is also a much wider circle to whom Pandit Sundar Lal's death is an irreparable loss. As we conclude our mournful task the noble words uttered by the bereaved Manoa over Samson dead ring in our ears as the aptest in which to take our leave of him:—

“Nothing is here for tears, nothing to wail,
Or knock the breast, no weakness, no contempt,
Dispraise, or blame,—nothing but well and fair,
And what may quiet us in a death so noble.”

His monument—a more lasting memorial than either bronze or marble,—is in the innermost recesses of the hearts of his countrymen, in their affectionate reverence and homage. He will live there for ever; his country will forget herself when she forgets him. Peace to his ashes.

S. C. C.

REFERENCES IN THE HIGH COURT.

THE HON'BLE MR. JUSTICE SIR GEORGE KNOX,

We meet to-day under the shadow of a great, I might almost say, irreparable loss. In the death of the Hon'ble Sir Sundar Lal, India has lost one of her most prudent citizens, one of her most loyal statesmen ; the Court has lost an eminent lawyer, and, more than an eminent lawyer, a pillar of strength whose word we could always trust and upon whom we would put steadfast reliance. Selfishly I may add that I feel I have lost one of the truest friends. His unfailing devotion to his work and to the welfare of his fellow-citizens, in the Court, in the University, and on every occasion of great public joy and of great public sorrow, will cause him to be remembered for years to come with deep esteem and with unfailing affection. My relations with the late Sir Sundar Lal carry me back to the time when I first knew him as a most beloved student of the late Augustus Harrison, the first principal of Muir Central College. A most beloved student of Professor Harrison's—a student of great promise—he was pointed out to me even then as a man who would make his mark in the world. That promise he wonderfully and amply fulfilled. For years he worked here, and then was rewarded a very small reward, with the title of Rai Bahadur in 1905. In 1909 he went from here for a short time to be the Judicial Commissioner in Oudh. Then we find him granted a C. I. E., in the year 1907 ; and in 1917 he was created a Knight. Throughout this time he was known and got to be known throughout these Provinces as a man of the first grade. He was the Vice-Chancellor of the Allahabad University for 6 years, and a Judge of this Court in 1914 and in 1916. It is with very heart-felt grief that I recall these facts to your mind. What I say is after all a very feeble tribute to the worth of him whose loss we mourn to-day. But our loss is so recent, our sorrow is so great that words fail me to do justice to so conspicuous an example of conduct and character. The Chief Justice regrets his inability to be present to-day, but he wishes me to convey to you all his testimony also to the sterling worth of our late friend. He feels, as I do, that he has lost in him a very true and very faithful friend.

THE HON'BLE PANDIT MOTILAL NEHRU.

My Lords, permit me on behalf of the Vakils' Association to add our humble tribute of respect to the memory of the great departed. Three days ago, my Lords, there was not a healthier and a stronger man amongst us, and it was impossible to suspect that the hand of Death was upon our great leader. He was seized with heart disease on Monday morning, and in spite of all that human love and skill could do to save his valuable life, he passed away in peace on Wednesday night. In the death of Sir Sundar Lal, my Lords, the profession loses one of its brightest jewels and the country, one of

its worthiest sons. His deep erudition, his comprehensive grasp of legal principles, his mastery over case-law, his encyclopædic information, his great powers of advocacy and his monumental industry—all combined to secure for him a position in the profession which has seldom been excelled in any country in the world. In his long career—an honorable career—extending over 38 years, he has left a brilliant record of the ablest and often the most original arguments that were ever advanced at the bar. And in the brief space of time that he adorned the bench of this Honorable Court and of that of the Judicial Commissioner of Oudh, he has left his impress upon case-law, and a clear and lucid exposition of many intricate and doubtful questions of law. My Lords, he was a distinguished lawyer, and I do not think I can be accused of exaggeration when I say that his memory will ever be on a level with the most distinguished lawyers in history. My Lords, this was not all. He was truly a great man with a noble soul, and he carried his greatness in the most unassuming manner. His kind heart, and his genial disposition, won for him the respect and regard of his fellow-men in every walk of life. His unflinching courtesy on the bench, at the bar, in private and public life, endeared him to all. If I may add a personal note, my Lords, I have the honour of being one of his oldest friends and colleagues in the profession and in public work; and during the last 40 years or more I have not seen him once losing his temper or saying an unkind word or doing an unkind act. His, my Lords, was a generous and patriotic nature. In spite of the enormous practice he had built up for himself he could find time to render valuable service to his country. He worked hard and unceasingly in the cause of education, and his labours were rewarded by his repeated appointment as Vice-Chancellor of the Allahabad University and latterly as Vice-Chancellor of the Hindu University of Benares. His munificent donation to the Hindu University and his liberal contributions in time and money to various public and charitable institutions are well known. As your Lordship has just remarked, he had the confidence of the people and the Government alike. He was recently honoured by our King-Emperor by the bestowal of the Knighthood which he received at the hands of the Viceroy only a few days before he was seized with the fatal illness. My Lords, a truly great and distinguished man has passed away, and it will be difficult to fill his place in this Court, in the University, in the Council Chamber, among the circle of his personal friends and, I may respectfully add, in his family circle. My Lords, the world is the poorer to-day than it was yesterday in culture, in learning, in kindness and generosity. Our hearts go out to the bereaved family, to Lady Sundar Lal, to his brothers, Pandit Baldev Ram and Pandit Kanhaiya Lal, in their great sorrow and in their hour of trial. My Lords, I cannot continue, and I conclude by tendering, on behalf of the Vakils' Association, our sincerest sympathies to the family of the deceased.

MR. C. C. DILLON.

My Lords, the members of the Bar Library desire to associate themselves through me with every word that has fallen from your Lordship and from my friend. My Lords, the news of Sir Sundar Lal's death came upon us all as a great shock. As my friend has just observed, it was only a few days ago—3 or 4 days ago—that he was amongst us, apparently as full of work as he had always been; then we heard the news that he had been suddenly taken ill. Then came the news yesterday that he was much better, nearly out of danger; then again this morning came the news of the tragic ending of a most useful and brilliant career. My Lords he was one of India's most distinguished and gifted sons. In my long practice at this bar I have never known his equal. He associated himself throughout his life with the advancement of his country, and particularly devoted himself to the cause of education to which he gave his time, his money and his best efforts. My Lords, in his private life and as a colleague at the bar, he was a man who was always ready to help the junior with advice and assistance; he never said or did an unkind word or act in his life. My Lords, it is therefore with feelings of the deepest sincerity that we tender our heart-felt and most sincere condolences to his family and to the Vakils' Association in their irreparable loss.

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CONFESSIONS.—PART II.

(FOR PART I SEE A. L. J. R., VOL. XII, p 1)

Is confession a basis of conviction?

The first point to be considered in answer to this question is whether "confession" is evidence or not

JACKSON, J., in *Queen v. Chunder Bhattacharji*, laid down that "confession is no evidence still less can it be the foundation of a case against a person implicated. If there is evidence against any such person tending to his conviction the confession should be taken into consideration as bearing upon the truth or sufficiency of such evidence" (24 W. R., p. 42)

BIRDWOOD and CANDY, JJ., observed "that confessions are not technically evidence and they could not therefore alone form the basis of conviction." (I. L. R., 15 Bom., 67.)

BLAIR and HENDERSON, JJ., thus interpret the law, "confessions are not to be treated as evidence. At all events, they have not the force of sworn evidence." (I. L. R., 22 All., 493.)

On the contrary GARTU, C. J., in *Empress v. Asutosh Chackerbutty*, says, "I do not see in what other way it can be taken into consideration than evidence. In proving the case at the trial, it matters little whether a confession precedes other evidence or the other evidence precedes the confession" (I. L. R., 4 Cal., 483)

It is submitted that this point can be best answered with reference to the Act itself. So far as the definition of 'evidence' given in section 3 goes, it certainly does not come in under clause 1 of that section, but I venture to say that though it is not called evidence in the general phraseology of the Act, it is yet treated as evidence under its general purview.

We find "a confession is proved" and "considered" in section 30. "Proved" is defined to be "a fact when after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

How can the court believe its existence so long as it is not a matter before it? The court can consider it only when there is material in the shape of an oral statement or of a document before it and then it cannot be treated otherwise than as evidence. The best evidence of its existence is the statement by the person making it.

Further when the Act says that confession is relevant under sections 27 and 28 it means that evidence may be given of its existence. It is perfectly true that it has the infirmity of not being made on oath, nor is it 'tested,' 'developed' or 'explained' by cross-examination. But we have also to regard the fact that it is the statement of a person who thereby exposes himself to the penalties of law and thus entitled at least to some consideration in deciding the facts of the case.

The controversy as to confession being the basis of a conviction or corroborative of other independent evidence, does not arise, if confession alone be sufficient to sustain any conviction. So it has become necessary to enter first into the second question. The second question can be divided into two heads:—

1. Confessions as regards the person making it, and
2. So far as it affects the co-accused.

Confession so far as it affects the person making it is conclusive if it is voluntary. It is the particular circumstances of a case which determine the voluntary nature of a confession and no hard and fast rule can be laid down about it. A confession made by the accused before a tribunal competent to try him is sufficient, whereon to form a conviction. (Roscoe's Evidence, p. 40).

In an unreported Bombay case, *R. v. Sangrappa*, SCOTT and JARDINE, JJ., thus interpret the law:—

"In India no doubt confessions must be very vigorously scrutinized and corroboration sought, but when they have been properly taken and there is no suspicion of cruelty or improper inducement they are amply sufficient to prove the guilt of the accused and they may be accepted as conclusive in themselves." (I. L. R., 20 All., and 29 All., cited later on, support the aforesaid view).

How far the confession of co-accused affects the other accused is the subject of many decisions. It has been held
 10 Bombay, 233. that it does not sustain a conviction, "because it
 15 Bombay, 66. is not entitled to even as much consideration as
 the testimony of an accomplice examined on
 oath and subject to cross-examination."

STRAIGHT J., says:—"So that, as I understand the rule, there must be some corroboration independent of an accomplice or as in the present case, of the

8 All., p. 312.

accomplice and the co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him."

The court should not be influenced by confessions against co-accused except where they are corroborated by independent evidence."
I. C. VIII, p. 770

"This, at all events, it must mean, that they are not to have the force of sworn evidence. Indeed it has been definitely decided that a conviction resting on such a confession cannot be maintained."
22 All.

SCOTT, J. C. "If there is other evidence, which, if true, would establish the charge the confession of a person being tried jointly of the same offence may be taken into consideration by the court and be used for the purpose of corroborating the other evidence."
4 Oudh Cases, p. 70.

SPANKIE, A. J. C. "An accused person ought not to be convicted where the only evidence against him is the confession of a co-accused and circumstantial evidence which although true, would not support a conviction."
6 Oudh Cases, p. 204.

"A conviction on the confession of an co-accused alone is bad in law."
I. C. X. 583.

On the other hand, it has been held that a properly attested confession of a prisoner before a Magistrate is sufficient for his conviction without corroborative evidence and notwithstanding its denial before the Sessions Judge and that a conviction based on the unsupported evidence afforded by the confessions of a co-accused would not be unlawful. 6 W. R., 83 Cr.; 12 W. R., 49; 25 W. R., 25; 20 All., 135; 29 All., p. 434; 4 A. L. J. R., p. 310.

In *Queen-Empress v. Maiku Lall* and another *EDGE, C. J.* and *BURKITT, J.* have held: It appears to us that every case of this kind must be decided upon its own circumstances, and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge in our opinion is bound to act, so far as that prisoner is concerned, on that confession, which he believes to be true."
20 All., 135.

In *Emperor v. Kehri*, *KNOX, J.*, observed:—"By making the confession, especially where it is made under the protection of a court, the person who makes the confession has exposed himself to the pains and penalties

prescribed for the offence, and we have this guarantee, *quantum valeat* for the truth of the statement. It may be a weak guarantee, but it is some guarantee, and I cannot agree that the retraction of the confession, especially if that retraction bears on the fact of it *indicia* of being false, can still further weaken the value which attaches to it when it has once been made."

As to the confession of one accused affecting his co-accused subsequently withdrawn his Lordship says:—"Does the law anywhere forbid a court in this country from considering it? It appears to me that this is a limitation which does not exist in and would have to be introduced into the words used in section 30 and to do so would not be to follow the law as it stands, but to legislate."

The question whether the confession is the basis of a conviction or corroborative of other independent evidence, presents itself when independent evidence exists.

A fortiori, when other evidence contradicts the confession, there is not the least doubt that "the confessions of some of the accused persons must be regarded as tainted, because from the position occupied by the persons making them, they are not entitled to the same weight as evidence of an independent witness."

It is one thing to take confessions into consideration as a material in a case and a different thing altogether to raise them to the level of sworn testimony so as to form the basis of a conviction. The circumstances of each case differ no doubt, but generally received tests cannot be varied on account of circumstances. Wherever there is a conflict between the confession and the testimony of an independent witness, confession cannot prevail, by force of circumstances. Otherwise, confession will in some cases rank higher than evidence on oath which has the advantage of being tested by cross-examination. This is not what the word "considered" in section 30 imports in contrast with "proved." Further section 133 has in express words allowed conviction only on the testimony of an accomplice. But it has not done so in the case of a confession of a co-accused. This also lends support to the conclusion that the Legislature ranked the testimony of an accomplice higher than the confessions of a co-accused. "The corroborative evidence of confessions must be more cogent and should be more strictly examined by the court than when an accomplice gives evidence as a witness, for a confession cannot be treated as of the same value as the evidence of an accomplice." 19 W. R., 25; 23 W. R., 24; 1 All., 665, 666; 14 Ind. Jur. N. S., 20; 26 Cal., p. 49; 28 Cal., p. 689.

A fortiori independent evidence is valued much higher than confessions and can never be superseded by confessions. Hence

the irresistible conclusion is that confessions can serve merely as corroboration of other independent evidence.

4 Oudh Cases, page 70, cited above entertains the same opinion :—
 “Such confessions do not stand on a better footing than the sworn testimony of an accomplice and cannot be treated as good evidence against the accused without being corroborated *alimide* by independent evidence in material particulars and specially in respect of the identity of the accused” I. C. VI, 492. The true effect of section 30 is that the court can only treat a confession as lending assurance to other evidence against a co-accused” I. C. X, 583.

Mr. Justice AMEER ALI has solved the difficulty by taking a short cut as shown in the following remark :—

“The matter, however, is of no practical importance, as whether they be treated either as the basis of a case, or only corroborative of other independent evidence, the issue of guilt will (if the confession be sufficiently corroborated) be determined upon the consideration of the whole evidence, including therein the confessions and other independent evidence ; both of these are elements in the case which, when combined offer the materials for the court’s decision, whichever of the two be regarded as the prior element or basis.”

7 Cal., 68, 10 C. W.
 N., 16 (1905).
 21 W. R., 25 & 58.
 10 Cal., 970, 11
 Bom. H. C. R., 196.
 1 Bom., 475, 8 All.,
 306.

What is the corroboration of confession in the eye of law? is the question we have to deal with now. One confession ordinarily does not strengthen another nor can the testimony of accomplices be corroboration of confessions.

“His statement whether made at the trial or before the trial and in whatever shape it comes before the court is still only the statement of an accomplice, and does not at all improve by repetition.”

11 Bom. H. C. R.,
 198.

“There must be some corroboration independent of accomplice or of the accomplice and the confessing prisoner to show that the party accused was actually engaged directly in the commission of the crime charged against him.”

8 All., 312, 13 Oudh
 Cases, 244.
 1 A. L. J. R., 110.

The approvers’ evidence supported only by a retracted confession does not constitute corroboration of a high value. The next point is what is corroboration in material particulars of a confession? The rulings on this point are not uniform. Corroborations of certain portions of the statement of the co-accused is held no corroboration unless they show the connection of each prisoner with the commission of the offence

1. C., Vol XVIII,
 p. 672.
 I. L. R., 8 All., 310.
 10 Cal., 973, 1 Bom.,
 475, 29 Cal., 782, 6 M.
 L. J., 93, 21 W. R., 69.

with which he is charged. In other words corroboration must extend to the identity of the accused persons.

10 C. W. N., 669,
12 C. W. N., 140,
27 Cal., 925, 28 Cal.,
343.
13 Mad., 426, 26
Bom., 196, 9 All., 528,
14 I. C., p. 849

The other view is that it depends upon the circumstances of each particular case to determine how far the facts deposed to by the prisoner alleged to be an accomplice, are borne out by those circumstances.

Where the circumstantial evidence constituted a very strong *prima facie* case against the accused, it was held sufficiently corroborative.

The last view at the outset is open to the objection that it prescribes a varying standard for each case which will be a source of innumerable difficulties to the Mofussil Court.

Secondly, that corroboration of some parts of the statement is corroboration of the whole statement, particularly when the statement by its very nature is open to suspicion, cannot be justified either on the ground of prudence or that of logic.

Thirdly, it can never be a good test as the real culprit can always tell details of crime as well as particulars about time and place which are true, but without the least semblance of truth as to the most important part which connects the prisoner with the crime. There he has ample scope to screen a guilty friend or to incriminate an innocent enemy. When he finds as to himself that his fate is sealed but there is a chance for wreaking vengeance upon his old enemy with impunity, he will generally be inclined to avail himself of it.

The *dictum* of LORD ABINGER cited by many eminent writers is to the effect :—

“A man who has been guilty of crime himself will always be able to relate the facts of the case, and if the confirmation be only of the truth of that history, without identifying the persons, that is really no corroboration. The danger is that when a man is fixed, and knows that his guilt is detected, he purchases impunity by falsely accusing others.”

RETRACTED CONFESSIONS.

This leads us to consider the question whether retracted confessions should not as a matter of law be acted upon without corroborative evidence ?

The first ruling that we come across upon the subject is in I. L. R., 10 Mad., 295, where KERNAN, J., observes :—“It is necessary according to the rulings of this court, to examine the evidence and see if

there is reliable independent evidence to corroborate to a material extent and in material particulars, the statements contained in the withdrawn confessional statements. If no such corroborative evidence exists, then the contradictory statements of the prisoner remain, and doubt exists as to which statement is true, and the confessional statements cannot be safely relied on against the prisoner."

This ruling was followed in I. L. R., 12 Mad., 123 and I. L. R., 18 All., 78. But the Bombay High Court took a different view in I. L. R., 19 Bom., 728 and held that a retracted confession, if proved to be voluntarily made, could be acted upon along with the other evidence and that there was no rule of law that a retracted confession must be supported by independent reliable evidence corroborating it in material particulars and that the use to be made of such a confession was a matter of prudence rather than of law. The Bombay High Court upheld the view in I. L. R., 23 Bom., 316

The Madras High Court modified its view in I. L. R., 21 Mad., 83 and practically agreed with the view enunciated in I. L. R., 19 Bom., COLLINS, C. J. and SHEPHARD, J., held that it could not be laid down as an absolute rule of law, that a confession made and subsequently retracted by a prisoner could not be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession must, it is clear, depend upon the circumstances under which the confession was originally made and the circumstances under which it was retracted including the reasons given by the prisoner for his retraction.

Subsequently in 3 Bom. L. R., 441, it was held "where a confession is retracted, it is the duty of the court that is called to act upon it, specially in the case of murder, to enquire into all surrounding circumstances and satisfy itself fully that the confession cannot but be true."

In I. L. R., 20 All., 133, EDGE, C. J. and BURKITT, J., observed "it appears to us that every case of this kind must be decided upon its own circumstances, and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge, in our opinion, is bound to act, so far as that prisoner is concerned on that confession, which he believes to be true."

The Madras and the Allahabad High Courts, as shown above, ultimately modified their views in respect of necessity of corroboration of retracted confession by reliable independent evidence, but the Calcutta High Court still upholds the rule of law enunciated in 10 Madras (*Supra*). BANNERJEE, and SALE, JJ., in I. L. R., 22 Cal., 164, observe "a confession so made and retracted must always be open to suspicion; and I would repeat what I had occasion to observe

more than once that I feel considerable force in what CAVE, J., says in the case of *Queen v. Thompson*, L. R., 1893, 2 Q. B., 12, where he remarks: 'I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse and which nevertheless are repudiated by the prisoner at the trial.' " (p. 172).

PRINSEP and HILL, J J., observed "it has been frequently held by this court that it is not safe to rely upon a statement, so made, unless it is corroborated by some evidence so as to show that it is true." (I. L. R., 27 Cal., 295.)

PRINSEP and STEPHEN, J J., did not act upon a retracted statement observing "though there is no evidence to show that it was extorted and we have the Magistrate's statement that it was voluntarily made, the character of the statement does not impress us to make us believe that it was freely made."

To sum up. Some of the rulings cited above lay down that the voluntary nature of the confession should be established by independent evidence before it can be acted upon.

There are others which require proof of the truth of a retracted confession by independent reliable evidence as a condition precedent.

The third theory is to the effect that any absolute rule of law on this point is impossible and it is rather a matter of prudence than of law. In consonance with that theory it is thought that each case is to be judged by its own peculiar circumstances and not by the weight attached to it in other cases. The necessity of supplementary evidence is not maintained on the aforesaid grounds.

It is submitted that retraction of confession is, as was said by JUSTICE STRAIGHT, "an endless source of anxiety and difficulty to those who have to see that justice is properly administered." The question arises how can the anxiety be best removed?

Does it tend to the solution of the difficulty to dispense with corroborative evidence in consideration of a retracted confession? With due deference to the propounders of that theory, I would say that it is the other way. The first difficulty in this case we have to surmount, is that we have two contradictory statements made by the same person without any other material whatever to guide us in accepting one or rejecting the other. Secondly the advantage of finding out truth by supplementary evidence which can be tested by cross-examination and otherwise in various details, is lost.

The result would be that one will be compelled to build his judgment upon guess or surmise which however skilful, can never take the place of sworn testimony. We have to face the double difficulty here as to its admissibility as well as to its weight. As soon as the confession is retracted the *prima facie* evidence of its voluntariness is gone; and the prosecution should prove its voluntariness before it can go on record and hence the necessity. As to its weight, when

of supplementary evidence we have two contradictory statements of the same person, to give preference to one over the other would be almost impossible, and particularly when we have no means of discovering the motives which prompted them. Under the circumstances the rule requiring corroborative evidence of the truth of a confession seems to be best calculated to meet the ends of justice. MR JUSTICE AMERU ALI in his learned treatise in conformity with a number of rulings observes as follows:—"A retracted confession is almost always open to suspicion and the courts will therefore generally require corroborative evidence of its truth. This procedure will in effect practically achieve the same results as a rule requiring proof of the voluntary character of a retracted confession, inasmuch as though these decisions require evidence of the truth of the confession and not of its voluntary character, the truth of voluntariness may not unreasonably, though not necessarily, be inferred when the truth of the confession is established." (Law of Evidence applicable to British India, 6th Ed., p. 255).

BISHAMBHAR NATH BHAN,
Vakil, High Court.

CASES AND COMMENTS.

Transfer of shares—Restrictions on transfer—Approval of directors—Refusal of one director to attend Director's Meeting to prevent quorum.

In re Copal Varnish Company, Limited, [1917] 2 Ch., 349.

The Articles of Association of a private company provided that no share should be transferred to any person not already a member without the consent of the directors. There were two directors only, E and P. E being the Chairman and having in that character a casting vote. E, without first having obtained the consent of the Board, executed transfers of some of his shares to two persons not already members of the Company and sent the transfers to the Company for registration. P purposely refused to attend Board meetings summoned to consider the transfers in order to prevent a *Quorum* being formed. On an application by the transferees for rectification of the register of the Company, held, by EVE, J., that the articles did not require the director's consent to be obtained before the execution of the transfers, and that the transfers therefore were not inoperative documents, though they had no legal effect till the consent of the directors had been obtained and registration effected. "A share-holder, whether in a public or a private Company, has a property in his shares, a property which he is at liberty to dispose of, subject only to any express restriction which may be found in the Articles of Association of the Company." *In re Bede Steam Shipping Co, [1917] 1 Ch., 132.* "The operation of legally transferring a share is indeed one of some complexity. In the first place there is the contract of sale followed by the

execution of an instrument of transfer containing an agreement by the purchaser to accept the shares subject to the several conditions on which the vendor held the same immediately prior to the execution of the transfer—that it is say, subject, amongst other things, to the conditions, imposing restrictions on the vendor's right to transfer to that particular purchaser. Up to this point all that has been done is to pass an equitable interest in the shares to the transferee. There has been no legal assignment completed; indeed the most crucial point in the transaction has not been reached—the acceptance of the transfer by the Board of directors and the passing of it for registration; and even then the matter is not completed, because until the actual entry of the name of the transferee on the register, the transferror remains the legal holder of the share.” [Per EVE, J., at 354]. As to the rights *inter se* of the transferror and the transferee, see *Bahadur Singh v. Shiam Sundar Tug*, [1914] 12 A. L. J. R., 629. EVE, J., further held that P could not by wilfully refusing to attend Board meetings prevent the transfers from being registered, and that the transferees under the circumstances were entitled to an order directing the Company to register the transfers.

Husband and wife—Agreement that all wearing apparel worn by wife shall be husband's property—Whether valid.

Rondeau Legraud & Co. v. Marks, [1917] 2 K. B., 636.

This case raised the interesting question as to the rights and interest of a wife in the wearing apparel provided for her by her husband. A husband is bound to provide wearing apparel for his wife but he is not bound to make her a gift of it. He can make the provision either by giving it to her in accordance with the common practice or by lending it to her. Therefore an agreement between the husband and wife that all articles of wearing apparel used or worn by the wife are to be purchased by the husband in his own name and on his credit and are to be his absolute property his wife having no right or title to them, except to wear them during his pleasure, is valid and enforceable as against judgment-creditors of the wife. “In normal cases the husband makes the provision by gift, and in the absence of evidence to the contrary the presumption in law is that the husband has given the apparel to the wife and that it therefore belongs to her. But there is no reason why the husband and wife should not enter into an agreement that the husband should not give, but merely lend, the wearing apparel to the wife.” There is no reason why this rule should not apply equally to Hindus and Moham-medans.

Contract—To be “void” in a certain event—Whether void or voidable.

In re New Zealand Shipping Company and Societe Des Atebirs at Chantiers De France, [1917] 2 K. B., 717.

Where a contract contains a provision that it shall become void in a certain event on the happening of that event the contract becomes void; but unless it clearly provides to the contrary, the

contract is subject to a condition or proviso that a party shall not take advantage of his own wrong and therefore a party whose wrongful act or default has brought about the avoidance of the contract cannot allege its invalidity.

Master and servant—Common employment—Mere volunteer—Volunteer with interest—Liability of master for negligence of servant.

Hayward v. Drury Lane Theatre and Moss Empires, [1917] 2 K. B., 899.

The defendants Moss Empires had under agreement the use of Drury Lane Theatre for the production of a revue. The plaintiff, a principal dancer, attended rehearsals of the revue; she was under no contract with the defendants to attend them and was not paid for her attendances but attended in the hope and expectation of obtaining an employment for the run of the revue when it was ready for production. At one of the rehearsals the plaintiff fell down a stair case which had been unskillfully constructed by the servants of the defendants, and was in the nature of a trap, i. e., a danger which a person who does not know the premises could not avoid by reasonable care and skill. On a suit for damages the defendants pleaded that the plaintiff was a volunteer and having regard to the doctrine of common employment was not entitled to any damages. On the facts the court held that the plaintiff was not a servant nor could she be regarded as a mere volunteer who could not be in a better position to recover damages from the defendants than their own servants, but was a volunteer in a service in which she had a common interest with the defendants and therefore had a right to sue for damages. The application of the doctrine of common employment to volunteers is now well settled and may either be justified on the existence of an implied contractual undertaking or more correctly on the ground "that the volunteer is as regards the master a trespasser and cannot claim a higher protection than that the master himself shall not wilfully or carelessly injure him but the master is not liable for negligent acts of his servants as their duties to the master do not include taking care of trespassers." The plaintiff in the case under notice was not a *mere* volunteer but was on the premises on the business of the owner and with a common interest with them and was entitled to the rights of an invitee without payment, as stated in *Indermaur v. Dames*, which are that the owner of premises must use reasonable care to protect him either by warning or precaution against traps whether existing or new dangers which such invitee, if ignorant of the premises, could not avoid by reasonable care and prudence." The judgment of SCRUTTON, L. J. is specially instructive and will amply repay perusal

Contract—Agent selling his own goods to principal—Rescission—Fall in value of thing sold.

Armstrong v. Jackson, [1917] 2 K. B., 822.

The defendant a broker was instructed by the plaintiff to buy shares for him. The defendant never did so but instead sold his

own shares to the plaintiff. This fact was not disclosed to the plaintiff nor was his assent obtained to the changed position of the broker. The plaintiff took up the shares and paid for them. Six years later when the price of the shares had considerably fallen the plaintiff discovered this misconduct of the broker and sued for rescission of the sale and refund of the price paid with interest. McCARDIE, J. allowed the claim. Two answers were made to it. First it was said that the contract between the parties having been executed no rescission could be had unless fraud was proved against the defendant, and secondly it was said that the court would not grant rescission unless there could be a *restitutio in integrum*, and the parties put in *statu-quo*. Here the plaintiff would not be restoring to the defendant what he got from him six years ago. McCARDIE, J. overruled both these pleas. As to the first while "it is undoubted law that where a vendor has procured the sale of his property by misrepresentation the purchaser can set aside the contract of purchase prior to completion, even though misrepresentation be innocent, but if the contract has been executed by the completion of a conveyance or a lease, or the formal assignment of a chattel, then rescission cannot be obtained on the ground of innocent misrepresentation by the vendor or lessor," but where fiduciary relationship as in the case of a principal and an agent subsists the rule is infinitely stricter and more severe and specially onerous duties are cast upon the agent. Further it is clear that an agent who secretly sells his own property to a principal is guilty of dishonesty and gross fraud. Cf. the provisions of sections 215 and 216 of the Indian Contract Act and *Damodar Das v. Sheoram Das*, [1907] 4 A. L. J. R., 587. Again the doctrine of *restitutio in integrum* would only bar the granting of the necessary relief to the plaintiff where it was shown that, knowing all the facts and his right to rescind, he had been guilty of laches and delay whereby the position of the defendant is substantially altered and prejudiced. But where the plaintiff has been prompt in seeking relief, mere deterioration of the subject matter does not destroy the right to rescind or indeed prevent *restitutio in integrum*. The defendant gets back precisely the same thing which he had sold, and the vendee is in no way responsible for the fall in the price.

Criminal law—Mens rea—Liability of master for act of servant.

Mousell Brothers v. London and North Western Railway,
[1917] 2 K. B., 836.

By the general principles of the criminal law if a matter is made a criminal offence, it is essential that there should be something in the nature of *mens rea*. *Prima facie*, therefore, a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon the

principal, even though he does not know of, and is not a party to the forbidden act done by his servant. Such is the case with *quasi-criminal* offences. To find out whether the master is to be held criminally liable, irrespective of *mens rea*, one must have regard where the language of the statute is open to doubt, to the avowed purpose of the Act, and consider whether a particular construction will render the Act effective or non-effective for that purpose. "*Prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down the person upon whom it is imposed, the person by whom, it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed." (*Per ATKIN, J.*). So, in the case under notice, the owners of goods, a limited company were held guilty and liable to penalties, under a Railways Act, of giving a false account with intent to avoid payment of tolls, though the false account was in fact given by their manager without the knowledge or instructions of the Directors. Cf. *Queen-Empress v. Tyabali*, [1900] 24 Bom., 423; *Empress v. Babu Lal*, [1912] 34 All., 319. The test of liability, laid down in *Beharilal v. K. E.*, [1911] 8 A. L. J. R., 1324, S. C., 34 All., 146, is, it is submitted, unsound.

*Trees planted in highway and protected by spiked guards—
Personal injury—Liability of urban authority.*

Morrison v. Sheffield Corporation, [1917] 2 K. B., 866.

This was an action for damages for negligence. The defendants, an urban authority, planted trees in certain of their highways, and surrounded each tree with an iron guard consisting of upright posts terminating at the top in spikes, the tops being bent downward to prevent boys from climbing up; the guards were a little over 5 feet high from the ground and the particular guard in question in the present case inclined about 3 inches out of the perpendicular in the direction in which the plaintiff approached it. Owing to the exigencies of the war all the street lights were ordered to be extinguished after 9 p. m. The plaintiff while walking on the road on a dark night after 9 p. m., walked into the guard of one of the trees and sustained serious injuries in his eye, and consequently brought this action for damages. The jury found that the guard was dangerous in the circumstances of the darkness that existed, and that the defendants had not taken reasonable measures to neutralize the danger and gave a verdict for the plaintiff. On appeal, held by the Court of Appeal, that there was a continuing duty on the defendants to take reasonable measures

to prevent the guard from being a danger to the public lawfully using the road and that the plaintiff was entitled to maintain his action. The public are entitled to a reasonably safe user of the highway, and the defendants were bound to keep the trees in such a condition as not to be dangerous to the public using the highway. "The obligation on the defendants continues as long as the trees and guards are maintained in the public highway. There is no duty to keep them absolutely safe, but it is their duty to use reasonable care, and they are not entitled to let the trees and guards remain in a condition which renders them dangerous to the public who are using the highway." (*Per* READING, C. J.).

Will read over to competent testator—Presumption of knowledge and approval.

Gregson v. Taylor, [1917] P., 216.

Assuming that since the case of *Fulton v. Andrew*, [1875] L. R., 7 H. L., 448, "it is no longer a binding rule, in cases where there is no fraud or suspicion of fraud, that a capable testator who reads, or has read to him, a testamentary paper which he thereafter executes must be taken to know and approve all its contents, yet these circumstances afford a very grave and strong presumption that he knew and approved all the contents, a presumption which can be rebutted only by the clearest evidence. The presumption is that the words which have been read over to and then signed by a capable testator as his will do represent his will, his whole will and nothing but his will. And if it is said that they represent his will and something more, then before that something more can be rejected as not being his will it must be established beyond all doubt that it is not his will." (*Per* HILL, J.). *Cf. Woomes Chander Biswas v. Rashmohini Dassi*, [1893] 21 Cal., 279.

NOTES AND CUTTINGS.

We reproduce below the following extracts from the judgment of WALSH, J., delivered on the 27th February last, in the case of *Saidan v. Shamsheer Khan*, (F. A. No. 85 of 1916), as deserving of attentive perusal by Judges in the courts below and also by those who are responsible for the satisfactory conduct of cases there. The facts were these:—

One Musammat Saidan was the widow of a wealthy Mohammedan named Mahomed Umar Khan. Under the Mohammedan Law her share in the estate left by her husband would be one-fourth if there were other heirs of her husband. The plaintiff, Shamsheer Khan, asserted that he was such heir, and he set up a pedigree which showed his relationship to Mahomed Umar Khan. The suit was to recover possession of the balance of the estate. The lady who was in possession contested the claim, alleging that the pedigree was wrong and that she was in possession of the estate in lieu

of her dower which, according to her, was Rs. 10,000. The plaintiff in replication said that the dower due to her was Rs. 500 which had already been satisfied. The court below decreed the suit for the share claimed, and also held that the dower was Rs. 500 which had been satisfied out of the usufruct of the estate leaving a balance of Rs. 274 in the widow's favour. The appeal was the outcome of this decree, and the plaintiff also filed cross-objections. The High Court dismissed the appeal and allowed the cross-objections. We do not report the case as the decision turns on the discussion of the evidence. The observations of WALSH, J., are important. Said the learned Judge:—

I agree. The only doubt I have felt is as to whether we ought not to order a new trial on the ground that the trial has been unsatisfactory. My reason for commenting upon some of the incidents of the trial to which my brother has referred is the fear that if such incidents are passed over in silence by a Court of Appeal, they may be regarded as precedents or at any rate sufficient care may not be taken to avoid them on future occasions.

One unsatisfactory feature is what took place on the examination of Musammat Siddiqan. Evidence once taken whether on commission or otherwise cannot be struck out of the case without the consent of both parties and the express order of the court. Once taken in any shape or form it is taken *de bene esse* and must be made part of the record. Even though a deposition is unsigned, if the witness has given material evidence upon a material issue it cannot be treated as unrecorded, "*littera scripta manet*," and Order 18, rule 5 of the Code of Civil Procedure indicates that the provisions of reading over in the presence of the Judge and the witness and of the signature to the deposition are only applicable when the evidence of the witness is completed, which the evidence of Musammat Siddiqan never was, and Trial Judges would do well, when confronted with a contingency out of the ordinary like this, carefully to consult the Code and regulate their orders accordingly. One thing is quite clear. The party who is responsible for the imperfect form in which the evidence of a witness is recorded cannot be heard to object to its being used against him, and any court is entitled to draw inferences against the statement of a witness which it does not in fact see when the witness has been withdrawn as this witness was withdrawn. In spite of the able arguments of Dr. Sulaiman upon the materials on the record, I think this incident by itself might be treated as fatal to his appeal.

The next feature is this. I agree that there are gaps in the plaintiff's case to which my brother has already referred. I would urge in particular upon those who represent parties in the trial court and upon the Trial Judges themselves the importance of calling or insisting upon hearing the evidence of the parties most concerned, in this case the plaintiff, at the earliest possible

moment. It is not merely a question of the direct evidence which a plaintiff in such a case as this can give. In a pedigree case much of the evidence is necessarily hearsay, although from that point of view the person most concerned may be expected to be able to contribute something, but whether he can or cannot, his absence to my mind casts suspicion upon the *bona fides* of his claim. He can at least inform the court where and with whom he has been living and what his previous history has been, and thereby open up obvious and necessary enquiries as to his real connection with the family to which he claims to belong. In this case paragraph 12 of the defence rightly or wrongly, and if wrongly, there was the more reason why the plaintiff should be called, alleged that some person behind the scene had put forward the plaintiff and caused this false suit to be filed with the plaintiff's help. In addition to those serious allegations the evidence also disclosed that as lately as January, 1915, the Judge of the Small Cause Court had deliberately decided that a plaintiff gratuitously and apparently collusively with this plaintiff had made him a co-defendant in a suit with which he had nothing to do in order to create, if it could be done, some sort of evidence in support of this plaintiff's contention. These circumstances connected as they are in my mind with the absence of the plaintiff from the box are not necessarily fatal to the plaintiff's case, but they undoubtedly leave the decision of this case to rest upon imperfect inferences and information—A matter which no Judge who is a party to the decision can regard satisfactory from his own point of view."

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THE LAW AND PRATICE OF MOFUSSIL SMALL CAUSE COURTS, BEING AN EXHAUSTIVE AND CRITICAL COMMENTARY ON THE PROVINCIAL SMALL CAUSE COURTS ACT, 1887. By K. J. Rustomji, Bar-at-Law, author of the Law of Limitation." Butterworth and Co., Calcutta, 1917. Price Rs. 4-8.

This is an annotated edition of the Small Cause Courts Act prepared and arranged after the manner, which has proved so satisfactory and useful, of the author's well-known commentary on the Limitation Act. Notes are lucid, concise and very much to the point and we imagine that every case on the Act has been noticed. But the Small Cause Courts Act is a well-worn topic with compilers of law books and it is difficult to add anything new or original to the information which is easily available in existing books on the subject. One could have wished that an author of Mr. Rustomji's talents would bestow his labours on subjects more fruitful and more worthy of his undoubted learning and skill as a text-book writer. The get-up is excellent, but the book with its 114 pages is, we must say, highly priced at Rs. 4-8.

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**CO-SHARER PRE-EMPTOR'S RIGHT AGAINST
CO-SHARER. VENDEE.**

There is a general impression prevailing among the lawyers that when a property is sold to a co-sharer, another co-sharer of the same degree has no right of pre-emption against such a vendee, not in respect of even so much to which he would be entitled to pre-empt in case the property were sold to a stranger and both the pre-emptor and the vendee had jointly laid a claim to pre-emption. Very many cases of pre-emption are not fought out simply because the lawyers who are consulted by the litigants in such, as in other, cases tell them that there is no right of pre-emption against a co-sharer. They have somehow or other imbibed the idea that pre-emption is a clog on transfer and that it is allowed in even Mohammedan Law to exclude only strangers who might turn out to be unwelcome neighbours. They are so much prejudiced by the obvious justice of the proposition that they do not care to see if the strict law is otherwise. Moreover the prominence given by MULLA to this view and the opinion of AMEER ALI, whose books are generally read by lawyers as students, have helped greatly to confirm them in their inaccurate opinion. To see how widely the misconception on this point of law prevailed, I purposely took the opinion of ten lawyers of whom only one seemed to hold a contrary opinion who, however, relinquished his view as soon as he consulted AMEER ALI's book on Mohammedan Law. As I think it is a question of some importance, I shall trace its history from the very beginning and show how it gradually developed under different High Courts and with what results.

The question naturally divides itself into two parts as the co-sharer vendee associates himself or not with a stranger. Let us take the last case first.

The earliest case on the subject is reported in 6 Weekly Reporter page 250 (*Babu Moheshee Lal v. Mr. G. Christian*) in which it was held by BAYLEY and PUNDIT, JJ., that no right of pre-emption

as against a co-parcener could exist. The right could, under Mohammedan Law only be against strangers or third parties, not co-parceners. The next case in point of time is 7 W. R., 150 (*Roshun Mahomed v. Mahomed Kuleem*). In that case the plaintiff in the suit, the vendor and the vendee were admittedly co-sharers in the property sold, which was a joint undivided estate, and a decree was given to the pre-emptor for half the property. It was however tacitly assumed that a co-sharer pre-emptor could sue a co-sharer vendee, and the point whether the plaintiff there could or could not sue the vendor in the case was neither taken nor decided. The question arose again in 7 W. R., 260 (*Teeka Dharee Singh v. Mohun Singh*). In that case the special appellant pleaded that both the lower courts erred in rejecting his claim of pre-emption on the ground that the vendee was not a stranger, but one who also had a right of pre-emption if anybody else had purchased. The Judges (BAYLEY and PUNDIT SHUMBHOO NATH) however relied on the fact that both the lower courts were presided over by two Mohammedan Moulvies, and the special appellant's pleader, also a Moulvie could not quote any text of law in support of his claim, and held that the Mohammedan Law of pre-emption was never intended to apply to a case in which the purchaser was not a stranger, but one who was already either a share-holder or a neighbour. The Full Bench case which settled the law in Bengal is reported in 4 Cal., 831 (*Lalla Nowbut Lall v. Lala Jewan Lall*). Of the two objections taken by the pre-emptor before the lower appellate court, one was that admitting the vendee to be a co-sharer, the plaintiff was entitled to a partial decree on the basis of 7 W. R., 150. MITTER, J., finding this ruling in conflict with 6 W. R., 250, referred the matter to a Full Bench composed of SIR RICHARD GARTH, C. J., and JACKSON, MARKBY, ANISHI and MITTER, JJ. The appellant's pleader quoted Hedaya, Vol. III, Bk. 38, Ch. I:—"When there is a plurality of persons entitled to the privilege of *shaffa* the right of all is equal, and regard is paid to the extent of their several properties; and again—"If some of the partners happen to be absent, the whole of the *shaffa* is to be decreed equally among those who are present...If, however, the *Kazee* should have decreed the whole of the *shaffa* to one who is present, and an absentee afterwards appear and claim his right, the *Kazee* must decree him the half; and so, likewise if a third appear, he must decree him one-third of the shares respectively held by the other two, in order that thus an equality may be established among them." Moreover, he referred to 6 W. R., 250 and 7 W. R., 260, and pointed out the conflict of the latter with 7 W. R., 150. It was held that there was no rule of Mohammedan Law giving one co-parcener any right of pre-emption where another co-parcener was the purchaser. The judgment was delivered by GARTH, C. J., who made the following observations.—"We are of opinion that by the Mohammedan Law one co-parcener has no right of pre-emption as against

another co-parcener. There appears to be no reason either upon principle or authority, why the right of *shaffa* should exist as between co-parceners; and the rule as laid down in Hamilton's Hedaya, Vol. III, Bk. 38, Ch. 1, appears to have been misunderstood in this respect. That rule merely prescribes that any one partner (or co-parcener) of a property has a right of *shaffa* as against a stranger, who purchases a share from his co-partner, and does not mean that the right exists as between co-partners, who may purchase shares from one another. The object of the rule, as explained in that Chapter, and in Chapter 3 is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious that no such annoyance can result from a sale by one co-parcener to another. The only result of such a sale would be to give the purchaser a larger share in the joint property than he had before and perhaps larger than other co-parceners have." No other authorities were cited in the judgment.

In MR. JUSTICE AMEER ALI'S Work on Mohammedan Law it is stated on p. 590 of Vol. I, that "when one co-sharer conveys his share to another co-sharer, no other co-sharer, if any, can have a right of pre-emption, the rights of all being equal, and the reason on which the right is founded, therefore, being absent. In other words no right of pre-emption arises in favour of a co-parcener when the purchaser himself is a co-sharer of the vendor and the claimant." The learned author evidently based his opinion on the above-mentioned rulings.

Let us next turn to the Allahabad rulings. In 4 All, 252 (*Manna Singh v. Ramadhin Singh*) though the question was not directly at issue, yet it seems to have been assumed that a co-sharer pre-emptor had no right against a co-sharer vendee. In that case a co-sharer of an estate sold his share to B, who was also a co-sharer in such estate, and to two other persons, who were not co-sharers, but "strangers," selling it to all of them jointly and collectively, for one integral sum as the consideration of the whole. The deed of sale specified that each of the purchasers took a one-third share of the property sold. The co-sharers of the estate were entitled, on the sale by a co-sharer of his share, to the rights of pre-emption. It was held that such specification could not alter the joint nature of the sale transaction or permit of its being broken up and treated as involving three separate contracts, so as to entitle R, as a co-sharer having an equal right of pre-emption, to resist so far as one-third of the property was concerned, a claim by another co-sharer to enforce a right of pre-emption in respect of such sale, but R, must be regarded as a "stranger" in respect of the whole of the property sold by reason of his having associated himself with "strangers." It was followed by 8 All, 462 (*Sheobaros Rai v. Jiach Rai*) in which it was held that inasmuch as the deed of sale contained an

exact specification of the shares purchased by the co-sharers vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers. The same rule was followed in 19 All., 148 (*Ram Nath v. Badri Narayan*).

The most important case on the subject which settled the law in these provinces is that of *Amir Hasan v. Rahim Bakhs*, reported at p. 466 of I. L. R., 19 All. The appellant's case was very ably argued by Mr. Karamat Husain before BANERJEE and AIKMAN, JJ. He quoted very many original authorities before them and got them to dissent from the Calcutta High Court and to overrule its own ruling mentioned above i. e., 4 All., 252. This was a suit for possession of a house by right of pre-emption according to the Mohammedan Law. The claim was based upon the allegation that the house sold was situated in the same lane as the plaintiff's house, the lane being in the joint user of the same plaintiff and vendors. The vendees defendants resisted the claim principally on the ground that they also had a house in the same common lane; that they thereby were possessed of equal rights of pre-emption with the plaintiff and that as the sale had been completed in their favour the plaintiffs' case could not succeed against them.

The court of first instance dismissed the suit and the first appellate court dismissed the appeal. It was contended on behalf of the plaintiff that the Mohammedan Law did not require that the claimant for pre-emption should have a preferential right, and that under that law if the vendee and the pre-emptor had equal rights of pre-emption as against an outsider, the property should be divided between them in the same way in which it would have been divided between them had the vendee been a stranger and both of them had claimed pre-emption against him. The contention was that the rule laid down in Book 38, Chapter 1 of the Hedaya (Vol. III, p. 566) that "when there is a plurality of persons entitled to the privilege of *shaffa* the right of all is equal" was as much applicable when the purchaser was a person having the right of pre-emption as when he was a stranger. After referring to the Calcutta rulings they observed as follows.—"As according to the Hedaya, the object is to prevent the vexation arising from a disagreeable neighbour (Vol. III, p. 591; Book 38, Chapter III), and as in the case of a purchase by a person who stands on the same footing as the claimant for pre-emption that object is non-existent, it would seem, were there no authority to the contrary, that the Mohammedan Law sanctioned the enforcement of the right of pre-emption against a stranger only. But the texts from various authors who are regarded as high authorities on Mohammedan Law

cited by Mr. Karamat Husain leave no room for doubt that the right of pre-emption may under that law be enforced against a purchaser who is not a stranger, but is a person who could equally with the plaintiff have claimed pre-emption against a stranger, and that in the case of purchase by such a person the rights of other persons entitled to pre-empt the property should be determined in the manner in which they would have been determined had the person who purchased the property acquired it by pre-emption against a stranger purchaser in the absence of other pre-emptors and the absentee pre-emptors had afterwards appeared and claimed their shares. It was held that according to the authorities cited there was a right of pre-emption even when the purchaser was a pre-emptor, that is, a person who would have the pre-emptive right as against a stranger. Very briefly the authorities referred to in the judgment are the following:—

1. *Takmil Balur-ur-Raik*, in which occurs the passage:—"It is given in the *Tatar Khaniyah* that a neighbour purchased a house and there another neighbour on the other side who claimed pre-emption; the house would be equally divided between the purchaser and the neighbour."

2. *Radd-ul-Mukhtar*, which quoting from *Alqunyah* says:—"A neighbour purchases a house, while there is another neighbour to it. (If) the neighbour then demands pre-emption and the purchaser too, the house is (to be divided) between them half and half, for both of them are pre-emptors."

3. *Fatawa-i-Alamgiri*, has the following passages:—"If a person purchases a house of which he is a pre-emptor and then appears another pre-emptor having an equal right with him, the *Kazi* (judge) will pass a decree for one-half.

Again:—"If the first vendee is a pre-emptor of the house and the pre-emptor present purchases it from him, and then the absent pre-emptor appears, the last named pre-emptor can, if he likes, take half the house under the first sale."

4. *Inayah* or *Aini*, which contains the following passage:—"If the first purchaser is also a pre-emptor and the pre-emptor who is present also purchases it jointly with him and subsequently the absent pre-emptor appears, he (the absent pre-emptor) can, if he likes, take half the house under the first sale."

5. *Durr-ul-Mukhtar*, which says:—"When two persons purchase a house and both are pre-emptors and then appears a third pre-emptor after division has been made under a decree or otherwise, he, that is, the pre-emptor, can have the division cancelled, because what was a half before has now become one-third (*Sharah Walbaniya*)."

They conclude their judgment with the following words:—"As however, the vendees have equal rights of pre-emption with him and they are two in number, the plaintiff would be entitled to only

a third share of the property on payment of one-third of the sale price, provided that he has complied with all the requirements of Mohammedan Law."

It was followed by 21 All., 292 (*Abdulla v. Amanatullah*) in which it was held that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to having regard to the claims of the other pre-emptors.

So according to the Calcutta and older Allahabad rulings, where one co-sharer in an estate sells to another, a third co-sharer has no right to come in and claim pre-emption as to the whole or any part of the share so sold, but according to the recent Allahabad rulings, even when the sole purchaser is a person who might have pre-empted in case of a sale to a stranger, other persons having a similar right of pre-emption are entitled to exercise it against him, to the same extent as if he had acquired the property by pre-emption in their absence.

Next as regards the co-sharer pre-emptor's right against a co-sharer vendee when the latter has associated a stranger with him. Here too there is a conflict between the older and the recent rulings. Let us first consider the Allahabad rulings. It was held in 2 N. W. P., 243 (*Guneshee Lall v. Zaraut Ali*) that where two co-sharers entitled to pre-emption in certain villages associated strangers with them in the purchase of such villages and other landed property, they must be regarded in the light of total strangers in respect of the whole of the property included in the sale deed, and that a note at the foot of the sale deed, mentioning the interest severally purchased by each of the vendees, will not entitle them to retain the shares respectively purchased by them. It was followed by 4 All., 252 which has been already quoted in another connection. Both these rulings were however dissented from in 8 All., 462 (*Sheobaras Rai v. Jiach Rai*) and it was held that this view was erroneous and that inasmuch as the deed of sale contained an exact specification of the shares purchased by the co-sharers vendees, who had an equal right of purchase to that of the plaintiffs in respect of such shares, and as the shares purchased and the consideration paid by the stranger vendee were also exactly specified, the lower court should not have decreed the claim for pre-emption as to that portion of the property which had been purchased by the co-sharers. The rule to be followed in such cases has been clearly laid down in 19 All., 148=A. W. N., 1897, 20 (*Ram Nath v. Badri Narain*) in the following words:—

"Where in purchasing lands in a village subjected to rights of pre-emption, a co-sharer of the village associates with himself, in the

purchase, a stranger to the village, in cases where from the sale deed itself, it is possible to ascertain what is the share, area of the property or interest in the village, which the stranger has purchased, that share, area or interest alone can be the object of pre-emption in the suit by the pre-emptor. Where, however, the sale deed does not, on the face of it, disclose the particular share or interest purchased by the co-sharer vendee on his own behalf, as distinct from the share or interest purchased by the stranger, then, the rule of pre-emption can only be enforced by treating the co-sharer vendee as if he were in the same position as the stranger in decreeing pre-emption against him. In such a case, the bargain made between the vendees and the vendor is one joint in all its incidents."

The Calcutta High Court on the other hand held in 15 Cal., 224 (*Saligram Singh v. Raghuber Dayal*) that in the case of a joint purchase made by two persons of shares in two villages, in one of which one of the purchasers was already a sharer, at one entire consideration, the specification in the deed of sale of their respective shares in the aggregate purchase would not affect the rule laid down in 4 All., 252 mentioned above. They however, seem to have decided it in ignorance of 8 All., 462 (*Sheobaro Rai v. Jiach Rai*), but this ruling does not appear to have been disapproved or dissented from since.

The Allahabad ruling just mentioned above (19 A., 148) was followed in 19 All., 311, though it was dissented from in 48 P. R., 1907.

On comparing 19 All., 148 with 19 All., 466, it will be seen that the earlier ruling has been modified so far as it excludes the co-sharer vendee's share from being pre-empted. It would be an interesting legal conundrum to solve as to what would be the decision of 19 All., 148 in view of 19 All., 466, i.e., whether the co-sharer pre-emptor would be permitted to pre-empt only in respect of the specified share of the stranger alone or of the co-sharer vendee as well? Or, to put it in other words, would the co-sharer vendee have to suffer any penalty for having associated a stranger with him? Again, the leniency of the Calcutta High Court as shown to the co-sharer vendee in 4 Cal., 831 is absolutely incompatible with the harshness of 15 Cal., 224. Where is the reason in holding that a co-sharer is free to purchase any property he likes of another co-sharer, but as soon as he should choose to associate a stranger with him, he would forfeit all his rights in the property, no matter how specifically their respective shares in the property purchased and the consideration paid might have been mentioned in the sale deed? I leave it to the readers to think over the one and to solve the other question.

H. P. BAGCHI, M. A., LL. B.,

NOTES AND CUTTINGS.

Under the heading "some problems in Specific Performance⁽¹⁾," Mr. George L. Clark of the University of Missouri contributes to 31 *Harvard Law Review*, p. 271, an article from which we make the following extract—The first question which the learned writer sets himself to enquire into is, "Is there a Positive Rule of Mutuality?" The doctrine of the mutuality of remedy in cases of specific performance may be stated thus:—A contract to be specifically enforceable by the court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other. Whenever, therefore, whether from personal incapacity the nature of the contract, or any other cause, the contract is incapable of being specifically enforced against one party, that party is generally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former. (Fry: *Specific Performance*, 5th ed., 231, Section 460) Suppose, for instance, there is a contract to sell land for a certain price. The buyer certainly is entitled to ask for specific performance, as damages are not an adequate remedy. It is said that the buyer being entitled to specific performance, the seller is also entitled to it. (See Williams on *Vendor and Purchaser*, 2nd ed., Vol. II, pp. 1106, 1107). Having premised so much let us now follow the learned writer in his own words. The article will repay perusal:—"Where a buyer asks specific performance of a contract to sell land or unique chattels it is usually quite easy to see that damages are not an adequate remedy. But suppose it is the seller who asks for specific performance—that is, asks that the buyer be compelled to pay the full purchased price and take the property—cannot the buyer properly insist that damages at law will be adequate? May he not plausibly argue that although there is no exact duplicate of the property there are other persons to whom the vendor may sell? The answer to this is that in perhaps the large majority of cases damages would not be adequate because there being no open market for such property, it may be very difficult for the vendor to find other buyers⁽²⁾. But

(1) The substance of this article will appear in a forthcoming book on equity.

(2) In reply to this it might be suggested that the vendor of land might sell it at public auction and collect the deficiency from the purchaser; but it might well happen that the buyer could raise the money to take the land and yet not be able to meet a judgment for damages for the deficiency.

this question is seldom considered (3); it is a hard and fast rule that if the property is such that the court would have given specific performance to the buyer if he had sued for it, the seller may have specific performance(4). This is usually referred to as the doctrine of mutuality(5), but it is to be noted that it is mutuality as a basis for *giving* relief and must be carefully distinguished from the doctrine of lack of mutuality as a ground for *denying* relief.

The two rules are sometimes so stated as to be destructive of each other; *e g.* it is sometimes said that "if one party to a contract may have specific performance, the other may." While it is still more common to find statements that "if for any reason one party to a contract cannot obtain specific performance the other party cannot." Somewhat like the famous cats of Kilkenny it is obvious that each rule, as thus stated, is capable of eating the other up. The solution to this enigma is that the two rules have each a separate place and function. The affirmative rule, apparently, has been invoked successfully only in favour of vendors or lessors against vendees or lessees and in only two classes of cases. If the subject-matter of the contract is such that damages would be inadequate to the purchaser, so that he could ordinarily have obtained specific performance if he had sued for it, the vendor may have specific performance; that is, if the buyers or lessees common-law remedy would have been inadequate, the court will not inquire into the adequacy of the seller's or lessor's common-law remedy. The other application of the rule is to the doctrine of part performance as taking a case out of the operation of the statute of frauds; if a purchaser is held to have made a sufficient part performance by the taking of possession so that he would have escaped the bar of statute if he had sued for specific performance, the vendor may likewise take advantage of such part performance. On the other hand apparently no one has attempted to apply the lack of mutuality rule to these two classes of cases; so that there has never been any conflict in the application of the two rules.

On principle the doctrine of mutuality is difficult to justify(6). It seems to be an illustration of the tendency of equity courts to

(3) In a few states the vendor of land must show that damages would be inadequate. *Porter v. Frenchman's Bay* and *Mr. Desert Land and Water Co.*, 84 Me., 195 (1892); 36 Cyc., 566, note 53.

(4) *Adams v. Messinger*, 147, Mads. 185 (1888); *Adderley v. Dixon*, 1 Simons and Stuart, 607 (1824); *Cheale v. Kenward*, 3 De Gex. and J., 27 (1858).

(5) *Kenney v. Weaham*, 6 Maddock, 355 (1822): "I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a will for specific performance."

(6) It is sometimes suggested that the vendor of land is entitled to specific performance because of the doctrine of "equitable conversion." But this is putting the cart before the horse—a mistaking of cause for effect, *Poolley v. Budd*, 14 Bear, 34, 44 (1851).

limit the scope of discretion and to widen the field of fixed rule (7). Historically it is perhaps traceable to a notion on the part of the courts that in thus giving the vendor specific performance they were following out the principle that equality is equity (8); it seems however, a misapplication of the maxim because that maxim properly applies only to members of a class, such creditors, children *etc.* It cannot reasonably be contended that the vendor and purchaser are members of a class.

It has been argued by Professor Ames that the vendor's right to get specific performance with inquiring into the adequacy of his common-law remedy "has nothing to do with any question of mutuality. The vendor from the time of the bargain holds the legal title as security for the payment of the purchase money and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption (9). It is not clear whether this refers to vendor's right to hold as security or to his obligation to hold. If it is the former that is meant then it may be answered that in case of "contracts to sell ordinary chattels without provision for credit, it is equally true that the vendor cannot be compelled to part with the title or possession of the goods till he has been paid; but this does not mean that he can recover the price in equity (10). But if the argument refers to the vendor's obligation to hold the property it amounts substantially to the following argument by Professor Cook (11).

"The seller's action for specific performance is really in the nature of an action to foreclose the equitable right of the buyer to specific performance. In other words, whether the seller asks for specific performance or seeks to foreclose the equity by a sale, the object of the suit is the same, to put an end to the situation created by equity in making the seller a trustee (12), for the buyer and

(7) See "The Decadence of Equity" by Roscoe Pound, 5 Cal. Law Rev., 20.

(8) *Lewis v. Lechmere*, 10 Modem, 503 (1721).

(9) James Barr Ames, "Mutuality in Specific Performance", 3 Cal. Law Rev., 1, 12.

(10) In some jurisdictions he may, under some circumstances, recover the price at law. Williston on Sales, section 562.

(11) Prof. Coalter Coheeler Cook in 6 American Law and Procedure, 183, arguing that the doctrine of mutuality is unnecessary.

(12) Where a vendor has been fully paid the purchase price, he ceases to have any beneficial interest in the land and is substantially in the position of a trustee, but in such a case he does not stand in need of any remedy against the purchaser. If he has not been fully paid it is inaccurate to refer to him as a trustee because he has an interest in the land which he may properly transfer by conveying to any one but a *bona fide* purchaser for value without notice, while the trustee is under an obligation not to transfer the property to any one, even though he may have loaned money to the *cestui que trust* upon the security of the trust property. And it is not accurate to call him a constructive trustee, because his

permitting this relation to continue even after the time set for performance in the contract itself."

There seem to be three defects in this argument. If for some reason ⁽¹³⁾, the purchaser could not enforce specific performance against the vendor, the latter is not a "trustee" or fiduciary and therefore there is no "situation" to put an end to, and yet the vendor may get specific performance. Secondly, in any case, if all that the vendor wishes is to get rid of his fiduciary obligation with reference to the land, it would seem that he can do that just as effectually by getting a common-law judgment for damages, as he can by obtaining a decree for specific performance, because such a judgment would apparently merge the cause of action not only of the vendor but also of the purchaser. After the vendor acquires a valid judgment at law for breach it is difficult to see how the purchaser could win a suit for specific performance. Furthermore there seems to be some confusion as to causation. The argument seems to assume that the vendor's right to have the property sold in order to satisfy his claim is dependant upon the purchaser having the right to specific performance; but if for some reason, the vendor could not enforce specific performance against the purchaser, but the purchaser could enforce against the vendor, could it be seriously contended that the vendor could foreclose the purchaser's equity by such a sale? The truth about the situation is that the right of the vendor to have the land sold to satisfy his claim is dependant not upon the purchaser's right to specific performance but upon the vendor's right to specific performance; in fact, it is a substitute given by equity in cases where specific performance is defeated by the inability of the purchaser to complete the contract. This is made even clearer by the further fact that if for some reason the purchaser cannot, but the vendor can enforce specific performance the vendor may have the property sold to satisfy his claim though there is of course no equity to foreclose. Of course the mere fact that the vendor's remedy of specific performance is somewhat similar to a mortgagee's bill for foreclosure is no reason in itself why the vendor should be given such remedy. The vendor's right to specific performance is a cause and not a result of the analogy ⁽¹⁴⁾, between the relation of mortgagee and mortgagor and that of vendor and purchaser.

obligation to hold the property for the purchaser and then to convey to him is consensual not constructive. Because of his obligation, not to convey to a *bona fide* purchaser he may properly be called a fiduciary.

(13) For example, if the purchaser has been guilty of fraud on the vendor, or if only the purchaser signed the memorandum required by the Statute of Frauds.

(14) Though this analogy is closer than the trust analogy because the mortgagee has a beneficial interest which he may freely transfer, it is not perfect. One important difference that while a mortgage can be foreclosed only by judicial proceedings, the vendor may foreclose the equitable

Professor Ames' argument continues:—

"This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor, just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common-law creditor. No case has been found in which a bill has been sustained under such circumstances. The case of *Jones v. Newhall* (15) is a solid decision against such a bill."

It would seem that the fact just mentioned does not tend to show that there is no positive rule of mutuality but merely that the rule is not applied where the vendor can get a judgment for the purchase money at law because the procedure peculiar to equity is here unnecessary. When the purchaser of land sues for specific performance he must do so in equity because he wants a decree *in personam* that the vendor convey something he cannot get at law. If the vendor sues without having conveyed, the suit must be in equity, because, *inter alia*, the common law does not regard the unaccepted tender of a deed of land as entitling the vendor to the purchase price; and a decree in equity is necessary to protect both parties by making the performance of each conditional upon the simultaneous performance by the other. No such conditional decree is necessary if the vendor has conveyed, and the remedy at law is quite adequate.

It would seem, therefore, that although it is difficult to justify the positive rule of mutuality, it is still more difficult to explain away its existence."

OUR readers are by this time familiar with the decision of the House of Lords in the case of *Bowman v. Secular Society, Limited*, [1917] A. C. 406. The following luminous note on that decision appears in 31 Harv. Law Review, p. 289.

THE LEGALITY OF ATHEISM.—Is the promotion of atheism a criminal offence at common law? (16). There are four possible

right of a defaulting purchaser outside of court by giving him notice of his intention to rescind the contract unless the purchaser completes within a reasonable time.

(15) [1874] 115 Mass. 244.

(16) For a summary of the English statutes on this and related matters, see 1 HAWKINS, PLEAS OF THE CROWN (6 ed.), 11 *et seq.*; [1917] A. C., 409.

In England bequests for the saying of masses for the soul of the testator or of other persons are still held to be illegal as superstitious uses. The law is otherwise in Ireland and in Canada. But in Ireland as well as in England bequests to or for the benefit of monastic bodies are illegal. *Ellard v. Phelan*, [1914] 1 I. R., 76, strangely enough the Blasphemy Act of 1697 (9 and 10 WILL. III, c. 32) is still on the English statute book. By this Act persons who have been educated in or have made profession of the Christian religion, who are convicted of denying the Trinity or the truth of Christianity or the authority of the Bible, are subjected to heavy penalties and disabilities. Of course the Act is not actually enforced to-day.

grounds for holding that it is, or that under some circumstances it may be.

1. That a denial of the very existence of God is an offence against God, and that in order to vindicate the Majesty of God the state should punish it. This view has been distinctly rejected by the courts, both in England (17) and in the United States (18). In so far as the offence is an offence against God, it is left for God or the Church to deal with it.

2. That the civil order is based on religion and in particular on Christianity, and that to attack religion or the fundamental doctrines of Christianity is to loosen the bonds of society and to endanger the state. This was the view taken by Lord HALE in a famous case in which he said:—To say religion is a cheat is to dissolve all those obligations where by the civil societies are preserved; Christianity is parcel of the laws of England; and therefore to reproach the Christian religion is to speak in subversion of the law(19).” Under this view any attack upon the fundamental doctrines of the Christian religion is criminal and the motive and manner of the attack are immaterial(20). This view is now repudiated by the courts.(21) It is no longer felt that it can be said that the decay of the Christian religion would mean the dissolution of the state, nor that a decorous discussion of the merits of Christianity would mean its decay.

(3) That since the majority of the members of the community are Christians, an attack upon Christianity has a tendency to cause

(17) 4 BL. COMM., 41 *et seq.*; STARKIE, SLANDER and LIBEL (Am. ed., 1877), § 772.

(18) *State v. Chandler*, 2 HARR. (Del.), 553 (1837).

(19) *Taylor's Case*, 1 Vent., 293, 3 Keb., 607, 621 (1675). The actual decision was undoubtedly right for the defendant's words were indecent. In a number of the cases special stress is laid on the religious sanction of a judicial oath. See STARKIE, SLANDER and LIBEL (Am. ed., 1877) § 772. This argument of course loses all its force when atheists are allowed to be sworn. See STAT 1 and 2 VICT. C 105, § 1, and acts amendatory thereof.

(20) *Regina v. Moxon*, 4 St. Tr. (N.S.), 694 (1841) (publishing Shelley's "Queen Mab"); *Reg. v. Petcherini*, 7 Cox, C. C., 79 (burning an authorised version of the Bible); *Rex v. Williams*, 26 How. St. Tr. 653 (1797) (publishing Paine's "Age of Reason"); *Rex v. Woolstan*, 2 Str., 820, Fitzg. 64, 1 Barnard, 162, 236 (1779) deny miracles of Christ); *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 206 (1832) promulgation of pantheistic ideas); *Updegraph v. Commonwealth*, 11 S. & R. (Pa.), 394, (1824) (denial of infallibility of the Bible). This view is accepted by STEPHEN, DIGEST OF CRIMINAL LAW (6 ed., 1904), 125.

(21) *Regina v. Bradlaugh*, 15 Cox, C. C. 217 (1883); *Regina v. Ramsay*, 15 Cox, C. C. 231 (1883); *Rex v. Boulter*, 72 J. P., 188 (1908). See *Shore v. Wilson*, 9 Cl. and Fin., 355, 524, 539; ODGERS, LIBEL and SLANDER (5 ed., 1911) Ch. xvii, which has a full collection of English cases; 3 WHARTON, CRIM. LAW, (11 ed., 1912), 2121.

a breach of the peace⁽²²⁾. Certainly the tendency to cause a breach of the peace may make conduct criminal which would otherwise be innocent⁽²³⁾. But to-day it can hardly be said that a decorous argument against Christianity tends to cause a breach of the peace. Moreover, even conduct which tends to cause a breach of the peace is sometimes justified on grounds of public policy⁽²⁴⁾, and surely the policy in favour of freedom of discussion of matters of vital interest to humanity is sufficient justification. But if the words are scurrilous or spoken in an insulting way or for the purpose of string up trouble, then indeed a justification is quite lacking⁽²⁵⁾.

(4). That an attack upon religion constitutes a public nuisance. It is a criminal offence to disturb the community by thrusting upon it something disgusting and nasty, whether that thing be a smell, a right or an idea⁽²⁶⁾. Hence, indecorous or contumelious language in regard to things generally regarded by the community as sacred constitutes a public nuisance⁽²⁷⁾. But a decorous discussion of such things is no nuisance⁽²⁸⁾.

It may therefore be concluded that to-day the promotion of atheism in decorous ways is not a crime. To this even Lord Finlay agrees⁽²⁹⁾.

Granting that the promotion of atheism is not a criminal offence, is it illegal in any sense? In 1850, in *Briggs v. Hastley*⁽³⁰⁾, the court held illegal as inconsistent with Christianity a legacy "for the best original essay on natural theology, treating it as a science, and demonstrating its adequacy and sufficiency when so treated and taught to constitute a true, perfect, and philosophical system of

(22) Of course true disciples of Christ would not resort to the illegal use of force. "The professing and devout Christian would indeed look on the scene more in sorrow than in anger, but his relatives and friends, who are not strictly professors of Christianity or members of any church or sect, and the great mass who have been educated in the Christian's belief though not professing to act up to it, would probably do as outraged and insulted men have in all ages been accustomed to do." *State v. Chandler*, 2 Harr. (Del.), 652.

(23) *Vise v. Dunning*, [1902] 1 K. B., 167.

(24) *Beatty v. Gilebanks*, 15 Cox. C. C., 138 [1882].

(25) *Re v. Baulter*, 72 J. P., 188 [1908]; *State v. Chandler*, 2 Harr. (Del.) 553 [1837]; *People v. Ruggles*, 8 Johns. (N. Y.), 290 [1811]. It is an indictable offence to ridicule the religious views of a minority of the community. *Commonwealth v. Haines*, 4 Pa. L. J., 17 [1824].

(26) BEALE, CASES ON CRIMINAL LAW [3 ed.], 81-102.

(27) *People v. Ruggles*, 8 Johns. (N. Y.), 291 [1811]; 2 BISHOP, NEW CRIMINAL LAW, Section 74.

(28) *Regina v. Bradlaugh*, 15 Cox C. C., 217 [1883]; *Re v. Boulter*, 72 J. P., 188 [1908].

(29) *Bowman v. Secular Society, Limited*, [1917] A. C., 406, 423.

(30) 19 L. J. C., 416, See also *Kinsey v. Kinsey*, 26 Ont., 99 [1894].

universal religion. In 1867 in *Cowan v. Milbourn*⁽³¹⁾, the court held illegal a contract to let rooms for the purpose of the delivery of lectures on such subjects as, "The Character and Teachings of Christ: the former defective, the latter misleading⁽³²⁾." Similarly in a Canadian case, decided in 1878, a contract to let a hall for the delivery of lectures containing an attack upon the fundamental doctrines of Christianity was held illegal⁽³³⁾. In the well-known Pennsylvania case of *Teisueiss v. James*⁽³⁴⁾, decided in 1870, SHARSWOOD, J., was of the opinion that a legacy to the "Infidel Society of Philadelphia hereafter to be incorporated.....for the purpose of building a hall for the free discussion of politics, religion *etc.*," was illegal. In *Lawrence v. Smith*⁽³⁵⁾, Lord Eldon refused to enjoin a pirated edition of a medical book because it seemed to throw some doubt on the doctrine of the immortality of the soul. It shows a remarkable openness of mind that in spite of these decisions the House of Lords was able to reach the result it did reach in *Bowman v. Secular Society, Limited*, [1917] A. C., 406, upholding a bequest to a registered company organised to promote atheistic doctrines, and for the first time establishing in the English Law a real freedom of decorous religious discussion.

One interesting and more doubtful question yet remains. Granting that the promotion of atheism is not criminal or in any way illegal, is it a charitable object? That point it was not necessary to decide in the Bowman Case where the fund bequeathed was to be paid to a registered company. If, however, the fund had been given to trustees to be expended in the promotion of atheism, the question whether such an object is charitable would have been presented. For unless it were held to be a charitable trust, it would be invalid under the doctrine of *Morice Bishop of Durham*⁽³⁶⁾ which requires a definite beneficiary in non-charitable trusts, and also as violating the principle of the rule against perpetuities. Lord Parker touching on this question in the Bowman Case came to the conclusion that such a trust is not charitable⁽³⁷⁾. It was expressly so decided a few years ago in an Australian case⁽³⁸⁾. A bequest was

(31) L R 2 Ex., 230.

(32) Lord Parker suggests that possibly *Cowan v. Milbourn* may be upheld on the ground that the lectures had a tendency to cause a breach of the peace. See principal case at p. 447.

(33) *Pringle v. Napance*, 43 U. C. Q. B. 285.

(34) 63 Pa., 465. Compare *Manness v. Philadelphia Library Co.*, 93 Pa., 165.

(35) Jac., 471 (1822) See also *Murray v. Benbow*, 4 St. Tr. (N. S.) 1410 (1822) where Lord Eldon refused to restrain the defendant from publishing a pirated edition of Lord Byron's "Cain"

(36) 10 Ves., 521.

(37) at p. 440 *et seq.*

(38) *In re Jones*, (1907) 8 Aust. L. R., 190. A provision in a bequest for the founding of a college that Ecclesiastics should be kept off the premises does not invalidate the bequest. *Vidal v. Philadelphia*, 2 How. (U. S.), 127, 198 (1844).

there made to the "Incorporated Body of Freethinkers of South Australia." The chief doctrine of that society was "that science provides for life, and that materialism can be relied upon in all phases of society." The corporation had ceased to exist at the time of the death of the testator, and the question was whether the legacy could be applied *Cy pres*. The court held that the purposes of the society were not charitable and that it could not be so applied. It may be difficult, though perhaps not impossible⁽³⁹⁾, to say that the promotion of atheism is the advancement of religion. Certainly, however, it may well be held to be the promotion of education, for education is not confined to matters taught and learned in the school-room.

At any rate, it may be held to fall within that broad class of cases where the purpose is "beneficial to the community."⁽⁴⁰⁾ Of course the fact that the testator sincerely believes that the community will be benefited by his scheme is not enough to make the scheme charitable. On the other hand, the fact that the members of the court and the great majority of the members of the community think that the members of the community will not be benefited is not enough to prevent the scheme from being charitable. The courts have upheld as charitable, bequests for the promotion of vegetarianism,⁽⁴¹⁾ for the suppression of vivisection,⁽⁴²⁾ for the spread of woman's suffrage,⁽⁴³⁾ for the publication of the doctrines of Henry George,⁽⁴⁴⁾ for the furtherance of conservative principles when accompanied by religious and mental improvement,⁽⁴⁵⁾ for the propagation of the writings of Joanna South Cote,⁽⁴⁶⁾ (who claimed that she would give birth to a new Messiah and whose writings the court thought not "inconsistent with Christianity"), for the promotion of Unitarianism,⁽⁴⁷⁾ for the promotion of Christian science,⁽⁴⁸⁾ for the advancement of spiritualism,⁽⁴⁹⁾

(39) In *Kinght's Estate*, 159 Pa. 500 (1855), the court was of the opinion that a legacy for such a purpose was so far a bequest for the promotion of religion as to be void under a statute invalidating bequests made less than one month before the testator's death.

(40) See *Commissioners of Income Tax v. Pimzel*, [1891] A. C., 531.[•]

(41) *In re Cranston*, [1898] 1 I. R., 431.

(42) *In re Foucaux*, [1895] 2 Ch., 501.

(43) *Garrison v. Little*, 75 Ill. Ab., 402. But see *Jackson v. Phillips*, 14 Allen (Mass.), 539.

(44) *George v. Braddock*, 45 N. J. Eq. 757, reversing 44 N. J. Eq. 124.

(45) *In re Scowcroft*, [1898] 2 Ch., 638.

(46) 31 Beav., 14.

(47) *Shore v. Wilson*, (1842) 9 Cl. and Fin., 355.

(48) *Chase v. Dickey*, 212 Mass., 565; *Glover v. Baker*, 76 N. H., 303.

(49) *Jones v. Watford*, 62 N. J. Eq. 339, 50 Atl. 180, affirmed in 64 N. J. Eq., 785.

(49) and for the furtherance of "the broadest interpretation of metaphysical thought."⁽⁵⁰⁾ Surely if all these objects, whether wise or unwise, are charitable, the furtherance of earnest inquiry into the fundamental questions of religion is likewise such. It makes no difference that the object is to present only one side of the question; innumerable religious trusts have been established to present other sides. It makes no difference that most people regard that side as the wrong side, if rational persons can and do regard it as the right side and can and do believe that its advancement will benefit mankind. At the end of the 18th century a learned writer said that no person in a Christian country can complain of the prohibiting of a denial of Christianity, for "even an infidel must acknowledge that no benefit can be derived from the subversion of a religion which enforces the best system of morality."⁽⁵¹⁾ But the sincere disbeliever does not acknowledge this. On the contrary, he believes that the spread of what he regards as truth and the removal of what he regards as superstition would conduce to the benefit of mankind. Surely the truth will prevail though the courts do not attempt to decide *a priori* what is the truth.

(3) *Jones v. Watford*, 62 N. J. Eq., 339, 50 Atl 180, affirmed in 64 N. J. Eq., 785,

(50) *Vineland Trust Co. v. Westendorf*, (1916) 86 N. J. Eq., 343.

(51) SWIFT, SYSTEM OF LAWS OF CONN., Vol. 2, 323.

CASES AND COMMENTS.

Gokul v. Mohri Bibi, A. L. J. R., Vol. XVI, 256.

It seems that in the above case the change in the law was not brought to their Lordships' notice. Under the old Code of Civil Procedure objections to attachment used to be preferred under section 278 which provided that the court should proceed to investigate the claim. Section 280 provided that if upon the said investigation certain facts were proved property was to be released from attachment while section 281 detailed the circumstances under which the objection was to be disallowed. Under section 283 the party against whom an order under section 280 or 281 was made was entitled to question the same by means of a regular suit instituted for the purpose. As no order under section 280 or 281 could legally be passed without an investigation it was held by practically all the High Courts that before the bar of limitation could successfully be pleaded in suits under section 283 it was necessary that the order complained of should have been passed after investigation. Article 11 of the old Limitation Act XV of 1877 which provided for a year's limitation also specifically referred to sections 280 and 281 and thus lent support to the view that the order should have been passed after investigation. There are many rulings, many of them not easily reconcilable, in which the *quantum* of the necessary investigation has been discussed. From a perusal of these authorities it was evident that the law on the point could not be said to have been quite settled. Many of the authorities have been examined and discussed by Mr. JUSTICE MUKERJI in *Kunj Behari Lal v. Kandh Prasada Narain Singh*, 6 C. L. J., page 362.

It is however submitted that the new Code of Civil Procedure and the new Limitation Act have made a change in the law. Order 21, rule 63 which replaces section 283 of the old Code omits to mention specifically the rule under which the objection has been allowed or rejected. Article 11A of the new Limitation Act which is applicable to cases under Order 21, rule 63, follows suit.

It seems that all that is necessary now for a successful plea of limitation in suits under Order 21, rule 63 is that there may have been an objection preferred, that it may have been allowed or rejected and that the suit to contest the said order may have been brought more than a year after the date of the order. The law thus seems to have done away with the nice and uncertain distinctions between sufficient and insufficient investigation.

This view has been taken by the Madras High Court in *Narasimha Chetti v. Vijiapala Nainar*, 27 Ind. Cas., page 944 and *Ponnusami Pillai v. Samu Ammal*, 38 Ind. Cas., 937, 31 M. L. J., 247 and by the Calcutta High Court in *Nogendra Lal Chowdhry v. Fani Bhushan Das*, 44 Ind. Cas., 265 and seems to be more in consonance with the law as it now stands.

LAW LIBRARY.

PSYCHOLOGY IN LAW. INTRODUCTION TO JURISTIC PSYCHOLOGY, by Prabodh Chandra Bose, M. A., B. L., (Thacker, Spink & Co., Calcutta).

The psychologist, the student of the human mind, finds food for thought and subjects for study and reflection everywhere. If he feels that retrospection is a tiresome process, if he is not satisfied with the observation of the workings, of his own mind, he has only to look about him to find abundant material for careful examination. A street corner, a market place, a railway station, a public meeting, ghat of a river and, above all, a court of law are all places where the psychologist can indulge his fancy and satiate his curiosity by closely observing the habits of men. The author of the book under review has specialized in the study of man as he appears in his various aspects in the law court: as a presiding officer, as an advocate, as a litigant, as a witness.

The author, himself a member of the judicial service and having served as a professor of logic and history at a college, has set himself to his task with commendable enthusiasm and has gone into the various departments of his subject with much learning and painstaking research. All persons interested in the fascinating subject of psychology and the mysteries of mind and consciousness will find in the book much that deserves close study and thinking. If we may offer one criticism, it would be that the author has paid too much attention to classification and analysis involving needless breaks and repetitions which jar on the art of continuous narration and cogent writing. With all its virtues analytic writing can but appeal to few and the general reader often lays down a book treated in that manner with a feeling of boredom. The book, as it is, is meant for the general reader and we cannot help wishing that it were more interestingly treated. With this one criticism we congratulate the author on his successful production and commend the book to all who should be interested in the study of psychology in general and its relation with law and lawyers in particular.

THE CENTURY REGISTRATION AND STAMP LAW WITH CHRONOLOGICAL TABLES FROM 1809—1917. By Atul Chandra Ganguli, M.A., B.L., Law Publishing Press, Calcutta, 1918. Price Rs. 3.

This appears to be a useful compilation. After a short summary of the past and present Registration Acts and regulations the present Stamp Act is reproduced. Then follows a summary of the rules, past and present, relating to the stamp duty requisite for various instruments mentioned in alphabetical order. 222 pages are occupied by the Chronological tables of the various eras commonly in use. The book is well and accurately got-up, and the price seems to be moderate.

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SOME OBSERVATIONS ON ORDER XXI, RULE 93,
CODE OF CIVIL PROCEDURE.

That Order XXI, rule 93 of the Code of Civil Procedure has been the subject of several conflicting decisions must be obvious to any one who has noticed, of late, the trend of the case-law on the subject. It cannot be said that it is a defective piece of legislation, defective by reason of its phraseology; for there is absolutely no ambiguity, but the fact remains that as one studies the rule one feels that there is a great deal of uncertainty about it. Not only is there a difference of opinion among the different High Courts, but the decisions of our own High Court differ. The rule reads "where a sale of immoveable property is set aside under rule 92 the purchaser shall be entitled to an order for re-payment of his purchase money with or without interest as the court may direct against any person to whom it has been paid." The rule as it stands, is perfectly clear. If there is anything in it which can give rise to any difference of opinion, it is '*order*.' But it is submitted that even it should not. The rule says "shall be entitled to an *order*." The question is, is he entitled to apply for an order or to bring a regular suit? There can be no two opinions on principle. At a court sale there is no warranty of title. The purchaser takes at his own risk. If the judgment-debtor had no saleable interest in the property and if, in consequence, the auction purchaser purchases a bag and wind instead of a thing of value, he has to thank himself. The principle of *caveat emptor* is there and he ought to have been on his guard." As NAPIER, J, observed in 23 M. L. J., 487, at page 489, "It is clear that where the property seized was personal estate and it was sold by the Sheriff, no suit lay either against the Sheriff or the judgment-creditor, who had received the purchase money, to recover it, when the property had been received from the purchaser by a person claiming title, the principle being that a sale by the Sheriff was not a sale in the market overt, the purchaser acquiring thereby only what the judgment-debtor had a right to sell, the precise interest and no more, which the judgment-debtor possessed in the goods and that there was no warranty of title implied in a sale by the Sheriff."

There is another aspect of the matter. Is it advisable to recognise a suit like this on other and equally important grounds? A suit is a much more dilatory proceeding than an application for an order and is likely to be instituted after a considerable loss of time. It is possible that the money realised by the sale of the property has been distributed among a number of creditors. Paying back is double labour, and such a suit is bound to disturb the *status quo ante*. RICHARDS, C. J., and TUDBALL, J., have clearly held in *Muhammad Najib-ullah Khan v. Jai Narain*, 12 A. L. J. R., [1914], p. 908, at p. 909, that "it is obviously most inconvenient after the sale had taken place that the auction purchaser should be entitled to come in and allege that the sale was bad on the ground of defect in a debtor's title. It may well have been that the money realised by the sale of the property had been distributed amongst a number of creditors."

There is yet another aspect. The intention of the Legislature is to avoid multiplicity of proceedings and save time. Such a suit is not calculated to countenance such an intention. Take, for instance, section 47 of Act V of 1908 which is very akin to these and cognate rules; for all proceedings under Order XXI, rule 82 to rule 102, are, in essence, in the nature of execution proceedings. It clearly indicates the intention of the Legislature. It says:—All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit." The old section 244 of the Code of Civil Procedure of 1882 also provided:—The following questions shall be determined by order of the court executing a decree, and not by a separate suit (namely):—

(a) "any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, or to the stay of execution thereof."

The report of the select committee says:—"The committee have re-drafted sub-clause (3) (of the old section) and made it compulsory on the court to determine questions arising as to representatives of parties.....It is inexpedient that separate suit should be instituted for the decision of such questions. The delay and expense involved are often very great and result in the needless protraction of litigation." It is obvious, therefore, that the Legislature has only emphasised its intention in the present Act and, as was observed by BANERJI, J., in *Gulzari Lal v. Madho Ram*, [1904] 1 A. L. J. R., p. 65, at p. 79, "As the learned Chief Justice has pointed out, the trend of recent decisions, both of the Privy Council and of the courts in this country is in favour of

placing on section 244 as wide an interpretation as is compatible with its provisions so that questions which may be determined by the court executing a decree should not be made the subject of a separate suit," and although KARAMAT HUSAIN and TUDBALL, JJ., in *Saiyed Mukhtar Ahmad v. Muqarrab Husein*, [1912] 10 A. L. J. R., p. 56, agreeing with BANERJI, J., in *Jagodishury Debia v. Kailash Chandra Laliry*, I. L. R., 24 Cal., p. 725, have held that "an order which determines merely an incidental question as to whether the proceedings are to be conducted in a certain way does not come within the provisions of section 47" conceded that "the words of section 47 of the Code of Civil Procedure are no doubt very wide."

The question then arises is a purchaser at an auction sale the representative of the judgment-debtor? STANLEY, C. J., in *Gulzari Mal v. Madho Ram*, [1904] 1 A. L. J. R., p. 65, after an exhaustive review of all the authorities on the subject answered the question in the affirmative. "There is no distinction" said His Lordship "between the case of a private purchase and a purchase in execution of a decree so far as regards questions which arise under section 244 clause (c) of the Code." BANERJI, J., agreeing with the Chief Justice held in the same case "every purchaser of the judgment-debtor's interests who is bound by the decree, is a representative of the judgment-debtor within the meaning of section 244, sub-section (c) of the Code of Civil Procedure, whether he is a purchaser under a private sale from the judgment-debtor or a purchaser under a compulsory sale held in execution of a decree obtained against the judgment-debtor".

The intention of the Legislature being thus abundantly clear the question arises what remedy is the auction-purchaser consistently with this intention, entitled to when he discovers that the judgment-debtor had no saleable interest? As said above, there is a difference of opinion among the High Courts despite the observations of FLETCHER, J., in *XLI I C.*, part 6, p. 924, at p. 927 that "apparently all the High Courts in India seem to agree that a suit of this nature does lie." They do not agree and if they do, they agree only to disagree. Some of the decisions of our own High Court appear to be irreconcilable. No attempt will be made in this brief review to discuss the whole case-law on the subject. All that is aimed at is the discussion of a few important decisions of our own High Court.

The earliest important case on the subject, the veritable sheet-anchor of the auction-purchaser is *Munna Singh v. Gajadhar Singh*, I. L. R., 5 All., p. 577. This was a case decided under the old Civil Procedure Code of 1882 which clearly recognised such a suit. Section 315 of Act XIV of 1882 provides:—"when a sale of immoveable property is set aside under section 310A, 312 or 313.

"Or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is, for that reason, deprived of it,

"The purchaser shall be entitled to receive back his purchase money (with or without interest as the court may direct) from any person to whom the purchase money has been paid."

The next case is *Kishun Lal v. Safdar Ali Khan*, I. L. R., 13 All., p. 383, in which EDGE, C. J., and KNOX, J., followed the above case and held that "where an auction-purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under section 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in section 315 of the said Code."

The above was followed in *Shanto Chandar Mukerji v. Nain Sukh*, I. L. R., 23 All., p. 355. The facts of this briefly are those :—In execution of a decree for sale upon a mortgage executed by the father of a joint Hindu family, certain joint family property was put up to sale without specification of the interests of the other members of the family. On suits by the sons, their interests, amounting to four-fifths of the entire property were exempted. The auction-purchaser thereupon brought a suit against the decree-holders and the sons to recover four-fifths of the price paid by him." STRACHEY, C. J., and BANERJI, J., held at page 356, "we think that a purchaser is only entitled to receive back his purchase money under the conditions stated in section 315, that in the absence of fraud, his only remedy is to recover back his purchase money, where it is found that the judgment-debtor had no saleable interest in the property at all and that he cannot by suit, any more than by application, obtain a refund in proportion to the extent to which the judgment-debtor had no interest." Following *Derry v. Peek*, L. R., 14 A. C., 337, their Lordships held at page 358 :—"In the third place, it is not suggested that the alleged misrepresentation amounted to fraud, and nothing short of actual fraud in the sense of dishonesty would entitle the plaintiff to compensation as damages. For these reasons we think that so far as regards the claim against the decree-holders for a refund of the purchase money, the decision of the court below was right." But the High Court awarded a decree to the auction-purchaser against the sons holding at page 359 :—"As the debt incurred by Shib Singh was not tainted with immorality, the mortgage made by him was binding on his sons and grandsons and therefore the four-fifths share of those persons was

equally liable with his own one-fifth share for the mortgage debt." But "if a party purchase at a sale in execution with full knowledge of the true state of things and knowing that the title offered is defective, a claim to be relieved from the consequences of his purchase cannot be listened to. *A fortiori* where a purchaser has allowed a sale by the court to him to be confirmed and the purchase money to be paid over to a judgment-creditor, he cannot, we think, be allowed to succeed in a suit for the recovery of the purchase money."—*Sumer Chand v. Wahid Husain Khan*, [1906] 3 A. L. J. R., p. 819, at p. 824. The decision in this case appears to be in the teeth of the earlier decisions, *e. g.*, *Munna Singh v. Gajadhar Singh*, I. L. R., 5 All., 577; for instance the observations of STANLEY, C. J. at page 825. "The procedure under it is by summary application within a limited time and not by a suit." But the circumstances of this case were peculiar and should hardly serve as a general guide for the future. The attaching creditor attached the property, the objector objected to the attachment, his objection was disallowed and then the plaintiff purchased the property and, what is more, *benami* for that very objector. After the dismissal of this objection the objector brought a suit for establishing his right. This was again dismissed. No wonder, then if the court lost all sympathy for the plaintiff who did not come to court with clean hands and a clear conscience and dismissed his suit. The attitude of the court is clearly reflected in the following observations towards the close of the judgment. They show that their Lordships did, after all, recognise such a suit, though, under the peculiar circumstances of the case, they were disinclined to grant any redress. "A suit will, no doubt, be maintainable for a return of the purchase money where there has been a total failure of consideration, but not, we think, in a case in which the plaintiff acted as the plaintiff did here."—3 A. L. J. R., p. 819, at p. 825.

A further study of the subject brings us to the consideration of an important case, *Sidheshwari Prasad Narain Singh v. Goshain Mayanand*, 11 A. L. J. R., 606. Although the suit was brought in 1910 after the enforcement of the new Civil Procedure Code yet the auction sale was held in 1907, the relations were created in 1907, the right vested in the auction-purchaser in 1907, everything took place in 1907 before the new Code came into force. RICHARDS, C. J., clearly observes at page 611 "we, therefore, think that assuming that the plaintiffs had any cause of action, their cause of action was to enforce the right which was given to them by sections 313 to 316 of the Code of Civil Procedure of 1882 (which admittedly was in force at the time of the sale and distribution of the purchase money in the present case)." Page 611. But their Lordships clearly say at the same place "we agree that outside the provisions of the Code of Civil Procedure to which we shall presently refer, an auction-purchaser has no right to re-

cover back the purchase money merely by showing that the judgment-debtor had no saleable interest."

We now come to Order XXI, rule 93 of Act V of 1908. It says "where.....shall be entitled to an order for re-payment of his purchase money" whereas section 315 of Act XIV of 1882 only provided "when.....shall be entitled to receive back his purchase money." The distinction is wholly clear. And there appears to be no ground for any ambiguity. As stated above, only one or two cases will be discussed. In *Muhammad Najib-ullah Khan v. Jai Narain*, 12 A. L. J. R., 908, the effect of the decision was to recognise such a suit.

The facts of the case were briefly these :—

C executed a mortgage in favour of *R*, father of the defendant *I* on 14th October, 1887. A decree was obtained on foot of this mortgage in the year 1892. Certain property was sold in execution of the decree on the 26th of November, 1910 and purchased by the plaintiff. The sale was confirmed and the plaintiff was put in formal possession. On application for mutation plaintiff found that *C* had already sold the property under two sale deeds, dated 17th September, 1880 and 23rd of June, 1886.

Issue was remitted in the case, but we do not know what the judgment was, but, as submitted above, the effect of the decision was the recognition of such a suit. Their Lordships remanded the following issue "Had the judgment-debtor any saleable interest in the property at the date of the sale?" It is submitted that it was unnecessary. The suit should have been dismissed in either case. If the judgment-debtor had a saleable interest, even though the most trifling, the suit was bound to fail, and even if there was no saleable interest, it should have failed. At page 910 their Lordships say "we find it, however, impossible to distinguish the present case from the case of *Munna Singh v. Gajadhar Singh*". With great respect, it is submitted it was not governed by that case. The sale which clothed the plaintiff with his right was held in 1910, that is, subsequent to the enforcement of the new Civil Procedure Code, and, consistently with their Lordships' observations in *Sidheshwari Prasad Narain Singh v. Goshain Maya Nand*, the suit ought to have been dismissed.

The decision in *Nannu Lal v. Bhagwan Das*, 14 A. L. J. R., p. 1216, clears most of the difficulties and held that such a suit was not maintainable. Their Lordships recognised the distinction between Act V of 1908 and Act XII of 1882 in this respect. "It is only necessary" said their Lordships at page 1220 "to point out that there is a marked difference in the terms of the present Code of Civil Procedure and the Civil Procedure Code of 1882."

The recent case of *Girdhar Das v. Sidheshwari Prasad Narain Singh*, 14 A. L. J. R., p. 236, is on all fours with the earlier case of 1913 reported in 11 A. L. J. R., p. 606 and notwithstanding the editor's remark "See, however, *Nannu Lal v. Bhagwan Das*, I. L. R., 39-All., 114, which does not seem to have been cited" there appears to be no inconsistency in it. In *Nannu Lal v. Bhagwan Das*, the sale was held in 1908, whereas, in this case it was held before 1908. The two, therefore, differ in the most material particular.

But, for all that, our difficulties do not end. *Muhammad Najib-ul-lah Khan v. Jai Narain*, 12 A. L. J. R., p. 908 has not been overruled, not even dissented from and is totally inconsistent with *Nannu Lal v. Bhagwan Das*. The former was cited in the latter case, but their Lordships summarily dismissed it, after a brief reference, "Possibly there was a finding that the judgment-debtor had a saleable interest." This does not go to the root of the question and does not carry us any further. The case merited a more detailed examination; for, as already submitted the suit should have been thrown out in either case whether the judgment-debtor had a saleable interest or no. The difficulty is that both are Division Bench rulings. We ought to have a clear and definite pronouncement overruling one or the other and so long as this is not done we can only exclaim with the great Goethe, as he was about to cross the bar and face his pilot, "*More light.*"

Gorakhpur.

SHIVA PRASAD SINHA.

CIVIL ACTION FOR MALICIOUS PROSECUTION.

Points for determination.—The success or the failure of a civil suit for damages for malicious prosecution must depend upon a careful and correct interpretation of the entire criminal proceedings brought about at the instance of the defendant, as well as a sound application of the legal principles enunciated and laid down by jurists and case-law concerning the elements that constitute, or show the absence of, 'malice' and 'reasonable and probable cause.'

Scope of Civil Courts.—In trying the various issues of facts as well as law the *forum* of the Civil Court remains absolutely unaffected by the proceedings in the Criminal Court already gone into which will not be evidence in the former, 14 W. R. 339; 9 Bom. L. R., 1134. But the admissibility in evidence of the judgment of a Criminal Court cannot be questioned, 1 C. W. N., 537. If the Criminal Court pronounces in clear terms that the charge as brought

was false and that the complainant had no grounds at all to bring the same, it shall be a strong factor for the Civil Court to take into consideration in determining the plaintiff's claim for damages for malicious prosecution 6 W. R., 29, though its discretion will not, in the least, be hampered by any pronouncement of the former. The plaintiff's claim for damages is, however, much weakened if the trying Magistrate gave him the benefit of doubt. This again will not deter the plaintiff from maintaining an action for malicious prosecution and adducing evidence to demonstrate his innocence, the malicious motives of the defendant, and the utter absence of reasonable or probable cause for bringing the accusation complained of. Altogether unfettered, therefore, by the Criminal Court decision, the civil tribunal may arrive at its own conclusions warranted by the evidence subsequently recorded before it. Hence his mere acquittal from a Criminal Court will not necessarily fetch the plaintiff a pecuniary compensation in a civil suit for damages for malicious prosecution. A dismissal of a charge may be on various grounds. In the civil suit the plaintiff has to satisfy the court that the prosecution was both malicious and without reasonable and probable cause, 17 W. R., 283 ; I. L. R., 25 Bom., 332.

Joinder of Parties.—Another very important question is that of the proper joinder of parties which, though a vital factor in an action for malicious prosecution, is very often ignored. Where the non-joinder may not in the least affect the form of the plaint, misjoinder in certain cases might prove fatal to the entertaining of the suit. And while the misjoinder of defendants might be considered to be only a formal defect leading to the award of costs to the defendant unnecessarily impleaded, the misjoinder of plaintiffs in an action for malicious prosecution must lead to a rejection or a return of the plaint, on the very clear principle that the reputation of every individual being different, any loss accruing to it, or the mental botheration or the social opprobrium that attends a prosecution, must be taken to be separate and distinct in the case of each plaintiff, though the loss to his reputation has resulted from one and the same conduct of the defendant. *Aldridge v. Barrow*, I. L. R., 34 Cal., 662; *Ali Serang v. Beadon*, I. L. R., 11 Cal., 524 ; I. L. R., 25 Bom., 259. In a civil suit for damages for malicious prosecution, therefore, each plaintiff has a different cause of action, and a joint suit must prove fatal and lead to its dismissal. It is not yet satisfactorily settled whether the real instigator behind the scene, for causing a false or vexatious complaint to be lodged or the prosecution witnesses in falsely instituted criminal proceedings can, without any legal flaw, be impleaded along with the complainant, as defendant in a subsequent civil action for damages. (Compare 1 C. W. N., 537.)

Onus on Plaintiff.—Great indeed is the *onus* that the plaintiff has to discharge in initiating civil proceedings for malicious prose-

cution. And succeed he must if he satisfies the court (a) that the defendant prosecuted him, (b) that the complaint was false and that he was innocent, (c) that the defendant had no reasonable or probable cause in bringing the accusation against him, (d) that, in doing so, the defendant was prompted by malicious considerations, (e) and that his credit or reputation has been injured or that he has suffered some kind of damage.

(a) *Prosecution by defendant*.—The principle applicable on the point in this country is that the plaintiff must have been prosecuted by the defendant for an offence. The word prosecution, in this connection is important. An application to a competent Magistrate under section 107 of the Criminal Procedure Code is not tantamount to a prosecution; and the unsuccessful applicant cannot be made to pay damages in a subsequent civil action for malicious prosecution. *Kandasami v. Subramania*, [1902] 13 M. L. J. R., 370. And the same principle should hold good even if the application for security contains statements which might prove to be discrediting to the reputation of the person from whom security is sought, for the applicant in a Criminal Court has to show the acerbity of feelings subsisting between the parties and the consequent apprehensions of a breach of the peace. It is true that exaggeration in such circumstances is commonly noticeable. The question, however, in an application for security with false and damaging assertions is more of defamation than malicious prosecution which, more often than not, leads to a confusion of issues. (As for Defamation see *infra*). Also an unsuccessful application under section 195, Criminal Procedure Code, affords no cause of action in a suit for recovery of damages on account of malicious prosecution. *Ezid Balhsh v. Harsukh Rai*, [1886] 1 L. R. 9 All., 59. The next puzzling question is whether an information to police and the unsuccessful prosecution of the plaintiff thereon, or owing to the action of the court ‘*suo motu*,’ will amount to a malicious prosecution by the informant so as to render him liable for damages in a subsequent civil suit. The answer depends upon the whole circumstances of the case, and the law is laid down very clearly in *Gaya Prasad Tiwari v. Sirdar Bhagat Singh*, [1908] I. L. R. 30 All., 525 (P. C.); also *Bandi v. Ram Din*, 6 A. L. J. R., 516; again see I. L. R. 36 Cal., 278, (Compare, however, I. L. R. 24 All., 317; I. L. R. 26 Mad., 362).

(b) *Innocence of plaintiff*.—The burden of proving his innocence undoubtedly lies on the plaintiff. It has also been thought that he should further prove that his innocence had been pronounced by the tribunal before which the accusation was made. I. L. R. 24 Mad., 59. The proof, however, of a pronouncement of innocence from a Criminal Court cannot always be had, for instance when the trial court gives the accused the benefit of doubt, or when the complaint is dismissed for default or when the

complainant himself applies for the withdrawal of his complaint. It is clear that it is not intended that the accused can have no civil remedy in these cases simply because he, at any rate, had not to undergo a more or less complete trial. The innocence or otherwise of the plaintiff, however, is purely a question of fact.

(c) *Reasonable or probable cause.*—Here also the *onus* is on the plaintiff to show that he had been prosecuted without any reasonable or probable cause. 14 W. R., 339; 17 W. R., 283; I. L. R. 25 Bom., 332; I. L. R. 8 Mad., 151; 6 B. L. R., 371. In the case, however, of an apparently false charge the defendant has to discharge the burden that he had reasonable and probable cause for making it. 20 W. R., 177. The question of reasonable and probable cause, is a mixed question of law and fact. As to what constitutes reasonable and probable cause, see *Bhim Sen v. Sita Ram*, [1902] I. L. R., 24 All., 363; and 12 C. L. J., 410. If any charge out of a number of charges is without probable cause, the liability for malicious prosecution cannot be avoided. 5 Bom. L. R., 940 (*cf.* I. L. R. 27 Cal., 532, and *differentiate.*)

(d) *Malicious considerations.*—An action for damages for malicious prosecution can succeed only if the plaintiff shows both malice and the absence of reasonable and probable cause I. L. R. 8 Mad., 151; and I. L. R. 28 Cal., 591. Malice in law is not to be presumed from the mere absence of reasonable and probable cause, (I. L. R. 13 Mad., 394; I. L. R. 24 Mad., 549); it should, however, be taken in the sense of “*malus animus*,” denoting that the party is actuated by improper and indirect motives, I. L. R. 24 All., 363 and 12 C. L. J., 410. Similarly the existence of malice cannot lead us to legitimately infer the absence of reasonable and probable cause which, when found to exist, will prove fatal to an entertainment of the civil action for malicious prosecution, (*Willans v. Taylor*, 6 Bing., 183). Again, malice will not be inferred merely from the acquittal of the plaintiff. 12 W. R., 402. Where the charge of assault against the plaintiff is dismissed, but it appeared that there was “criminal intimidation” on his part, he would not be entitled to any damages as no malice or dishonest motive could be imputed to the defendant in bringing the charge of assault. I. L. R. 27 Cal., 532 (*cf.* 5 Bom. L. R., 940, *supra*, and *differentiate.*)

(e) *Damages*—The plaintiff has to show some damage to him as a result of the prosecution. It may be to his fame, person or property. The damages claimed must be directly associated with, and be the resultant of, the prosecution, and must not be unconnected with it. The true criterion of the amount of damages should not, as a rule, be the sum claimed by the plaintiff, but the harm that has been caused to him by the nature of the defendant's conduct, measured by considerations of the position and status of the defendant sued. It would not be wrong to say that, in most cases, the status of the defendant should be the only guide in determining

the amount of an award of damages, more so because the question of the amount of damages is a question of fact and the High Court will not interfere in second appeal upon such a question. [1909] I. L. R. 31 All., 333, *Musammatt Dhuman v. Sayed Abdullah Khan*.

Acquittal from an appellate court.—This is another perplexing problem. It is not subject to any hard and fast forensic formulæ. Equitable considerations based on the real circumstances of the case in hand will prevail over any definite legal principles, in determining the maintainability or otherwise of a civil action claiming damages for being falsely and maliciously prosecuted. It should be borne in mind that the plaintiff's acquittal from an appellate authority cannot, in law, always entitle him to sustain a suit for damages against the complainant in the criminal proceedings. Does it not involve the clear reasoning that the conviction and sentence of the lower Criminal Court would have remained intact had the higher tribunal not reversed the order complained of in appeal and acquitted the accused? Plaintiff's former conviction, though subsequent acquittal, will, therefore not entitle him to sue the complainant civilly, unless very cogent and trustworthy evidence is adduced, and the existence of very exceptional circumstances shown, by him to prove that the Criminal Court of first instance decidedly erred in convicting him. *Jadubar Singh v. Sheo Saran* [1898] I. L. R., 21 All., 26; I. L. R., 3 Mad., 238; I. L. R., 24 Mad., 549; 10 W. R., 439; 13 W. R., 276; 12 C. L. J., 410; 2 N. W. P., 88; 2 L. B. R., 111. But at the same time his acquittal on appeal will help the plaintiff in civilly suing the defendant if it becomes manifest that the latter falsely instituted the criminal proceedings and supported the same by evidence, the falsity of which he was fully conscious of *Padarath v. Dulam*, 10 A. L. J. R., 423; [1902] I. L. R., 26 Mad., 506; [1906] 16 M. L. J. R. 18. The whole matter is, therefore, purely discretionary; and the decision hinges on carefully weighing the facts of each case.

Survival of cause of action—In a suit for damages for malicious prosecution, plaintiff's death before trial will not entitle his legal representatives to be brought on record. No cause of action survives to them. (I. L. R. 31 Cal., 406). But the defendant's death will entitle his legal representative to prosecute the second appeal preferred by him when he dies in the course of the appeal. (I. L. R. 26 Mad., 499). On grounds of public policy, however, the complainant's legal representatives ought not to be made liable, after his death, for the criminal proceedings initiated by him in his life-time.

Defamation—The present article does not deal with the theme of defamation. But defamation is sometimes closely associated with malicious prosecution. The question as to whether a criminal complaint dismissed under section 203, of the Code of Criminal Procedure will entitle the plaintiff to sue the complainant for

damages in a civil suit for defamation, has now been fortunately settled by the Full Bench ruling of the Allahabad High Court in the quite recent case of *Chunni Lal v. Narsingh Das* (16 A. L. J. R. p. 360).

N. B.—In the above article the subject of malicious prosecution has not been discussed in all its aspects. Only the controversial points have been taken up.

ANJANI NANDAN GAUR, B. A., LL. B.,

[Is the question of reasonable and probable cause in an action for malicious prosecution a question of law or a question of fact? See I. L. R., 25 Bom., 398.—*ED.*]

CASES AND COMMENTS.

Local authority—Notice to frontager to build—Time allowed too short—Notice invalid.

Corporation of Bristol v. Sinnott, [1918] 1 Ch., 62.

This case, though it turned upon the construction of the Public Health Act, 1875, laid down a rule of general importance. Under section 150 of that Act power is given to the local authority that where a street is not sewered (and so on) to their satisfaction, they may serve a notice on the owners or the occupiers of the premises fronting, adjoining or abutting on the street requiring them to do the work within a time to be specified in such notice. If the notice is not complied with, the local authority may, if they think fit, execute the works mentioned themselves and recover the expenses so incurred from the frontagers. Power to execute the works and charge the frontagers is conditional upon due service of the notice and non-compliance with it. The local authority served a notice requiring the defendant to execute certain works within one calendar month of the service of the notice. The period of one month was fixed as a mere matter of practice without reference to whether it was a reasonable time for the completion of the work, and was, in fact, grossly insufficient for the purpose. The defendant did not comply with the notice, nor did he take any objection as to the sufficiency of the time allowed. The local authority waited for three months, then executed the works themselves (it took them four months), and afterwards brought the present suit to recover the expenses incurred by them in so doing. The Court of Appeal, affirming *NEVILLE, J.*, gave judgment for the defendant. The court held that no proper notice having been given, the defendant was not liable. "Where a statute provides that an authority may serve a notice for work to be done within time to be

specified in such notice it must, in order to be a valid and not an illusory notice, specify a time within which the work can reasonably be completed. The authority must consider the nature and extent of the work and having regard to the circumstances, the time which ought fairly and reasonably to be allowed for the completion of that work. They have no discretion to fix a shorter time. When once the least time that could be fairly and reasonably allotted for the completion of the work has been ascertained that is the least time to be inserted in the notice. They have, however, a discretion to allow further time," but they are bound to allow reasonable time in the first instance. A notice which is insufficient in point of time would not be a compliance with the statute and would not, in the event of non-compliance, give the local authority any right to enter and complete the work themselves. Similar provisions are to be found in various Indian Statutes, more particularly in Municipal Acts, and this aspect of the matter should be borne in mind.

Free and Compulsory Education—Right of parent to free Education of his children—Whether enforceable.

Gateshead Union v. Durham County Council, [1918] 1 Ch., 146.

This case raised an interesting question of great importance, namely, whether a parent, who is compelled under the various Education Acts to send his child to school and has the benefit secured to him of having him educated free can enforce his right as against the education authority. The Court of Appeal held that he could. A statutory obligation to provide education without fee and without religious restriction, if broken, gives a right of action to any person specially injured by the breach of such an obligation though he is not expressly mentioned in the statute. A parent is a person specially injured by any unauthorized exclusion of his child from the free education to which he is entitled, and therefore is a person entitled to sue for such a breach of statutory obligation. A duty to send the child to school obviously implies a right to have him taught free of charge. The school authorities can, of course, refuse admission on other reasonable grounds, such as breach of school discipline, not inconsistent with the right of the parents to the free education of their children.

Original lease—Reversionary lease to commence more than twenty-one years after its date—Whether valid—Rule against perpetuities.

Mann, Crossman & Paulln v. Land Registry (Registrar),
[1918] 1 Ch., 202.

This case raised a point which is absolutely clear under the Indian Transfer of Property Act. The question was whether a reversionary lease, for a term to commence more than twenty-one

years after its date, offended the rule against perpetuities. Doubts had been thrown by the text-writers that it did, but NEVILLE, J., in a considered judgment held that it was perfectly valid. It is necessary that a lease should come into force at some fixed date, but that date may be past or in future. The interest thus created in the lessee is obviously a vested interest within the meaning of section 19 of the Transfer of Property Act, and is a heritable and alienable right *in rem*. It is not a mere agreement but gives rise to an absolute proprietary right to take possession of the land when the stipulated time for the commencement of the term arrives see *Pitchakutti v. Kamala*, 1 Mad. H. C. R., 153.

Gift to provide an annual treat for school children—Whether good.

Mellody, *In re*, Brandwood v. Haden, [1918] 1 Ch., 228.

The courts are always anxious to support a gift which may in any way tend to the advancement of education or promote the welfare of scholars. It is not necessary that it should be intended to relieve poverty nor is a gift bad simply because it superficially appears to provide amusement rather than instruction. In the case under notice, a testatrix bequeathed the income of a fund in trust to provide an annual treat or field day for the school children of a particular locality, or as many of such children as the same would provide for. EVE, J. sustained the bequest as a good charitable gift on two grounds:—(1) as tending to the advancement of education by giving the children an opportunity of observing objects of the country side and of nature about which they had been taught at school and also by affording an incentive to regular attendance and industry in order to be selected as participants, and (2) as being for purposes beneficial to a particular section of the community namely, the School children, resident or being educated in that locality.

Gift to persons age of twenty-five—Date when age reached.

Shurey, *In re*, Savory v. Shurey, [1918] 1 Ch., 263.

The testator left his residuary estate upon trust for such of his three sons, O. S. and two others who were named, "as shall attain the age of twenty-five years." The eldest son, O. S. was born on July 22nd, 1891, and died on July 21st, 1916—Namely on the day immediately preceding the twenty-fifth anniversary of the day of his birth:—*Held*, by SARGENT, J., that O. S. had attained the age of twenty-five years at the time of his death. Popularly speaking, a man is said to attain the age of twenty-one years on the twenty-first anniversary of his birthday, but the legal rule is different and well-settled. Shortly put in legal computation the day of the birth is not excluded and on the anniversary of each birthday a person really commences a fresh year of his age. See 13 C. W. N. 1197.

Company—Director—Payment of dividends out of current profits—

Least capital on Revenue account—Misfeasance.

Ammonia Soda Company v. Chamberlain, [1918] 1 Ch., 266.

Under section 235 of the Indian Companies Act, 1913, (corresponding to section 215 of the English Act) it is well-settled law that directors are liable to refund to the company all dividends paid out of capital. This would be so even though the action of the directors had been approved by the share-holders in a general meeting, the reason being that payment of dividends out of capital is *ultra vires* the company. The rule sometimes operates very harshly, and it was sought to be extended still, further, though unsuccessfully, in the case under notice. The plaintiff company carrying on a newly-established business incurred losses on its trading account for some years after its incorporation and subsequently made profits. The directors set-off the losses against an appreciation of the company's capital assets as ascertained by a valuation made by two of the number who were not expert valuers and approved by the company in general meeting and paid dividends out of the subsequent net-profits without any further provision for replacing the losses. It was argued on behalf of the company that wherever there was a debit to the profit and loss account irrespective of the way in which it arose, of the stage in the company's operations, and of the nature and business of the company it was illegal to divide profits subsequently earned without first writing off out of those profits the amount of the debit. The Court of Appeal did not accede to this contention and held that there was no duty on the part of the directors, apart from considerations of financial stability of the concern, to appropriate profits made in a particular year in order to wipe off losses incurred in previous years. If capital is once lost in any particular year, it is lost and cannot be taken into consideration. There is no statutory obligation to replace it out of the profits subsequently made. This case will probably be taken up to the House of Lords, but the rule enunciated by the Court of Appeal appears to be just and equitable, the more so when one bears in mind the fact that dividends are declared by approval of the company in general meeting, and subsequent attempts to compel the past directors to make good to the company all dividends so paid are offspring of greed and ill-will. Directors, provided they act honestly and *bona fide*, should not be made to suffer for mere errors of judgment.

The distinction between "fixed" and "circulating" capital of a company is clearly brought out in the judgment of SWINFEN EADY, L J:—"The fixed capital of a company is what the company retains in the shape of assets upon which the subscribed capital has been expended and which assets either themselves produce income independent of any further action of the company or, being retained by the company are made use of to pro-

duce income or gain profits. The circulating capital of a company is a portion of the subscribed capital intended to be used by being temporarily parted with and circulated in business in the form of using goods or other assets which or the proceeds of which, are intended to return to the company with an increment and to be used again and again and always return with accretions. When circulating capital is expended in buying goods which are sold at a profit or in buying raw materials from which goods are manufactured and sold at a profit the amount so expended must be charged against or deducted from receipts before the amount of any profit can be considered."

Bye-laws—Void for unreasonableness.

Repton School Governors v Repton Rural Council, [1918] 1 K. B., 26.

It is settled law that bye-laws made by local authorities may be declared bad by the courts for unreasonableness. BAILHACHE, J., after referring to the dictum of LORD RUSSELL, C. J., that bye-laws ought to be benevolently interpreted and supported if possible, laid down principles of general application with particular reference to building bye-laws: "if the effect in a given case, which might be of frequent occurrence, of construing a bye-law in a particular way would lead to a result quite unnecessary for the protection of the public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think one would be entitled to say that the bye-law was void because it was unreasonable. One must, of course, be careful to see that the result is such as no one would desire, and would in itself be absurd, but if it is found to be so" then such a bye-law is bad for unreasonableness. The case under notice furnishes an apt illustration of such an unreasonable bye-law. The plaintiffs proposed to build an addition to the front of one of the school boarding houses consisting of a projection containing three rooms one above the other. The defendants refused to approve the plans as the proposed addition would infringe one of their bye-laws, which provided that "every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building and of an aggregate extent of not less than one hundred and fifty sq. feet." BAILHACHE, J., held that the bye-law was unreasonable and therefore bad inasmuch as it was obviously impossible to provide an open space at the rear of a new building which consisted of an addition to an existing building.

NOTES AND CUTTINGS.

We are indebted to Mr. Joseph Heighton for the following extracts from his recent book called *Legal Life and Humour*. Comment is unnecessary.

The accusation which has often been levelled against Judges that they cling to the court too long, and should seek retirement or be compelled to retire long before they do, reminds one of a story told of Sir William Wightman, who held office in the old Court of Queen's Bench far beyond the prescribed time. But at last, on the eve of the long vacation, he took a sort of farewell of his brother Judges. However, when the court sat again he turned up smiling at Westminster Hall.

"Why, brother Wightman," said Sir Alexander Cockburn, "you told us that you intended to send in your resignation to the Lord Chancellor before the end of August."

"So I did," said Sir William "but when I went home and told my wife she said :

"'Why William, what on earth do you think that we can do with you messing about the house all day? So you see I was obliged to come down to court again.'"

There is another story told of Lord Coleridge and it is still more amusing :—

"An action was being tried before him for damages for the death of a sheep dog, a winner of many prizes at bench shows, and counsel for the defence was endeavouring to show that the dog had "had his day," and that damages should be nominal. Lord Coleridge, however, was sweetly slumbering, and counsel felt the necessity for rousing him, if possible. So, gradually raising his voice he asked one of the plaintiff's witnesses :

• "Is it your experience, as an exhibitor, that when an old dog has taken his place regularly on the bench for many years he gets sleepy and past his work?" The laughter that followed had the desired effect."

"A wise old lawyer of our own time, looking over the shoulder of a pupil who was engaged in writing an opinion on some apparently simple question, ran his pen through the words, "I am *clearly* of opinion," which the novice had written. "My young friend," he said, "never write that you are *clearly* of opinion on any question of law. When you have my years and experience the question you will always have to determine is, on which side the doubt predominates."—*The Lawyer and Magistrate*.

LAW LIBRARY.

HINDU LAW AS ADMINISTERED IN BRITISH INDIA. By Sir Ernest John Trevelyan, D. C. L., Second Edition, Revised, Thacker Spink & Co., Calcutta, 1917. Price Rs. 20.

We welcome with pleasure the second and revised edition of Sir John Trevelyan's well-known book on Hindu Law. It is a tried friend of the Profession and we need not say much in its praise at this time of day. In lucidity and skill of arrangement and accuracy of statement it can hardly be surpassed by any other legal textbook on the subject. This edition has been brought up-to-date. All the recent cases have been noticed, and their full effect brought out with rare exceptions. For instance while discussing the recent case of *Salu Ram Chandra v. Bhup Singh*, [1917] 15 A. L. J. R., 437, the author overlooks the *dictum* of LORD SHAW about the pious liability of the Hindu son which has been perplexing the Indian Courts and has already led to a conflict of authority. The citation of cases so far as we can see is complete except that all non-official reports (but two favoured ones) have been ignored. But these are minor points and we have no doubt that this work will continue to occupy the leading position it does in the lawyer's library. The get-up is excellent.

THE CODE OF CIVIL PROCEDURE, BEING ACT V OF 1908, WITH EXPLANATORY NOTES AND COMMENTARIES. By D. F. Mulla, M. A., LL.B., Students Edition, Bombay, N. M. Tripathi & Co., 1918. Third Edition. Price Rs. 6-8-0.

It has always appeared to us that Mr. Mulla's various law books for the use of students are almost perfect of their kind. With lucid exposition of the underlying principles supported by reference to the leading authorities on the subject they are not over-laden with cases. His Student's edition of the Code of Civil Procedure is exceedingly well done. Notes are clear and well adopted for the comprehension of a beginner in legal studies. In this edition the recent cases up to the end of 1917 have been duly noticed, and the rules framed by the various High Courts under section 122 of the Code have been reproduced in the Appendix. We have no doubt the present edition will prove as useful and as popular as any of its predecessors. The book is exceptionally well printed and got-up.

JUDICIAL INTERPRETATIONS OF TERMS AND LAWS OF BRITISH INDIA, CIVIL. By Lalit Mohan Ghose, B.L., Vakil High Court, Two Vols. 1917, Calcutta, Messrs. Thacker Spink & Co. Price Rs. 12.

This is the first work of its kind in Indian legal literature and will, we trust, meet a long felt need. It is described by the author as a treatise containing judicial interpretations of words, phrases, and expressions occurring in Indian Enactments, deeds, text-books of Hindu and Mohammedan Laws; and also such Subjects and Principles of law as rest on such interpretations and are of constant applications in Indian Courts with a historical review of the case-law on each." The task which the author set to himself was rather ambitious but he has carried it out with a reasonable amount of success. It covers practically the whole field of Indian Case-law and Mr. Ghose has spared no pains over his work. The words and phrases are dealt with in alphabetical order with a reference to the section of the Act (if any) where they occur, then follows a succinct definition or explanation supported by reference to the authorities in point. On various questions where there is conflict of judicial opinion the history of the law on the point is treated with greater fullness in foot-notes. There are several Indexes. Index A is an Index of statutory terms as interpreted by the courts, Indexes B & C contain the words in Indian deeds and text-books of Hindu and Mohammedan Laws respectively. The remaining two are subject Indexes, one of the subjects and principles of law dealt with in the book, the other summarises the Interpreted Laws under the various provisions of the important Indian Acts. There are frequent references to the author's projected work "the Annotated Index of Disapproved Cases" which has not yet been published. The present work is confined to the civil law, the interpretations of terms occurring in the criminal law will, it is said, be published in a separate volume. We have read the book with interest and profit. In the first edition it would be unreasonable to expect perfection, the more so, when one has regard to the enormous litigation of the most varying kind in such a country as India. To take a single instance the judicial interpretations of the words and terms appearing in *wajib-ul-arzes* in these Provinces relating to pre-emption would fill a small volume. Then again the number of enactments, Imperial and Local, is so large as to require a book almost for themselves for satisfactory treatment. It is but natural that in a first venture like this, cases should have escaped notice. For example we do not find any reference to the leading case of *Kamta Nath vs Chairman Municipal Board Allahabad*, where Knox, J., defines the meaning of the word "erect" occurring in section 87 of the U. P. Municipalities Act (I of 1900). Such omissions are but natural and will, we hope, be remedied in the next edition. To save space, may we suggest to the learned author that long disquisitions in a book of this nature on such contentions topics as *res judicata* are out of place. They cannot but be fragmentary and elementary and cannot, in our opinion, serve any

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PARTICULARS.

The subject of Particulars is dealt within Order 6 of the Code of Civil Procedure which deals with pleadings and not in Order 11 which deals with the subject of discovery and inspection; yet particulars are also a branch of discovery. Rule 4 of Order 6 provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence and "in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid particulars (with dates and items if necessary) shall be stated in the pleading." It will be noticed that the rule is silent as regards the case of a plaintiff suing for accounts nor is any assistance to be derived on referring to the forms, as these do not specifically provide for particulars. The Bombay High Court has framed rules for the guidance of litigants and Rule 88 provides that in case of debt, there shall be annexed to and filed with the plaint a bill of particulars of the plaintiff's demand.

The subject can be considered in reference to a claim to a general account and in reference to a claim to a specific account. It is now well settled by the authorities that when the plaintiff claims a general account, he need not give particulars of the sums which he says the defendant has received to his use; if however a specific amount is claimed, particulars must be given. The decided cases further go to show that the mere asking for an account will not prevent the court ordering particulars, but if the court is satisfied that an account must be taken, it will not order particulars. The party from whom particulars are sought often declares that he cannot give any further information or that he cannot do so without laborious research. Such objections, if—genuine, are often met by an order that he shall deliver forthwith the best particulars which he can at present give, with liberty to supplement them not less than 14 days before the trial.

Augustines v. Nerincka, [1880] 16 C. D., 13 was an action by a legal personal representative in respect of advances alleged to have been made by her intestate, under an agreement in the

nature of a partnership agreement and sought to establish a lien upon a certain fund, of what should be found due. The defendant applied for particulars of the sums advanced and the times when they were advanced. On the ground that no specific sum was claimed and only an account was asked for, JESSEL, M. R. declined to order particulars. Another case in point was that of *Blackie v. Ormastein*, (1884, 28 C. D., 119) which was a claim by executors to recover one-half of a sum of £16,233-9-7, alleged to have been paid by their testator and themselves and for which they sought to hold the defendant liable to pay one-half. The defendant applied for particulars. Council on behalf of the executors contended that the question was one merely of amount and the *onus* of proof was on him to show what sums had been paid and there was no occasion for particulars. The matter was heard by LORDS JUSTICES BAGGALLAY, BOWEN and FRY. LORD JUSTICE BAGGALLAY observed.—“If the action had been merely for an account of what the plaintiffs and their testator had paid, I should have been of opinion that an order for particulars ought not to be made. But that is not the case. The plaintiffs allege that they and their testator paid sums of money under the suretyship mentioned in the statement of claim and received various sums by way of contribution from other sources, and that after deducting sums so received, there remained due a balance of £16,233-9-7 of which alleged balance, they ask that the defendant may be decreed to pay one-half. Under a statement of claim in the present form I think particulars would be very useful for enabling the defendant to frame his defence.” The learned Judge observed that it was not the practice to order particulars when the plaintiff sought only a general account but it was otherwise where he asked for payment of a definite sum, and that the distinction drawn in *Augustines v. Nerinckx* between claims for an account and claims for a definite sum, was sound and should be adopted. Likewise BOWEN, J., observed that the case being for a specific sum, made up of items presumably not known to the defendant, particulars were of course.

An objection of a different character, to the giving of particulars was taken in *Kemp v. Goldberg*, [1887] 36 C. D., 505. This was a redemption action filed by the mortgagor against the mortgagee. The latter put in a counter-claim, in the course of which he stated:—“The defendant has since the date of the sale, received divers sums in respect of the moneys due to him on open account as aforesaid, but after giving credit for all moneys so received, a large balance is still due and owing from the plaintiff to the defendant.” In showing cause against the mortgagor’s summons for particulars, the defendant contended that in a mortgage action when an account is asked for, no particulars should be ordered, as to do so would in fact be anticipating an account that must be taken. NORTH, J. disallowed this contention. In the

course of his judgment he said.—“This is a claim for a definite sum and nothing else. It seems to me a case in which common sense requires that the defendant who has the sole means of knowledge, should state what he has received. The plaintiff will have the opportunity if he knows the amount, of paying off the balance claimed. It does not seem to me that merely because an account is asked for particulars should be refused.” The matter received further elucidation in *Godden v. Gorsten*, [1879] 5 C. P. D., 17, in which it was held that the plaintiff may be ordered to give particulars of items which are, in his claim, *placed to the credit of the defendant*, citing the opinion of COCKBURN, C. J. in 3 Q. B. D., p. 9 that a party who was placed in the predicament of being liable to have a Judgment signed against him summarily, was entitled to have sufficient particulars to enable him to satisfy his mind whether he ought to pay or resist. LORD COLERIDGE said:—“here the credit being general and the items various, and the total put at a lump sum, it was evident that the defendant not only may not know but apparently does not know which of the items these credits are given for, still less does he know what particular sums the plaintiff has allocated to separate items, and if the defendant wanted to plead payment or set-off it is essential that he should know what items the plaintiff has given him credit for. No hardship is imposed on the plaintiff by making him bring out the credits into £-s-d for he must know and can easily state, how the specific sum for which he gives credit is made up.”

The following two cases which were between principal and agent show the dividing line. In general *Stock Exchange v. Bethel*, (1885-6, 2 T. L. R., 683) the defendant alleged that he had employed the plaintiffs as his agents for the sale and purchase of stocks through brokers on the Stock Exchange. The plaintiffs had rendered him accounts and when the transactions had ceased, sent him on a balance of account. The defendant pleaded that the plaintiff had not bought and sold stocks, as authorised by him but had themselves speculated in them, and that they had given fictitious accounts and he sought to obtain particulars from them the dates of the purchases and sales, and the names of the persons to or of whom the shares had been sold or bought by the brokers employed by them on the Stock Exchange, of the amounts paid by them on his behalf and the mode of payment of such money. The court held that the only question between the parties being whether or not the plaintiffs acted within the authority given to them by the defendant, he was not entitled to the particulars for which he asked. On the other hand in *Litch v. Albot*, (31 C. D., 374) the plaintiff alleged that he had employed the defendant as a stock broker, but that the defendant had in many of the transactions dealt with himself as principal and had also charged

the plaintiff with moneys not paid. The plaintiff delivered interrogatories asking for the particulars of the dealings on behalf of the plaintiff and the names of the persons with whom defendant had dealt and the amounts paid. The defendant refused to answer on the ground that the plaintiff was not entitled to this information until after decree. The court held that having regard to the relation between the parties which was that of principal and agent, though there were no particulars of the fraud alleged, the plaintiff was entitled to discovery in order to enable him to give details of the fraud alleged.

A number of cases have been decided in England on the sufficiency or otherwise of "special endorsements" within the meaning of Order 3, rule 6, which help to elucidate the principles underlying the question. In *Walker v. Hicks*, (L. P. Rep., 37; N. S. P., 329) a writ was endorsed as follows:—£399 the defendants share or contribution to payment of certain bills and Promissory notes on which he and the plaintiffs were jointly liable and which bills and notes have been taken up by the plaintiffs on the joint account of themselves and the defendant. "The court held this to be an insufficient endorsement." Similarly in *Parpaite Freres v. Dickinson*, (38 L. T. R., N. S., 178) a writ was endorsed as follows:—"The plaintiffs' claim is £2,323 being 75% of the invoice price of goods supplied by the plaintiffs to the defendant, under an agreement entered into between the plaintiffs and the defendant in or about March, 1877, whereby the plaintiffs agreed to consign the said goods, to the defendant for further consignment by the defendant to Australia;" this was held insufficient to enable the plaintiff to sign final judgment under Order 14.

The Code does not provide for penalising a party for disobeying the rule as to giving particulars, in the way the law allows in England. In *Davey v. Bentink*, (1893, 1 Q. B. D., 185) which was a suit for services performed and money paid by the plaintiffs for the defendant at his request and on an account stated, the court ordered particulars and when the particulars given were not satisfactory, the court dismissed the plaintiff's suit.

The Indian Reports are singularly, devoid of cases on this branch of pleadings. It may therefore be permitted, to express the hope that the courts will encourage particulars on the principles so well settled in England, thereby simplifying matters in issue and saving unnecessary costs to litigants, of protracted hearings.

NAYAN H. PANDIA.

CASES AND COMMENTS.

Salamat Zamin Begam v. Masha-allah Khan, [1917] I. L. R., 40

All., 187.

The learned Judges while agreeing in the ultimate order passed differ in effect in their answer to the crucial point in the case viz., "Can there be a parole exchange of properties worth Rs. 100, or more in spite of Sections 54 and 118, Transfer of Property Act." WALSH, J., answering it in the affirmative and PIGGOTT, J., in the negative. With all respect, it is submitted that the view of WALSH, J. is open to question. The learned Judge thinks that the *dicta* of the Privy Council in I. L. R., 44 Cal., 542, have the effect of overriding the clear provisions of a statute like Sections 54 and 118, Transfer of Property Act. Admittedly by virtue of a registered instrument of sale the title to the property in question had passed to the plaintiff in the case. How then can the defendant who has acquired no title to it by any means known to law resist the claim for possession on the part of the legal owner of the property. The learned Judge rests his decision upon the English doctrines of equity and upon what he calls the general principles of law in this country which have no place where there is a rigid codified enactment. It is said that the defendant does not rely upon a document of transfer but upon the complete performance of a contract of sale by exchange. What exactly the learned Judge means by 'complete performance' is not clear but it is safe to assert that in the absence of a conveyance as required by section 54 of the Transfer of Property Act the transaction has not advanced beyond the stage of a contract of sale. The learned Judge says that section of the Transfer of Property Act does not *prohibit* vesting of title or interest in property unless effected by a formal transfer. It is difficult to accept this position in the face of that section which states 'A contract of sale does not of itself create any interest in or charge on such property.' The object of this provision really seems to be to prevent the application of the legal effects of a contract of sale in England to such contracts in this country. Strong reliance is placed upon the decision of the Privy Council in I. L. R., 42 Cal., 807. The point involved in the case shortly was this. There was a compromise in a suit which with reference to certain portions therein required registration. The question was whether the absence of registration could be cured by the acts and subsequent conduct of the parties. Their Lordships held in the affirmative. That was not a case under the Transfer of Property Act and in fact the transaction in question there was before the enactment of the Transfer of Property Act.

The learned Judge relies upon a previous decision of himself and TUDBALL, J. in I. L. R., 39 All., 696. That was also a case under the Registration Act.

Reference is made to I. L. R., 24 Bom., 400.

In that case the difficulty was solved by a registered conveyance having been taken during the pendency of the suit. This very question came up for decision in a more recent case in the Bombay High Court reported in I. L. R., 39 Bom., 472. BATCHELOR, J., held as follows:—

‘ If the question had to be decided on grounds of general principle or reference to equitable doctrines much might be said in favour of the decree of the District Judge. But the question as it seems to me is not open to be decided upon any such broad principles but is concluded by the express words of the statute governing such transactions viz., section 54 of the Transfer of Property Act.’ The question has been discussed at considerable length and decided by a Full Bench of the Madras High Court in I. L. R., 29 Mad., 336. BATCHELOR, J. has followed it unreservedly. It cannot be said WAISH, J. has sufficiently met the grounds of the decision in 29 Mad., 336. True, a Full Bench of the Bombay High Court in I. L. R., 41 Bom., p. 438 have held that an agreement to sell coupled with delivery of possession would be an answer to a suit for ejectment like the present one ; but they restrict their decision to cases where the agreement was enforceable on the date of the suit. The remedy of the defendant in a case of that kind is pointed out in the 29 Mad., case to lie in a suit for specific performance pending the suit for ejectment and an application for both the suits being tried together.

But in the present case there was no subsisting claim for specific performance on the date of the suit. The learned Judge referred to I. L. R., 38 Mad., p. 519 ; but disposed of it by saying merely as it follows the so-called Full Bench decision in 29 Mad., 336.

PIGGOTT, J. has definitely held that the *dicta* of the Privy Council in 42 Cal., p. 807 do not apply to the facts of the present case, there has been no valid transfer of the property in dispute by way of exchange and that plaintiff is the legal owner thereof ; but curiously enough has also held the defendant is entitled to be in possession by virtue of the agreement. Beyond the fact that the case on hand is a hard one there appears to be no legal warrant for this conclusion.

It is to be hoped that the Legislature will take up this point for consideration and amend the sections concerned by making the matter clearer and thus put it beyond the range of controversy.

Company—Memorandum of Association—Registration, effect of.

Cotman v. Brougham, [1918] A. C., 514.

The memorandum of association of a company is, among other things, required to state the objects of the company, that is to say, the purpose or purposes for the attainment of which it is being formed. A strict compliance with the law is necessary as it is well settled that the company is in law incompetent to enter into and cannot be bound by any transaction outside the objects so specified. Such statement, as pointed out by LORDS PARKER and WRENBUARY in the case under notice, serves two purposes. "The first is that the intending corporator who contemplates the investment of his capital shall know within what field it is to be put at risk. The second is that any one who shall deal with the company shall know without reasonable doubt whether the contractual relation into which he contemplates entering with the company is one relating to a matter within its corporate object." There is, of course, no statutory limit on the number of objects which may be specified in the memorandum. But what the law requires is a statement of *the objects* of the company, and not of the powers to be exercised by the company in effecting them. The law intends that "the company, if it be a trading company should by its memorandum define the trade, not that it should specify the various acts which it should be within the power of the company to do in carrying on the trade." It is obvious that the inclusion in the statement of objects in the memorandum of vast and unlimited powers to do every thing conceivable under the sun is in substance a fraud on the law and ought not to be permitted. The evil becomes the greater in that when once the certificate of incorporation is granted by the Registrar, it is conclusive and the courts have no power to examine into the propriety of the memorandum. (See section 24, Indian Companies Act, 1913). LORD WRENBUARY strongly condemns "the pernicious practice of registering memoranda of association which, under the clause relating to objects, contain paragraph after paragraph, not specifying or delimiting the proposed trade or purpose; but confusing power with purpose and indicating every class of act which the corporation is to have power to do" with the result that the function of the memorandum is taken to be "not to specify, not to disclose but to bury beneath a mass of words the real object or objects of the company with the intent that every conceivable form of activity shall be found included somewhere within its terms." Thus in the case under notice the memorandum contained an objects clause with thirty sub-clauses enabling the company to carry on almost every conceivable kind of business which a company could adopt. But the company having been duly registered it was held that the only jurisdiction of the court was to construe the memorandum and to

see whether the disputed transaction was or was not *intra vires* the company having regard to the plain meaning of the language used in the memorandum.

Principal and agent—Appropriation of Principal's money by agent to his own use.

John v. Dodwell and Co. Ltd., [1918] A. C., 563.

The plaintiffs authorized the manager of their business at Colombo to draw cheques in their names upon their banking account for the purposes of the business. In 1909 and 1910 the manager bought shares on his own behalf through the defendants as brokers, and in payment of the price fraudulently gave them cheques drawn by him upon the plaintiffs' account. The defendants received the amount of the cheques without fraud but with knowledge that the manager, without apparent authority, was drawing for his own purposes upon the plaintiffs' funds. The defendants paid over the receipts (except a small part) to the sellers of the shares. The plaintiffs did not discover the fraud of their manager until October, 1911. In January, 1913, they sued the defendants in Ceylon to recover the amount of the cheques. Held that the action lay. "When an agent is entrusted by his principal with property to be applied for the purposes of the latter, and to be accounted for on that footing, he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of courts which administer equity, whether in the form in which the Court of Chancery in this country applied it to trust, or in the form which later developments of the Roman Law have recognized." The money received by the defendants was trust money and having been received by them with notice of the trust affecting it, they were bound to account for it to the plaintiffs.

Hire—Purchase agreement—Option to purchase—Sale by hirer, effect of.

Whiteley, Ltd v. Hilt, [1918] 2 K. B., 115.

This case turned upon the true meaning and effect of hire-purchase agreement now in so common use. The plaintiffs let a piano to *N* under a hire-purchase agreement which provided that

periodical payments were to be made for the hire and that the hirer might become the owner upon paying all the instalments, but that until the last of the instalments was paid she was to remain a bailee only. The hirer was further, not to remove the piano without the consent of the plaintiffs, and in case of breach of the agreement by the hirer the plaintiffs were entitled to retake possession, the hirer could, on her part, terminate the agreement at any time by returning the piano. The hirer paid several instalments, and on a certain date, at a time when she was not in default, she sold the piano to the defendant. Subsequent instalment, not having been paid by the hirer, the plaintiffs demanded a return of the piano. The defendant offered to pay the balance of the hire-purchase money, but refused to return the piano. In an action of detinue and conversion, the plaintiffs were held entitled to a return of the piano or its full value. Until the payment of the last instalment the hirer was a mere bailee and had no right to assign. By wrongfully selling the piano she had repudiated the agreement, and neither she nor her transferee could subsequently fall back upon it. See also *Helby v. Mathews*, [1895] A. C., 471 at 481.

*Contract—Commission payable for obtaining benefit from Government
—Void as opposed to public policy.*

Montefiore v. Munday Motor Components Company, [1918] 2 K.B., 241.

"It is contrary to public policy that a person should be hired for money or valuable consideration to use his position and influence to procure a benefit from the Government, and a contract for that purpose is therefore illegal and void" per SHEARMAN, J. In the case under notice the plaintiff sued for money alleged to be due to him as commission for introducing capital for the company, and it was found that the true consideration for the giving of the note was that the plaintiff should use his position and the value of his good word in favor of the defendants in getting Government assistance in the form of money or contracts. The bargain between the parties was the recommendation by the plaintiff, for a pecuniary consideration, of the merits of the defendants and the exercise of the influence of the plaintiff with servants of the Crown in order to induce an advance of public money to the defendants for the securing or the obtaining of Government contracts. SHEARMAN, J., held that the contract was illegal and void as contrary to public policy and that it was the duty of the Judge to take the objection, even if the defendants had omitted to do so, by accident or design. It is submitted that the rule has been too widely stated. It is directed not only against the use of improper

influence, but would cover the case of even honest persuasion. If no attempt is made or intended to be made to bribe or otherwise improperly approach public servants, if their discretion is left absolutely unfettered, if, all that is intended is, that a person, who has, by reason of his position, access to public officers, should place, for a consideration, in the fairest light the claims of a party to Government patronage, without the use of any indirect means whatever, the transaction would not appear to be open to any reasonable objection. Public policy does not imperatively demand that none but disinterested persons should presume to advise or persuade public servants for a definite end. It is said that the law looks to tendencies and strikes at all such agreements indiscriminately for the general good. See *Ledu Coachman v. Hiralal Bose*, 43 Cal., 115. But no definite authority can be found in support of the rule as extended by SHEARMAN, J., and nothing can be more unsafe than to invent new heads or even sub-heads of public policy. Cf.

Pichakutty Mudali v. Narayanappa Aiyar, 2 M. H. C. R., 243 and see.
[1918] 34 Mad. L.J., 282

Specific legacy of Stocks to debtor to testatrix—Claim by executor of right of retainer.

In re Sarage Cull v. Howard, [1918] 2 Ch., 146.

It is well-settled that an executor of a creditor is entitled to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor's estate. Such a right is rather a right to pay out of the fund in hand, in other words, a right of retainer than a right of set-off. The right of retainer can only be exercised in respect of a debt which is due, and against a cross-payment to the debtor. There is no right of retainer out of a specific legacy or out of a specific gift of free-hold or lease-hold property. If what the executor holds for the legatee is not money he cannot pay himself the debt out of it by way of retainer, nor has he any lien over the property bequeathed. The mere fact that the debt due is statute barred is immaterial and does not prevent the exercise of the right of retainer. Where, therefore, a testator, by her will specifically bequeathed sums of Colonial Stocks to H., who had borrowed £500, from her and had not re-paid it, and whose debt was statute-barred, SARGANT, J. held that the amount of the debt could not be retained by the debtor out of the stocks, as what the executor held was not money—although it was something easily turned into money.

NOTES AND CUTTINGS.

LIBERTY OF PEOPLES.

The following address was delivered on July 4th, 1918, at the Tomb of Washington, Mount Vernon, Before Representatives of Thirty-three Nations and Peoples Allied to Oppose the Teutonic Powers By Woodrow Wilson, President of the United States.

Gentlemen of the Diplomatic Corps and My Fellow-citizens : I am happy to draw apart with you to this quiet place of old counsel in order to speak a little of the meaning of this day of our Nation's independence. The place seems very still and remote. It is as serene and untouched by the hurry of the world as it was in those great days long ago when General Washington was here and held leisurely conference with the men who were to be associated with him in the creation of a Nation. From these gentle slopes they looked out upon the world and saw it whole, saw it with the light of the future upon it, saw it with modern eyes that turned away from a past which men of liberated spirits could no longer endure. It is for that reason that we cannot feel, even here, in the immediate presence of this sacred tomb, that this is a place of death. It was a place of achievement. A great promise that was meant for all mankind was here given plan and reality. The associations by which we are here surrounded are the inspiring associations of that noble death which is only a glorious consummation. From this green hillside we also ought to be able to see with comprehending eyes the world that lies around us and conceive anew the purpose that must set men free.

It is significant—significant of their own character and purpose and of the influences they were setting afoot—that Washington and his associates, like the Barons at Runnymede, spoke and acted, not for a class, but for a people. It has been left for us to see to it that it shall be understood that they spoke and acted, not for a single people only, but for all mankind. They were thinking not of themselves and of the material interests which centred in the little groups of land-holders and merchants and men of affairs with whom they were accustomed to act, in Virginia and the colonies to the North and South of her, but of a people which wished to be done with classes and special interests and the authority of men whom they had not themselves chosen to rule over them. They entertained no private purpose, desired no peculiar privilege. They were consciously planning that men of every class should be free

and America a place to which men out of every nation might resort who wished to share with them the rights and privileges of free men. And we take our cue from them—do we not? We intend what they intended. We here in America believe our participation in this present war to be only the fruitage of what they planted. Our case differs from theirs only in this, that it is our inestimable privilege to concert with men out of every nation who shall make not only the liberties of America secure but the liberties of every other people as well. We are happy in the thought that we are permitted to do what they would have done had they been in our place. There must now be settled, once for all, what was settled for America, in the great age upon whose inspiration we draw to-day. This is surely a fitting place from which calmly to look out upon our task, that we may fortify our spirits for its accomplishment. And this is the appropriate place from which to avow, alike to the friends who look on and to the friends with whom we have the happiness to be associated in action, the faith and purpose with which we act.

This, then, is our conception of the great struggle in which we are engaged. The plot is written plain upon every scene and every act of the supreme tragedy. On the one hand stand the peoples of the world—not only the people actually engaged, but many others, also, who suffer under mastery but cannot act; peoples of many races and in every part of the world—the people of stricken Russia still, among the rest, though they are for the moment unorganized and helpless. Opposed to them, masters of many armies, stand an isolated, friendless group of Governments, who speak no common purpose, but only selfish ambitions of their own, by which none can profit but themselves, and whose peoples are fuel in their hands; Governments which fear their people, and yet are for the time being sovereign lords, making every choice for them and disposing of their lives and fortunes as they will as well as of the lives and fortunes of every people who fall under their power—Governments clothed with the strange trappings and the primitive authority of an age that is altogether alien and hostile to our own. The Past and Present are in deadly grapple, and the peoples of the world are being done to death between them.

- There can be but one issue. The settlement must be final. There can be no compromise. No halfway decision would be tolerable. No half-way decision is conceivable. These are the ends for which the associated peoples of the world are fighting and which must be conceded them before there can be peace:

I.—The destruction of every arbitrary power anywhere that can separately, secretly, and of its single choice disturb the peace of the world; or, if it cannot be presently destroyed, at the least its reduction to virtual impotence.

II.—The settlement of every question, whether of territory, of sovereignty, of economic arrangement, or of political relationship, upon the basis of the free acceptance of that settlement by the people immediately concerned, and not upon the basis of the material interest or advantage of any other nation or people which may desire a different settlement for the sake of its own exterior influence or mastery.

III.—The consent of all nations to be governed in their conduct toward each other by the same principles of honor and of respect for the common law of civilized society that govern the individual citizens of all modern States in their relations with one another; to the end that all promises and covenants may be sacredly observed, no private plots or conspiracies hatched, no selfish injuries wrought with impunity, and a mutual trust established upon the handsome foundation of a mutual respect for right.

IV.—The establishment of an organization of peace which shall make it certain that the combined power of free nations will check every invasion of right and serve to make peace and justice the more secure by affording a definite tribunal of opinion to which all must submit and by which every international re-adjustment that cannot be amicably agreed upon by the peoples directly concerned shall be sanctioned.

These great objects can be put into a single sentence. What we seek is the reign of law, based upon the consent of the governed and sustained by the organized opinion of mankind.

These great ends cannot be achieved by debating and seeking to reconcile and accommodate what statesmen may wish with their projects for balances of power and of national opportunity. They can be realized only by the determination of what the thinking people of the world desire, with their longing hope for justice and for social freedom and opportunity.

I can fancy that the air of this place carries the accents of such principles with a peculiar kindness. Here were started forces which the great nation against which they were primarily directed at first regarded as a revolt against its frightful authority, but which it has long since seen to have been a step in the liberation of its own people as well as of the people of the United States; and I stand here now to speak—speak proudly and with confident hope—of the spread of this revolt, this liberation, to the great stage of the world itself! The blinded rulers of Prussia have roused forces they knew little of—forces which, once roused, can never be crushed to earth again; for they have at their heart an inspiration and a purpose which are deathless and of the very stuff of triumph—(*Chicago Legal News*).

ADDRESS OF PRESIDENT OF LAW SOCIETY IN ENGLAND ON
ARBITRATION PROCEEDINGS.

Mr. Samuel Garrett, President of the Law Society in England at the annual meeting of the society in giving an account of the arbitration proceedings which are now so common among mercantile and trade associations for settlement of disputes and differences that arise out of contracts is reported to have said:—"In all democratic countries lawyers necessarily and properly take a large share in the business of Government and legislation. In autocracies it is not so, but we all hope that the days of autocracy in civilized countries are numbered. It is not an accident that of the last twelve Presidents of the United States, from Lincoln downwards, eight have been lawyers, or that the law since the establishment of the third French Republic has always been and is still largely represented in the Government of our friends and Allies across the Channel, or that in our own country for the last ten years a Prime Minister of one branch of legal profession has been succeeded in his high office by a member of the other branch, and that other ministerial offices are largely filled by lawyers. The more complicated human relations become the more the need of the lawyer in the work of Government. The first pre-requisite of reform in any branch of Government is knowledge of what the existing law is and what effect any proposed change in one department is likely to have on other departments. Yet to judge by the popular outcry one might think that it would be to the public benefit to be rid of lawyers altogether in politics. Sneers at the "legal" type of mind or at "lawyer-ridden" Governments are part of the stock-in-trade of the popular press. They express a real popular feeling which we must recognize and account for and alter if we are to fulfil satisfactorily the functions for which we exist. The feeling is not without justification in the existing state of affairs. It cannot be denied that the training, the traditions, the organization and the outlook of the legal profession in this country are such as naturally produce the state of popular sentiment which I have endeavoured to describe. It is a somewhat melancholy admission to make at the end of one's career, but I make it in the hope that the younger members of our profession to whom the future belongs will see to it that at the end of their career they will not need to make any such confession. Old-fashioned, not to say archaic, systems, however interesting on historical and sentimental grounds, must be "scrapped." There will be no place for them in our reconstructed society. The reforms in order to be effectual must be drastic, and should, as it seems to me, be directed to two objects, viz., (1) the education and organization of the legal profession; and (2) legal procedure."

LAW LIBRARY.

THE SELECTED DECISIONS OF THE CHIEF COURT, BENARES STATE, Vol. I, [1911-12]. EDITED by Kumuda Prasad, B. A., Vakil and Public Prosecutor, Benares State. First Edition. 1917. Price Rs. 5.

A good test of a well-ordered polity lies in the efficiency of its administration of justice. And the published judgments of its courts give us the key to the formation of our opinions thereon. It was, therefore, a bright idea which induced Mr. Kumuda Prasad, B. A., to publish the judicial pronouncements of the Chief Court of the newly-formed State of Benares. In a well-written but modest introduction the learned editor makes known to us the reason which influenced him in undertaking this useful work. "In the absence," says he of its own Legislature in the Benares State enacting its own formal rules of law for the State, these precedents may very well serve the purpose of the common law of the Benares State, and as such their importance cannot be overrated. With this view the editing of the leading cases decided by the Chief Court at Ramnagar has been undertaken." We fully agree, and we have nothing but praise for the manner in which he has accomplished his self-imposed task. It is refreshing to learn that only choice decisions have been published, and the selection appears to have been made with scrupulous care. We note the expression "leading cases," but we are not quite clear as to its meaning as used here. A "leading" case, to our mind, is one which has stood the test of time and has remained unshaken in spite of what changes may have come about. We shall be glad to be informed as to which are the decisions here which may fairly be said to bear that stamp. We shall not, however, quarrel about mere words. There are three sections in this volume, the first in the projected series—Civil, Criminal and Revenue. The index and the table of cases prefixed to each section is full and complete, and the head note to each case accurately expresses the purport of the decision.

The get-up leaves much to be desired. Misprints occur very often, and the cover might have been better. These are minor blemishes and we hope that they will be duly attended to and removed when the second volume comes to be put into the hands of the public. Much depend upon external appearance. The price is moderate. We congratulate Mr. Kumuda Prasad on his venture and wish him success.

STARLING'S COMMENTARIES ON THE INDIAN LIMITATION ACT. AS ADOPTED TO ACT IX OF 1908. SIXTH EDITION REVISED AND BROUGHT UP-TO-DATE by R. S. Broomfield, I. C. S., Joint Judge, Ahmedabad. Bombay: N. M. Tripathi and Co., book-sellers and publishers, 1918.

'Starling on limitation' has deservedly attained the rank of a standard treatise on the law of limitation in British India and it is unnecessary therefore to say much in its praise. The present edition has been carefully revised and brought up-to-date if this can be legitimately said of a legal work which only notices cases reported in the official Indian Law Reports and the Bombay Law Reporter. Why the latter, of all the other non-official reports, should have been accorded this enviable distinction we are unable to say unless it be that the learned editor was particularly familiar with that publication. This self-imposed abstinence does detract, not a little in our opinion, from the usefulness of the present edition as a book of reference. We are not in favor of indiscriminate citation of all cases reported anywhere, but to shut-out deliberately cases reported in non-official reports of long and recognized standing is unjustifiable.

Starling's is a valuable commentary and the learned editor appears to have bestowed considerable pains and industry in making the statement of the law and authorities as accurate and as complete and the discussion as informing and suggestive as was possible within the narrow limits observed by him. We can only hope that the utility of the work will be enhanced, in future editions, by a more liberal use of the authorities on the subject. We should also like to point out that in our cursory perusal of the book we have come across some erroneous statements. For instance at page 46 in a discussion on the powers of the Managers of a joint Hindu family in regard to the provisions of section 7 of the Limitation Act, a reference is made to the case of *Shamra-thi Singh v. Kishan Parshad*, (I. L. R., 29 All., 311), which is apparently treated as a good authority on the subject. As a matter of fact the judgment of the High Court was reversed on appeal to the Privy Council, (I. L. R., 33 All., 272). We trust such inaccuracies will be corrected in a future edition. The get-up is very neat.

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MARRIAGE UNDER THE MOHAMMEDAN LAW.

An exhaustive definition of 'marriage' and a concise comparison of the various notions concerning the same under the prevailing systems of law will not be inopportune. 'Marriage' has been defined to be 'an act, ceremony, or process by which the legal relationship of husband and wife is constituted.' In these days the lawyer is mostly concerned with the forms and incidents appertaining to marriages in vogue among the Hindus, the Christians and the Mohammedans. A description of the systems of marriage current among the Hindus and the Christians may be briefly dismissed without going into their various details. Under the Hindu Law marriage is purely a sacrament, a *sanskar*, and it is obligatory on those persons who profess the Hindu religion. Its performance and completion are solely based on religion and it is intended for the procreation of a son to deliver the father from the hell known as *put*. Among the Christians marriage is simply a civil contract between the parties with certain rights and obligations arising therefrom. It is not a religious act although it is solemnised by a clergyman with the pronouncement of some religious words. It is stated that in America marriage is neither a religious act nor a civil contract.

Marriage, under the Mohammedan Law, appears originally to have been an act of God-worship. It is laid down in *Durr-ul-Mukhtar* that 'there is no worship for the Mohammedans which has come down to them from the time of Adam except faith (in God) and *nikah* (marriage).' It appears that the Mohammedan Lawgivers did not conceive of marriage without religious sanction. But later on they failed to develop the religious side of marriage and gradually it came to be purely a civil contract. (See Tagore Law Lectures 1873 by Shyama Charan Sarkar p. 291, where it is laid down that marriage among the Mohammedans is not a sacrament but purely a civil contract). '*Nikah*' in its primitive sense means carnal conjunction, but in the language of law it implies a particular

contract used for the purpose of legalising generation. (*Hedaya*, Book II, p. 25). Various definitions of marriage have been given by various law-books and some of these are given below. Marriage is a civil contract the object of which is the realisation of the right of enjoyment and the procreation of children. (Baillie, Vol. I p. 4). It is also meant for the solace of life and is one of the primal necessities of mankind. Hence marriage can be had in extreme old age when there is no chance of offspring or further life. (*Kifayah*, Vol. III, p. 577). Marriage is not a religious ceremony. (Tayabji's Mohammedan Law, p. 53). The central idea in the family law of Mohamedans is the institution of *nikah* or marriage. It is through the marriage that paternity of children is established and relationship and affinity are traced. (Abdur Rahim's Mohammedan Jurisprudence, p. 326). Marriage is obligatory on those persons whose passion is ungovernable, it is a duty to him whose condition is moderate, but it is abominable to a person to whom there is an apprehension of its being a source of annoyance. (*Durr-ul-Mukhtar*, p. 196).

There is no elaborate ceremony to constitute marriage between two persons of opposite sex. Declaration and acceptance or in other words *ijab* and *qabul*, in the same meeting are the essentials of a valid marriage. (Sarkar, p. 293). The pillars of marriage, as of other contracts are *ijab* and *qabul*. (*Fatawa Alamgiri*, Vol. I, p. 377). It can be effected by the words *hibah* or gift, sale, purchase or the like. (Sarkar, p. 294.) It can be contracted by the guardians to the couple to be married. (Sarkar, p. 296). There can be a presumption of marriage without a contract. There must be either a reality or a semblance of marriage otherwise it is *Zina* and brings on punishment. (*Fatawa Alamgiri*, Vol. II., p. 202). Marriage may be presumed by living together as husband and wife. (Sarkar, p. 318). Marriage by presumption appears to correspond to a certain extent to what was known under the Roman Law as *usus* i.e. the acquisition of the wife by prescription. The Mohammedan law-givers permit a follower of their religion to have a plurality of wives (four at a time) and hence the opinion of Justice Abdur Rahim at page 327 of his Mahomedan Jurisprudence that the law contemplates monogamy is questionable.

- The advantages of marriage have also been enumerated by Mohammedan law-givers. The intercourse of a man with a woman who is neither his wife nor his slave is unlawful and prohibited absolutely. (*Hedaya*, Vol. II., p. 586). Marriage legalises sexual intercourse with persons of opposite sex for the purpose of preserving human species, the fixing of descent, restraining men from debauchery. It encourages chastity and promotion of love and union between husband and wife and mutual help in earning livelihood. It is the most important social function and without it there must have been chaos and no society.

As there are conditions imposed upon every sort of legal contract with which it should comply in order to be of valid, so there are the following main stipulations for a legal Mohammedan marriage. They are :—(1) legal competency in the contracting parties, *e.g.* understanding, puberty and freedom; (2) a fitting subject *i. e.* a woman to be married; (3) hearing by each party of the words used by the other, if the words are not understood even then the marriage is valid and complete; (4) *Shahadat* or presence of witnesses; (but witnesses are not necessary in a Shia marriage); (5) the witnesses ought to be free and of full age (puberty) and they should profess Musalman faith. (Baillie Vol. I., pp. 5 and 6). Equality is also one of the conditions of a valid marriage. (Baillie, Vol. II, p 34), although it is not essential in a country other than Arabia. (Baillie Vol. I p. 70 and Sarkar p. 300). The jurists of the Hanafi School have laid down the following six requirements of Equality :—(a) *Nasab*; family or descent; (b) *Islam*; (c) Profession; (d) Freedom; (e) Good character, and (f) Means. The question of equality was raised in a case of restitution of conjugal rights between a Sayed woman and a non-sayed man in the Punjab Chief Court and it was decided by the learned Judges of that court that such a marriage was valid. (*Jamait Ali Shah v. Mir Muhommad*, 38 I. C., 10 in which the case of *Mohumdee Begum v. Bairan Khan*, 1 Agra H. C. R., 130 is referred to). *Fatawa Alamgiri*, as quoted in Ameer Ali's Mohammedan Law, p. 408, declares that except Islam and freedom, equality in any other respect is not invariably observed. But in connection with *nasab* it is stated at p. 529 of *Radd-ul-Muhtar*, Vol. II., that *koriesh* are each others equal, but are superior to all other Arabs. Even a non-Arab king is not equal to an Arab woman (Ameer Ali, Vol. II., p. 406, 3rd Ed.) In *Sharah-ul-Vikayah* it is stated that the marriage of a woman who is free, sane and adult is effectual even though there be inequality, but Hasan reports from Abu Hanifa that marriage with an unequal is invalid, and upon this decision is given in *Fatawa Qazi Khan*. (*Sharah-ul-Vikayah*, Vol. II., p. 232; Sarkar, p. 300).

A Mohammedan marriage does not affect the personal rights and property of the parties. It confers no right on either party over the property of the other. The legal capacity of the wife is not sunk in that of the husband. She retains the same power of using and disposing of her property, of entering into all contracts regarding it and of suing and being sued without his consent or concurrence, as if she were still unmarried. She can sue the husband himself and she is not under his guardianship. On the other hand, he is not liable for her debts, although he is bound to maintain her, and he may divorce her at any time without assigning any reason. (Baillie's Introduction to his *chapters on marriage*).

It appears that temporary marriages technically known as *muta* prevailed among the Mohammedans when Mecca was not conquered, but when it was conquered *muta* was prohibited to doomsday. Temporary marriages are not allowed among the Sunnis although they are still lawful among the Shias.

The law of marriage is personal to the Mohammedans and in whatever country they may be their marital rights are not affected unless they happen to go to a country which has no respect for such social rights. A Musalman is absolutely subject to the laws of Islam whatever the domicile. (*Kifayah*, Vol. II, p. 763). A mere change of domicile unaccompanied by a change of system affects no alteration in status or legal capacity of Moslems. Under the Italian and French law he would still remain subject to the Islamic system inspite of the change of domicile so long as he still retained his allegiance to his religion. But as to property the law of the country applies. (AMEER ALI, p. 151). A peculiar question of inheritance arises in cases when a Mohammedan marries another professing a different faith. The law allows such a marriage the only essential condition being that the parties belong to some of the revealed religions. By 21 Geo. III., C. 71, it has been expressly declared that in India the law relating to the Mohammedans shall in all matters relating to them be strictly and impartially administered. So it may be assumed that as far as Indian Mohammedans are concerned the law of their domicile would mean the Mohammedan Law. What law will govern the inheritance to the property of a Jew wife married to a Mohammedan husband? Will it be the law of the wife or that of the husband and according to which of them the property is to devolve? The question of prohibited marriage unions has been enunciated and described in all the legal systems and specially in Mohammedan Law to a nicety. Such prohibitions are mainly based on difference of religion (placing all the monotheistic religions on equal footing, inter-marriage among them having been pronounced legal), consanguinity, affinity and fosterage. These prohibitions require a separate treatment for themselves for they embrace a large field.

As an ordinary contract can be broken by either party wilfully, so marriage can also be terminated at the option of the parties to the same, but in this respect the husband's right dominates that of the wife inasmuch as that a husband can divorce his wife at his own sweet will whereas a wife cannot obtain *khula* without her husband's consent. The law of marriage has provided certain safeguards to ensure the continuance of marriage by means of dower, maintenance, guardianship of children &c., but these subjects are of much importance in themselves and will require separate and detailed discussion hereafter.

SARAT CHANDRA ROY B. A.
Vakil High Court.

IPUR.

CASES AND COMMENTS.

Hindu Law—Sudras—Succession—Putative father, whether heir to his illegitimate son.

Subramania Ayyar v. Rathnavelu Chetty, [1918] I. L. R., 41 Mad., 44.

In this case it was held by the Full Bench of the Madras High Court that where an illegitimate son, who if he had survived his putative father, would have inherited his (father's) estate either alone or along with others, died leaving no issue, his putative father was entitled to succeed as his heir.

The law as to the position and rights of the illegitimate sons of Sudras is by no means clear, and the grounds upon which the decision under notice proceeds would seem to be at variance with the commonly accepted notions on the subject. There is a long series of cases in all the Indian High Courts that illegitimate issue of Sudras cannot inherit collaterally and have indeed rights of inheritance even in their father's estate by reason of definite express texts in the *Mitakshra*. Except as provided for in those texts the illegitimate issue are not recognized in the table of heirs in the *Mitakshra*. It has indeed been held by the Privy Council, approving the view taken in *Sadu v. Baizn*, I. L. R., 4 Bom., 37, by the Bombay High Court, that the legitimate and illegitimate sons of a Sudra succeed to their father's estate as joint tenants, and on the death of the legitimate son, the illegitimate son succeeds to the whole estate by right of survivorship. (*Jogendra Bhupati v. Nityanund Man Singh*, [1891] I. L. R., 18 Cal., 151). That these cases are and should be confined to joint tenancies, and do not lay down any general rule of succession in favour of legitimate and illegitimate brethren *inter se* has been repeatedly held by the Bombay as well as the other High Courts. See *Ravji Sakuji*, [1909] I. L. R., 34 Bom., 321, *Shome Shankar v. Rajesar Swami Jangam* [1898] I. L. R., 21 All., 99. SADASIVA AYYAR, J. based his opinion in favour of the father's right to inherit on the well-known text of Yajnavalkya, quoted and commented on at length in the *Mitakshra*, dealing with the course of succession in the absence of lineal descendants. "The wife, and the daughters also, both parents brothers likewise and their sons, gentiles, cognates etc." It is obvious that if this text is to be regarded as an authority in favour of the father, it is equally good in favour of collaterals. But the argument founded on this text has constantly been rejected on the ground that it plates cases of lawful marriages only. There is n

authority recognizing the right of the father as apart from collaterals. The other ground on which the present decision is based—mainly by Wallis, C. J.—is one of reciprocity, that is to say, if the illegitimate son is a good heir to his father, the converse case must *ipso facto* hold good. This is plausible but scarcely satisfactory. The rules of succession in Hindu Law are based on the theory either of propinquity or spiritual efficacy. The putative father cannot be of any spiritual use to his illegitimate son, whether he is a *Sapinda* or not within the meaning of the *Mitakshra* is more debateable. But it is clear that if a father is a *Sapinda*, so is an uncle, or a brother, or a grandfather. It is only a question of degree. The fact of the matter appears to be that the general rules of succession laid down in the *Mitakshra* govern the cases of *Aurasa* and *Dattaka* sons only and no others. The case of succession to illegitimate persons who die issueless, has been left unprovided for. The learned Judges themselves felt that their decision was somewhat inconsistent with the *ratio decidendi* of the earlier cases, and that apprehension is clearly well-founded. There is much to be said in point of moral justice, for the view taken by their Lordships, but we think, with respect, that it is opposed to principle and authority.

Penal Code, sections 441 and 448—Criminal trespass—Ingredients of offence.

S. Vullappa v. S. Bheema Row, [1918] I. L. R., 41 Mad., 156.

It is difficult to reconcile the decision in this case with that of the Allahabad High Court in *Emperor v. Chote Lal*, [1918] I. L. R. 40 All., 221, and we think, with respect that the view taken by the majority of the learned Judges at Madras is right. The question whether a person can be fixed with "an intent to annoy" within the meaning of section 441 of the Penal Code, merely because he knows that his conduct is likely or even certain to annoy the owner of the house, is a vexed one and has given rise to a great divergence of judicial opinion. Having regard to the language of the section, as compared with that of other sections of the Code, and the declared opinions of the framers of the Code as expressed in their reports on this subject, there can be little doubt that, on a strict interpretation of the section, the existence of an actual intent, as distinguished from a knowledge of the likely consequences, must be proved by the prosecution. There is an evident tendency in certain decisions to construe the language more widely for reasons of expediency in order to obviate great public inconvenience and mischief. That would be stating and not interpreting the law. It is almost always that every civil trespass is not punishable criminally,

and the stringent requirements of section 441 should be fairly complied with in order to prevent the abuse of process of criminal courts concerning disputes of a civil nature. The authorities on the subject are fully discussed in the case under notice, and it is submitted that the doctrine of 'express prohibition' and 'a barred door' enunciated in *Emperor v. Chote Lal* is not based on any sound principle nor can it be fairly deduced from the scheme or the language of the Penal Code.

Indian Contract Act, section 15—Coercion, whether threat to commit suicide amounts to.

Chikkam Ammiraju v. Chikkam Seshamma, [1918] I. L. R., 41 Mad., 33.

This was an uncommon case. By a threat of suicide, a Hindu induced his wife and son to execute a deed of relinquishment in favour of his brothers in respect of certain properties which they claimed as their own. The wife and son subsequently instituted this suit for cancellation of the deed on the ground of coercion. Such a case is very easy to allege and very difficult to disprove. The courts however found in favour of the plaintiffs on the question of fact. The question whether the threat of suicide comes within the purview of section 15 of the Indian Contract Act led to a difference of opinion in the High Court, three Judges deciding that it did, and two deciding, that it did not. The rule in the section is very wide, much wider than the rule in England. But though the language in the section is very general, we think, that it must be construed within reasonable bounds. Suicide may be an act, inferentially, forbidden by the Indian Penal Code, though the view of Oldfield, J., is the other way, but it is still more doubtful whether the threat of suicide can ever be to "the prejudice of a person" within the meaning of section 15. Prejudice means pecuniary loss or other harm which can be measured by the court. Lives of near relations are dear, and of some friends still dearer, but it is impossible to say that the threat of suicide by a relation or friend, no matter how dear, assuming the threat to be genuine, can ever prejudice a person. It may cause a sense of anger, or apprehension, or even alarm, but surely prejudice is a different matter.

Private reference to Arbitration—Subsequent suit—Arbitrators, their authority.

Appavee Rowther v. Seeni Rowther, [1918] I. L. R., 41 Mad., 115.

There was a private reference to arbitration. But arbitrators could enter upon the reference and deliver the

one of the parties to the reference instituted a suit relating to the subject-matter of the reference. Subsequently the arbitrators decided the matter. On an application to file the award and for a decree in its terms, held that after the institution of the suit, the arbitrators became *functus officio* and had no longer jurisdiction to proceed in the reference. The only remedy open to the other party was to apply for a stay of proceedings in the suit under section 18 of Sch. II to the Code of Civil Procedure. Under that section it is well-settled that on the defendant's expressing his readiness to go on with the arbitration the court would, in the absence of any special circumstances which must be proved by the plaintiff, direct a stay of the suit and thus compel the plaintiff to abide by the decision of the tribunal chosen by the parties. But unless proceedings are stayed under that section there is nothing in law to prevent a trial by the court, and it is obvious that a subsequent decision by the arbitrator cannot operate as a bar and would not even be admissible in evidence. The view taken in Madras is, therefore, correct on principle and is also supported by the history of the legislation on the subject.

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THE LAW OF INTEREST IN BRITISH INDIA, (WITH EXHAUSTIVE COMMENTARIES ON THE USURIOUS LAWS ACT X OF 1918. THE INTEREST ACT, XXXII OF 1839 AND THE USURY LAWS REPEAL ACT, XXVIII OF 1859) by C. S. Somanath Sastri, B.A., B.L., and P. Ramanatha Aiyar, B.A., B.L., Vakils, Madras. The Modern Printing Works, 1918.

This is an exhaustive book on the Law of interest. The learned authors have dealt with the subject in the most thorough manner. The Introductory Chapter contains a mass of interesting historical learning on the Law of Interest with a description of the Roman, the Hindu, the Mohammedan, the Greek and the French laws on the subject. The history of the Anglo-Indian Law of Interest is also well-sketched. The succeeding chapters deal most fully with "Right to Interest," and its disallowance, Rates of Interest and Compound Interest, suit for and appeal as to Interest, and other cognate matters. We do not think a single Indian ruling on the subject has been omitted, and most of the English Cases have also been cited. The statement of the law is clear and accurate, and the book is well arranged. Too much material has been relegated to the foot-notes. There is a good Index, and a useful Table of contents is prefixed to each Chapter. In the Appendix the recent Usurious Loans Act is reproduced with a good commentary. The get-up is very good. We have no doubt the book will prove exceedingly useful to all practitioners.

PRINCIPLES OF CIRCUMSTANTIAL EVIDENCE APPLICABLE TO BRITISH INDIA by Walter Russell Donogh, M.A., Bar-at-Law, Calcutta. Bitterworth & Co. (India), Ltd., 1918, pp. 1-288.

This book is divided into two parts. The second part merely reproduces the text of the Indian Evidence Act with an appendix containing the Proceedings in Council relating there

first part contains, in effect, a commentary on the doctrine of relevant fact as enacted in sections 6—16, and 45—57 of the Act. The commentary, though not very original, or profound, is explanatory and the numerous illustrations drawn from notable criminal trials make it instructive and interesting. There are chapters devoted to a discussion of the relevance of evidence as to motive, preparation, conduct, identification, states of mind and body, and expert opinion. The learned author has referred to the leading Indian and English Cases, mostly criminal. The law is accurately stated, and the principles of circumstantial or indirect evidence have been well discussed. We recommend this book specially to the notice of beginners in the profession. The get-up is very neat and the price moderate.

THE LAW OF ESTATE DUTY IN INDIA, by Alexander Kinney, Bar-at-Law, Officiating Administrator General and Official Trustee of Bengal. Calcutta, Butterworth & Co., 1918.

The law of Estate Duty in British India is to be found in some sections of the Court-fees Act, and Mr. Kinney comments on those sections at length, with reference to decided cases. His practical experience as an Administrator-General makes him peculiarly competent to deal with the subject and the various suggestions he has made for removing existing inconveniences and defects in procedure will, we trust, be duly considered by the Legislature. The model forms of affidavits incorporated in the book are very useful. There is a chapter giving a broad outline of the English Acts relating to Estate Duties. We have no doubt the book will prove of great use—specially in the Presidency Towns. The get-up is very good, and there is a very full index.

THE LAW OF LANDLORD AND TENANT IN BENGAL AND BIHAR, by Ranjit Sinha, B. A., B. L., Vakil High Court, Patna, Calcutta, R. Cambray & Co., 1918.

is an able and well-written treatise on a complicated law, and though mainly of interest to lawyers in Bengal

and Bihar it will, we are sure, appeal to a wider circle of readers. Numerous provisions in the Bengal Tenancy Act resemble closely those in the Agra Tenancy Act, and Calcutta decisions are sometimes much to the point. The two chapters devoted to a commentary on the chapter of leases in the Transfer of Property Act are of general interest, though we must say that the learned author, while referring freely to English decisions, has not bestowed the same attention to the rulings of the Indian High Courts other than the Calcutta High Court, and least of all, to those of our Court. The introductory chapter, dealing with the merits of the Permanent Settlement, is of historical interest. The book, so far as we have been able to judge it, is well-arranged, and the statement of the law clear, concise and adequate. It is not an easy task to grapple with the land laws of Bengal with its innumerable tenures. The get-up is good.

THE LAW OF PARTNERSHIP IN BRITISH INDIA, by Janki Prasada Singhal M. A., LL. B., Vakil High Court, Aligarh. Calcutta, Butterworth & Co., 1918, pp. 1—526.

This is a well-arranged and well-compiled book on the law of partnership. There are many standard treatises on the subject in England, pre-eminent among them being Lindley on Partnership, but apart from what can be found in commentaries upon the Indian Contract Act and the Digests there was no systematic work dealing with the subject in detail in a comprehensive manner with special reference to the Indian statute and case-law. The present book supplies therefore a long-felt want, and having regard to the clearness and completeness with which the learned author has set out the principles and the authorities, both English and Indian, we have no doubt it will prove very useful to the profession. It may indeed with justice be regarded as an abridged Indian edition of Lindley on partnership. The book is divided into seventeen chapters. The first two describe the essential requisites of a partnership. The third and fourth deal with the formation and duration of legal partnerships. The next four treat of the rights and obligations of partners to third persons. Chaps. IX—XII are devoted to a consideration of the rights and obligations of partners

The remaining five chapters deal with actions between partners with a view to dissolution or otherwise, actions between partners and third parties, and matters arising out of bankruptcy of partners. The law is well and accurately stated, and the cases, especially the Indian cases, are well discussed. There is an elaborate Table of Contents. The book is very well got up.

THE LAW RELATING TO HINDU AND MOHAMMEDAN ENDOWMENTS,
By P. R. Ganapathi Iyer, B. A., B. L., High Court Vakil, Madras.
Second Edition. With a foreword by the Hon'ble Mr. Justice
ABDUR RAHIM, M. A., (Bar-at-Law). One of His Majesty's Judges
of the High Court of Judicature at Madras. 1918, Madras. Price
Rs. 12.

There is no need to praise this treatise or to dwell on its merits. It has already won well-deserved success and is recognized as the leading book on the subject. It is remarkable for its learning, accuracy and lucidity and for thorough exposition of legal principles relating to Hindu and Mohammedan Endowments. The learned author has endeavored in this new and enlarged edition to make the book as complete as possible and has, we think, wholly succeeded. It is divided into 28 Chapters, and we think no possible question can arise on which the learned author has not something to say. Among others there are interesting chapters on Mosques, Darghas, Khankhas and Takkias, Building and consecration of Temples, Fakirs and Darveshes, Rights and Duties of Founders, of Worshippers, of Mutwallis, of Managers, of Matha Pathis. It is needless to say that all judicial decisions have been carefully and accurately noticed and adequately discussed. Mr. Ganapathi Aiyar has taken a keen interest for long years past in promoting legislation for the better management of Religious Trusts and Endowments and his views are entitled to the highest respect. We cordially commend this edition to the Profession. The get-up is neat, the book handy, and the price exceedingly moderate.

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AUCTION-PURCHASER UNDER THE CODE OF CIVIL PROCEDURE.

It is no small wonder that there should still be in regard to the position of an auction-purchaser and his rights a good deal of room for doubt and mystification. The Legislature itself is not without its share of blame in the matter. The wholesome principle of *caveat emptor* which binds a purchaser at a private sale finds no application in the case of a purchaser at a sale held in execution of a decree inasmuch as he can, if he chooses, apply under Order 21, rule 91 of the present Code of Civil Procedure to have the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold [*Vide.*, *Ram Kumari v. Ram Gour*, I. L. R., 37 Cal., 67]. Of course, if the purchaser at the time of the sale in execution of the decree knows that the judgment-debtor has no saleable interest, he is precluded from so applying. [See., *Mahabir Prasad v. Dhuman Das*, I. L. R., 3 All., 527; and, *Sumer Chand v. Wahid Hussain*, 3 A. L. J. R., 819]. The Madras High Court in the case of *Parvathi Ammal v. Govindasami Pillai*, reported in 30 I. C., p. 827, expresses its point of view in a different way, though there seems to be no difference in meaning. At p. 829, their Lordships observe:—"The general principle of *caveat emptor* would affect the purchaser unless he chooses to adopt the remedy given him by the statute." The remedy provided by the present Code of Civil Procedure is to be found in Order 21, rule 91 and it follows, therefore, that by availing the remedy so provided, an auction-purchaser does exempt himself from the operation of the principle of *caveat emptor*.

This leads on to the consideration of the respective position of an auction-purchaser and a purchaser by private sale. Their Lordships of the Privy Council in the well-known case of *Dorab Ally Khan v. Abdul Aziz*, L. R., 5 I. A., p. 116, having pointed out at one place that the sales held by court through Amin are in the nature of sales held under the writs of *facias* in England with this distinction that while the latter are concerned only with chattels, in India moveable and immoveable properties both are alike capable of being seized under the writ, take particular care to explain why it is that a certain rule applicable to sales by private contract is inapplicable in the case of sales *in invitum*. "The chief reasons" they say "for the rule are that the purchaser by private

contract has full means of investigating the title of the vendor, and of either satisfying himself that it is good or of protecting himself against any apparent or latent defect in it by proper and apparent covenants. If he fails to do either, his subsequent eviction is the result of his own negligence. But the purchaser at a Sheriff's sale has at best inadequate means of investigating the title of the judgment-debtor; all that is sold and bought is the right, title and interest of the judgment-debtor with all its defects; and the Sheriff who sells and executes the bill of sale is never called upon, or if called upon would refuse to execute any covenant of title." MUTTUSAMI AYYAR, J., in *Sundara Gopala v. Venkatavarda Ayyangar*, I. L. R., 17 Madras, 228, speaking of the Privy Council decision aforesaid says:—"The decision of the Privy Council seems to be an authority for the proposition that the implied warranty of title in respect of sales by private contract cannot be extended to court sales except so far as such extension is justified by the processual law in India." The section in the Code of Civil Procedure, 1882, justifying such extension is said to be section 315. A recent Bombay case *Rustomji Ardeshir Irani v. Vinayak Gangadhar Bhat*, I. L. R., 35 Bom., p. 29, even goes to the length of holding that under the Civil Procedure Code an implied warranty of some saleable interest is implied when the right, title and interest of a judgment-debtor is put up for sale. How far this is a correct law having regard to the reasoning which forms the basis of the Privy Council decision and which all the High Courts in India have practically endorsed from time to time is difficult to say. The trend of authorities, no doubt, seems to be in favour of the view that an auction-sale does not give any warranty of title, and what passes to a purchaser is the right, title and interest of the judgment-debtor only as it exists at the date of sale. Sometimes the question arises whether on the sale of the right, title and interest of a judgment-debtor in execution of a decree, the whole estate passes to an auction-purchaser or a limited interest only. As for instance, when a decree in execution of which an auction-purchaser purchases the property is obtained against a Hindu widow or a father of a joint Hindu family. In either case it becomes very material to find out the nature of the suit. If it is a personal one, a limited interest of that particular person alone passes on sale in execution, but if it is of a representative character, namely, where a judgment-debtor is sued in his representative capacity, the whole estate would pass to an auction-purchaser. [Compare: *Jugal Kishore v. Jotendra Mohan Tagore*, 11 I. A., p. 66; and, *Loki Mahto v. Ajai Ali*, 4 O. L. R., 465.]—In considering the question as to what was really sold, it is not sufficient to examine the decree without also considering the proceedings in execution I. L. R., 12 Bom., 691. It is a question of fact in each case whether the entirety of the estate was sold or only a share. [cf: I. L. R., 17 Cal., 584 P. C.]

So much for auction-purchaser's warranty of title and the interest that he purchases on sale in execution of a decree. It has to be seen now to what extent he can be said to represent the judgment-debtor. In *Nadamuni Narayana Iyengar v. Veerabhadra Pillai*, 8 I. C., p. 429, the Madras High Court held that a purchaser of a judgment-debtor's property in execution of a money-decree is not his representative, though in case of a mortgage-decree he will be so. Pursuing the matter still further it would appear that the principle of estoppel which would operate against a judgment-debtor would not so operate against a purchaser at execution sale in so far as the latter does not claim through the judgment-debtor. In *Dinendronath Sannial v. Ram Kumar Ghose*, L. R., 8 I. A., p. 65, the Judicial Committee observed:—"There is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree. In the former, the price is fixed by the vendor and purchaser alone; in the latter, the sale must be made by public auction conducted by a public officer of which notice must be given as directed by the Act and at which the public are entitled to bid. Under the former, the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor and freed from all alienations or incumbrances affected by him subsequently to the attachment of the property sold in execution." The case of a mortgagee, however, stands on a different footing, and if he purchases the mortgaged property in execution, he will be bound by the previous conduct of the debtor in respect of the property mortgaged. See *Poresh Nath Mukerji v. Anathnath Deb*, 9 I. A., p. 147. In the case of *Ali Sahab v. Kaji*, I. L. R., 16 Bom., 197, it has been held that an auction-purchaser can add the period of the debtor's possession to his own for pleading limitation.

The interpretation put on the term "representative" as used in section 244 of the old Code of Civil Procedure corresponding to section 47 now throws additional light on the representative character of an auction-purchaser. The learned Chief Justice SIR JOHN STANLEY observes in the Full Bench case of *Gulzari Lal v. Madho Ram*, I. L. R., 26 All., p. 447:—"The term representative" as used in section 244, Civil Procedure Code, when taken with reference to the judgment-debtor does not mean only his legal representative, that is his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest who so far as such interest is concerned is bound by the decree. The judgment of BANERJI, J., is more lucid "Every purchaser of the judgment-debtor's interest," says his Lordship "who is bound by the decree is a representative of the judgment-debtor within the meaning of the section, whether he



is a purchaser under a private sale from the judgment-debtor or a purchaser at a compulsory sale held in execution of a decree obtained against the judgment-debtor. There is no distinction between the case of a purchaser under a private sale and an auction-purchaser, provided that the decree in execution can be enforced against him. The word "representative" means a person against whom the decree can be enforced either as legal representative of the judgment-debtor or as his representative in interest.

The position of an auction-purchaser, who buys at court sale without any the least warranty of title, concerning his right to the refund of purchase-money in case the judgment-debtor is found to have no interest in the property sold, is, however, placed on the same footing that of a private purchaser who has implied warranty of title, at least in his favour (section 55, clause (2) of the Transfer of Property Act). On considering the result of sections 313, 315 and 316 of the Code of Civil Procedure, 1882, MUTTUSAMI AYYAR, J., observed in the 17 Madras case referred to above :—"What passes to the purchaser at a court sale is the right, title and interest of the judgment-debtor subject, however, to this condition, namely that the purchaser may recover back his purchase-money when he finds that the judgment-debtor had no saleable interest at all." The same equally holds good under the Code of Civil Procedure now in force. The only doubtful feature is whether the remedy allowed to an auction-purchaser under Order 21, rule 93, corresponding to section 315 of the previous Code is exhaustive so as to bar his right to bring suit independently for recovery of his purchase-money or it is not exhaustive and an auction-purchaser can bring an independent action besides taking proceedings on the execution side as provided in the rule aforesaid. Section 315 of the old Code ran as follows :—

‘ When a sale of immovable property is set aside under section 310A., 312 or 313, or, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money (with or without interest as the court may direct) from any person to whom the purchase-money has been paid.

The repayment of the said purchase-money and of the interest (if any) allowed by the court may be enforced against such person under the rules provided by this Code for the execution of a decree for money.”

Order 21, rule 93, of the present Code of Civil Procedure stands thus :—

“ Where sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money with or without interest as the court may direct, against any person to whom it has been paid.”